PENAL TREATIES WITH MEXICO AND CANADA

HEARINGS

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

EX. D, 95TH CONG., 1ST SESS.

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

AND

EX. H, 95TH CONG., 1ST SESS.

THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND CANADA ON THE EXECUTION OF PENAL SENTENCES WAS SIGNED AT WASHINGTON ON MARCH 3, 1977

JUNE 15 AND 16, 1977

ited for the use of the Committee on Foreign Relations

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PENAL TREATIES WITH MEXICO AND CANADA

WEDNESDAY, JUNE 15, 1977

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The committee met, pursuant to notice, at 10:19 a.m., in room 4221, Dirksen Senate Office Building, John Sparkman (chairman of the committee) presiding.

Present: Senators Sparkman, Church, Pell, Clark, Stone, and Javits.

The CHAIRMAN. The committee will come to order, please.

I am sorry we have run into this situation. The Senate is already in session and important matters are being considered over there.

OPENING STATEMENT

The purpose of the meeting this morning is to open hearings on the Treaties with Mexico and Canada. We have out-of-town witnesses here this morning.

A poll made of the committee indicated we would have very good attendance. I suppose at that time all Senators did not know about the situation on the Senate floor.

This is a matter on which I would like to have full or at least good attendance of the committee because we will consider many features in this for which I know the members would want to be present. But, you cannot be in two places at the same time.

As it happens, we have some witnesses from out of town, and we don't want to hold them up unduly. We have two Members from the House of Representatives who will testify this morning. I think we will first proceed with the testimony of the two Congressmen. The transcript of their testimony will be made available to all of the members of this committee.

We also have the attorney general of the State of Texas here, and we would like to suit the convenience of all witnesses as best as we can.

First we will hear the two Members of Congress, Hon. Fortney H. Stark, of California, and Hon. Benjamin A. Gilman, of New York. After they have delivered their statements we will hear from the attorney general of Texas.

We are very glad now to hear from Hon. Fortney H. Stark, of California.

We have your printed statement and that will be printed in the record of this hearing in its entirety. I would like, if possible, for you to summarize and discuss it, instead of reading the whole statement.

[Senator Sparkman's prepared opening statement follows:]

PREPARED OPENING STATEMENT OF SENATOR JOHN SPARKMAN

Today and tomorrow, the Committee on Foreign Relations will hear testimony on two treaties which embody new concepts of international law and which would involve the United States in the internal criminal justice systems of foreign nations, Accordingly, this Committee wants to examine carefully the foreign policy aspects of the Treaties with Mexico and Canada on the Execution of Penal Sentences and their status under the Constitution. American citizens are held in prisons in a large number of countries, and the Committee will seek to determine if these two treaties will be good precedents for the negotiation of new bilateral or multilateral agreements on the exchange of prisoners.

The Treaty with Mexico has arisen from the vigorous efforts made by the Government of Mexico, with encouragement and assistance from our Government, to crack down on the production of drugs in Mexico and the use of Mexico as a trans-shipment point in the international drug traffic. With the crackdown, the number of American citizens held in Mexican jails increased drastically. Most of the new American prisoners are being held or have been convicted on drug related charges, generally possession of marijuana or cocaine. The increase in Americans held brought a wave of newspaper articles about the conditions in Mexican jails and the operation of the criminal justice system in that country. Allegations of mistreatment, bribery and violation of the Mexican Constitution began to surface. In response to this situation the Mexican Government headed by former President Luis Echeverria proposed the idea of a prisoner exchange agreement with the United States to Secretary of State Kissinger in June of 1976. Formal negotiations began in September and were concluded in November of 1976. The agreement was ratified by Mexico on December 30, 1976.

At the suggestion of Canadian parole authorities discussion on an exchange of parolees to improve rehabilitation efforts began in 1975. In May of 1976, the Canadian officials expanded the discussions to include confined offenders. Negotiations in person resumed on January 7, 1977, and the treaty was signed in Washington on March 2, 1977.

The Committee will hear today from representatives of the Executive Branch—the Department of State, the Department of Justice and the Drug Enforcement Administration. From these witnesses, the Committee will want to know what effects these treaties will have on our relationships with Canada and Mexico, how the constitutional questions involved can be answered and what these treaties will mean to international drug control efforts. We will also hear today from Representatives Fortney H. Stark and Benjamin A. Gilman who have been involved for several years in the problems of Americans incarcerated abroad, and from the Honorable John L. Hill, Attorney General of Texas, who can testify on the effects of these treaties at the state and local levels.

During the course of the hearings today and tomorrow, the Committee will hear from witnesses who will suggest the inclusion of a reservation designed to resolve the constitutional questions involved. The Committee would therefore appreciate the comments of the Deparement of State on such a reservation and particularly on the acceptance of a reservation by the Governments of Canada and Mexico. It would be helpful if a representative of the Department of State could remain throughout the hearings in order ot provide information and assistance on any reservation which may be proposed. The Committee will also appreciate comments on the advisability of an understanding to the Treaties, which would prevent the deposit of the instruments of ratification on these two Treaties until the legislation necessary to implement them has been enacted.

Although we will hear testimony on the treatment of accused and convicted individuals by Mexican officials, it should be remembered that these hearings are not confined to this problem. These two Treaties could be precedents for others to facilitate rehabilitation of prisoners. The United Nations has begun a study of the question and the possibility of a multilateral agreement. In addition, the Treaty with Canada does not involve any problem of mistreatment and should not be judged on such grounds.

STATEMENT OF HON. FORTNEY H. STARK, U.S. REPRESENTATIVE FROM THE NINTH DISTRICT OF CALIFORNIA

Mr. STARK. Thank you, Mr. Chairman. I will try to give you the "Reader's Digest" version of my prepared remarks.

DENIAL OF LEGAL AND HUMAN RIGHTS IN MEXICO

About 3 years ago, a constituent of mine brought the plight of over 500 U.S. citizens incarcerated in Mexico to my attention. He and others had been routinely denied their legal and human rights in ways forbidden by the U.S.-Mexico Bilateral Consular Convention, the Vienna Convention, the Geneva Convention, Mexican laws, and indeed, the Mexican Constitution. These violations of Mexican law include: Torture and physical abuse; forced confessions made in Spanish without the aid of an interpreter; denial of access to legal counsel and to Embassy representatives; incommunicado detention; confiscation of personal property; excessive pretrial detention; court proceedings held without interpreters; and many cases of extortion of prisoners and their families, some in excess of $40,000. All of this, again, has been in violation of Mexican law.

There is indeed general prison abuse, and these violations prompted me to write to the State Department and to Secretary Kissinger to ask for an investigation and a review.

The responses which we received were vague. After the State Department finally realized that we were not criticizing it but trying to bring about some change in the attitude of the Mexicans, and after a House Subcommittee on International Political, and Military Affairs, chaired by Chairman Dante Fascell of Florida looked into this issue, the Department of State agreed to join with us in a case-by-case review of the alleged abuses.

In January 1976, with that review completed, the State Department agreed that 84 percent of the alleged instances of denied rights were either substantiated or had merit since they formed a credible pattern.

On the basis of that review, we all agreed that direct action was necessary to stop the abuses suffered by American citizens of Mexico.

Today, 2 years after I first raised this issue in the Congress, the abuses continue. New arrestees in Mexico continue to be tortured, extorted, and faced with illegal trial procedures, and the best their Government can do is to send official letters of protest destined to lay unopened, unacknowledged, or ignored on somebody's desk in Mexico.

Secretary Vance reported to Congress this March that only minimal progress has been made to insure full legal and human rights for U.S. citizens arrested and detained in Mexico.

PROPOSED PARTIAL SOLUTION TO PROBLEM

The Mexican Government is now proposing a partial solution to the problems that I outlined to you today. This is a bilateral treaty through which prisoners may be transferred home.

With all due respect to the efforts put in by our State Department, by this committee and by the House Committee on International

Relations, the treaty falls short of addressing the most serious abuses of human rights that Americans experience when arrested in Mexico. It ignores the many instances of torture and emotional abuse, and it does not include any agreement or method to put an end to this abuse of human rights. It does not safeguard the rights of due process for Mexicans and Americans arrested outside their own countries. In fact, the treaty disregards the questions we have raised about legal procedures.

Under the present terms of the treaty, only some of the prisoners in foreign jails are eligible for transfer; thus it is somewhat inequitable, positively affecting certain types of offenders while ignoring other groups.

Because the treaty specifies that prisoner transfers would not take place until after sentencing and because the Mexican process takes several years, arrestees will be detained in Mexico at least 2 years before transfers. Considering our track record in securing legal and human rights for U.S. citizens, 2 years in Mexico without the assurance of human rights can be a very, very long time.

CONSTITUTIONAL QUESTIONS RAISED BY TREATY

The treaty raises serious constitutional questions. However, since I am not a lawyer, I would not like to get into the fine, sophisticated points of the constitutionality of the treaty. But it seems to hinge precariously on the voluntary and express consent of the individual being transferred.

I am not completely comfortable with any form of consent where one of our citizens waives his or her constitutional rights. I understand that there is some disagreement on this among legal experts, and I also understand that this committee is taking every possible step to insure the constitutional rights of our citizens. I hope that these decisions will be reviewed by a court rather than in a legislative or executive setting.

If we and Mexico cannot agree to provide due process to foreign nationals, we could presumably devise a method for circumventing those situations in which abuse is likely to occur.

TAKING RESPONSIBILITY FOR U.S. NATIONALS AT TIME OF ARREST SUGGESTED

In the hearings last year, I suggested that we might take responsibility for our nationals in foreign lands before they become a source of international contention—at the time of arrest, for example. For years we have pursued this policy when members of our military forces are arrested abroad, even in countries where we do not have an agreement for quartering troops. For example, although there are some 600 Americans in jail in Mexico, less than half a dozen of these are members of the armed services.

Perhaps the chairman and others are familiar with the situation of the Navy stationed in San Diego and its proximity to Tijuana. The delights of that border town are offered to lonely soldiers and sailors away from home. It seems inconceivable that over the years we have had so few, if any, members of our Armed Forces violating even the merest Mexican law.

I submit that this is because the Department of Defense takes care of its own with far more interest and success than our State Department takes care of the average citizen. Unfortunately this is not part of the treaty under discussion.

REASON TREATY RECOMMENDS ITSELF

Despite these deficiencies, the treaty does recommend itself for one overriding reason. It provides an important option to some prisoners. It will improve our bilateral relations and lessen what has been a considerable source of tension between Mexico and our country for several years. It will reunite families in both Mexico and in our own country. Parents, husbands, wives, and children will no longer have to travel so far, at such great cost to help their loved ones.

It will reduce one of the great problems with Mexican prison conditions. We have a different approach to health care in our country, and for both our citizens with ordinary health problems and for those with special medical conditions requiring attention on a regular basis, health care is inadequate in Mexico jails, even under the best conditions.

It will offer citizens of both the United States and Mexico an alternative to the unfamiliar prison system and the inevitable prejudice imposed on them in foreign jails.

Most importantly, it will provide relief to Americans arrested in Mexico who, when transferred, will receive the benefits of U.S. parole regulations. Currently, parole is denied to any person convicted of a narcotics violation in Mexico. Some of the prisoners in Mexico are now serving terms of several years for crimes considered misdemeanors in their own country. Since our own 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 on all of our drug offenders.

CONCLUSION

Mr. Chairman, in concluding my remarks, I find myself between a rock and a hard place. I have serious reservations about the effectiveness of this treaty in solving the deplorable conditions and absence of human and legal rights for Americans who are arrested in Mexico and are outside the treaty's jurisdiction. On the other hand, I must urge and support its ratification, if for no other reason than that even in its small way, the treaty is a step towards alleviating some of the suffering now imposed on our prisoners, their families and their friends.

So, despite the treaty's shortcomings and its inability to deal with all of the abuses of human and legal rights in Mexico, I urge this committee to move swiftly and positively. As one mother of an American prisoner in Mexico described the treaty, "It's like table scraps. But when you're very hungry, even those scraps are very welcome."

I thank you for letting me be with you today and I thank the committee for the effort they are taking on behalf of those citizens of our country who are now in jail in Mexico.

The CHAIRMAN. Thank you very much.

[Representative Stark's prepared statement follows:]

PREPARED STATEMENT OF REPRESENTATIVE FORTNEY H. STARK, JR.

Mr. Chairman: 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. His allegations, which included mistreatment ranging from denial of rights under Mexican law to gruesome torture, were shocking. In the next few months, similar complaints from other prisoners, concerned parents, and friends began flooding my office, revealing a pattern of treatment, apparently implemented without regard for legal and human rights. This pattern started with arrest and continued through years of incarceration. Examining these complaints in more detail, we discovered that much of the alleged mistreatment was not only inhumane, but forbidden by the terms of the U.S.-Mexico Bilateral Consular Convention, the Vienna Convention, the Geneva Convention, Mexican laws, and the Mexican Constitution. The major alleged violations of Mexican law and international convention agreements include:

Torture and physical abuse at the time of arrest, including the use of an electric cattle prod and water tortures.

Forced confessions made in Spanish without the aid of an interpreter.

Denial of access to legal counsel and to Embassy representatives, despite repeated requests.

Incommunicado detention—sometimes for weeks.

Confiscation of personal property such as airplanes, cameras, autos, passports, jewelry, etc.

Extensive pre-trial detention in flagrant violation of the Mexican law that requires sentencing within one year of arrest.

Absence of interpreters during court proceedings.

Denial of access to information relevant to the defense.

Extortion of prisoners and their families by Mexican attorneys to the tune of $40,000. Several prisoners alleged, moreover, that a U.S. Embassy official vouched for the competence of a notoriously corrupt Mexican attorney.

Finally, general prison abuse, including beatings sometimes resulting in broken bones, lack of proper health facilities, medical treatment, and the requirements for even a minimal standard of living.

Understandably, prisoners, their relatives, and friends were anxious to bring their cases before anybody interested in helping them. By mid-summer, 1974, my case file on U.S. citizens imprisoned in Mexico had grown from one constituent, to over one-hundred Americans from all parts of the country. The serious charges levelled against the Mexican government and the U.S. consular services in Mexico prompted me to write to Secretary Kissinger, requesting more detailed information on the cases brought to my attention. The State Department's vague answer to my first inquiry provoked me to write twice more, between September and December of 1974, calling for a full investigation of the matter, review of cases in which prisoners had alleged illegal treatment, and the development of a more adequate protection policy for the future. Neither of these letters received the attention they deserved, and both failed to provoke substantive responses on the past of the State Department.

In March of 1975, my frustration approached that of the many concerned relatives and friends of U.S. prisoners in Mexico, whose inquiries had also been ignored for months. I introduced H. Res. 313, mandating the executive branch to disclose information on the cases of more than 150 prisoners named in the resolution. Hearings were held on H. Res. 313 before the Subcommittee on International, Political and Military Affairs of the House International Relations Committee in April, July, and October, 1975, and January and June of 1976.

As a result of the first hearings before Chairman Fascell's subcommittee, the Department of State agreed to conduct the case by case review I had requested six months earlier. Working together, members of my staff and State Department officers determined to procedure followed by the team investigating the allegations made by U.S. prisoners in Mexico. Unfortunately, this investigation did not receive the full cooperation of the Mexican government; although State Department officials were permitted to visit our citizens incarcerated in Mexico, on two separate occasions, members of my staff who had gone to Mexico to join in the investigation were denied access to the prisons.

The investigatory team undertook an enormous task. The Mexican government's unwillingness to reveal incriminating information on arrest proceduress and prison conditions, the prisoners' understandable reluctance to speak freely and thus expose themselves to physical and legal recrimination, as well as the difficulty of finding conclusive evidence of skillfully administered torture, months—or even years—after the fact, presented serious obstacles to the investigators. Nevertheless, in January of 1976, the Department of State completed its case by case review and presented its findings to Chairman Fascell's subcommittee. Despite the difficulties already mentioned, State concluded that 84 percent of the alleged instances of denied rights were either fully substantiated or had "* * * form(ed) a credible pattern." That 84 percent, Mr. Chairman, represented a compelling number of instances in which U.S. citizens were denied their rights under Mexican law and international humanitarian agreements. Finally, with proof in hand, even the State Department agreed that direct action was necessary to put a stop to the abuses suffered by American citizens in Mexican jails.

In the following six months, little progress was made in this direction. In June, 1976, State reported that, despite their efforts to persuade the Mexican government to abide by their own laws and to secure early consular access to new detainees, new arrestees continued to experience physical abuse and repeated denial of due process. While U.S. citizens were beaten, extorted, and subjected to illegal trial procedures, the best their government could do was to send official letters to protest destined to lay unopened, unacknowledged, and ignored on someone's desk in Mexico City. Today—two years after I first raised this issue in Congress—the situation remains the same. As Secretary Vance reported to Congress this March, in accordance with Section 408(b)(2) of the International Security Assistance and Arms Export Control Act of 1976, only minimal progress has been made to insure full legal and human rights for U.S. citizens jailed in Mexico.

Throughout my three-year involvement with this issue, my objective has been, and remains, to secure legal and human rights for our citizens in Mexico. Our lack of progress in this direction, our inability to do anything more than "report" on the situation, distresses me. Our U.S. citizens in Mexico continue to complain of regular physical abuse and illegal police activities. Although consular access to prisoners in Mexico City has improved considerably—and I commend the State Department for this—in the more remote areas of Mexico, the lack of communications between American prisoners and consular officers, as well as between U.S. consulates and Mexico state and local prison authorities remains as serious a problem as ever. And, early consular intervention is the one area in which the State Department contends we have made progress!

Another problem raised during the hearings last year, concerns the experience of U.S. citizens while actually serving terms in Mexican prisons. I need not go into great detail on this matter—there are ex-prisoners here who are more qualified than I am to do so. I would, however, like to point out a few of the conditions which make Mexican prisons a less than ideal place to rehabilitate our citizens.

Mexican prisons operate on a "faena system". The Mexican Government supplies prisoners with the barest necessities for only a marginal standard of living. Prisoners must purchase food if they are to have an adequate, not to mention well-balanced, diet. Necessary clothing must be purchased, and even cells—for those who wish to avoid unsanitary, overcrowded cell assignments—cost a modest $1,000.

Mexican prisons depend upon prisoners to run individual cell blocks. These "mayors" notoriously take full advantage of their authority to extract large sums of money from prisoners. The prisoner's only alternative to this kind of pay-off system necessitates putting up with harassment, beatings, robbery, and deprivation.

Both the faena system and the mayoral system impose considerable hardship on American prisoners and their families. Mexican prisons are no freer of prejudice toward "gringos" than are our own prisons toward those of brown or black skin. To guards, Mexican prison authorities, and other Mexican prisoners, American citizens represent "walking cash registers" (as CBS's "Sixty Minutes" put it) who must buy everything from toilet paper to a good night's

sleep. Unfortunately, the hardship extends beyond the prisoners, themselves, to family and friends in the United States who must provide large amounts of survival money.

The Mexican Government has now proposed a partial solution to the problems I have outlined today—a bilateral treaty through which prisoners may be transferred to their home country to serve out sentences. I commend the Mexican Government for taking this initiative but, at best, it is only a halfway measure. A review of the proposed Treaty reveals several deficiencies which concern me:

The Treaty falls short of addressing the most serious abuses of human rights Americans experience when arrested in Mexico. Ignoring the many instances of physical and emotional abuse we have brought to the attention of Mexican and U.S. officials, the Treaty does not include any agreement or method to put an end to the torture and beatings of Americans in Mexico.

The Treaty before us does not safeguard the rights of due process for Mexicans and Americans arrested outside their own country. In fact, the Treaty disregards the questions we have raised about legal procedures. It fails to guarantee even the right to counsel or a fair judicial process which does not rely upon confessions obtained under duress, and the arrestee's ignorance of the national language.

According to the present terms of the Treaty, only some of the prisoners in foreign jails are eligible for transfer. Thus, the Treaty is inequitable, positively affecting certain types of offenders, while completely ignoring other groups of prisoners.

Because the Treaty specifies that prisoner transfers would not take place until sentencing has occurred and the time allowed for appeal procedures has elapsed, U.S. citizens would not be eligible for transfer for a full two years after arrest. Considering our track record to date, in securing legal and human rights for U.S. citizens arrested in Mexico, two years is a long time.

Finally, the Treaty raises serious constitutional questions involving the process by which each nation would recognize and enforce a sentence imposed by a foreign court. As I understand it, the constitutionality of this Treaty hinges precariously on the "voluntary" and express consent of the transferring individual. Frankly, I am not comfortable with the notion of any form of consent through which a citizen agrees to waive his or her constitutional rights. I understand that legal experts disagree widely on the constitutional aspects of this Treaty. Unfortunately, its uniqueness leaves us with little precedent to fall back on. Obviously, if the Senate ratifies this Treaty, test cases will soon create new precedents. I would suggest, however, that a judicial, rather than a legislative or executive setting, might be the proper forum for resolution of such fine constitutional disputes.

If Mexico and the United States cannot agree to provide due process to foreign nationals, we could, presumably, devise a method for circumventing situations in which abuse is likely to occur. In hearings last year, I suggested that we might take responsibility for our foreign nationals before they became a source of international contention—at the time of arrest, for example. Indeed, for years we have pursued a similar policy when members of our military forces are arrested abroad. Unfortunately, however, this is not the case in the Treaty under discussion.

Despite these serious deficiencies, the Treaty does recommend itself for one overriding reason. It provides an important option to some prisoners. Also,

It will improve our bilateral relations, lessening what has been a considerable source of tension between Mexico and the United States for several years now.

It will reunite families in both Mexico and in our own country. Parents, husbands, wives, and children will no longer have to travel so far, or at such great cost to see their loved ones.

It will reduce one of the greatest problems with Mexican prison conditions. As you know, Mexico and the United States have rather different approaches to health care. For both our citizens with ordinary health problems and those with special medical conditions requiring attention on a regular basis, health care is inadequate in the Mexican jails, even under the crudest of standards.

It will offer citizens of both the United States and Mexico an alternative to the unfamiliar prison systems and inevitable prejudice imposed on them in foreign jails.

Most importantly, it will provide relief to Americans arrested in Mexico who, when transferred, will receive the benefits of U.S. parole regulations. Currently, Mexico denies parole to any person convicted of a narcotics violation. Some of the prisoners in Mexico are now serving terms of several years for crimes considered misdemeanors in their own country. Since our own 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.

Mr. Chairman, in concluding my remarks today I find myself on the horns of a dilemma. I have serious reservations about the Treaty's effectiveness because of so many of the deplorable abuses of human and legal rights which occur when Americans are arrested in Mexico fall outside of the Treaty's jurisdiction.

On the other hand, I must support its ratification, if for no other reason than that in even its small way, this Treaty is a step towards alleviating some of the suffering now imposed on United States prisoners in Mexico, their families, and friends. Despite the Treaty's many shortcomings, I urge the Committee to move swiftly and positively towards its ratification.

As one mother of an American prisoner in Mexico described the Treaty, "it's like table scraps. But when you're starving, table scraps are welcome."

The CHAIRMAN. The next witness is Congressman Benjamin A. Gilman of New York.

STATEMENT OF HON. BENJAMIN A. GILMAN, U.S. REPRESENTATIVE IN CONGRESS FROM THE 26TH DISTRICT OF NEW YORK

Mr. GILMAN. Thank you very much, Mr. Chairman.

Mr. Chairman, I am a member of the House Select Committee on Narcotics and I have served as a Delegate to the Interparliamentary Conference between Mexico and the United States at both the Sixteenth Conference and the Seventeenth Conference, which just completed its work last month.

I welcome the opportunity to appear before this distinguished body as it begins consideration of the treaty between the United States of America and the United Mexican States on the Execution of Penal Sentences.

I will summarize my remarks and request that the full text of my statement appear in the record.

The CHAIRMAN. It will be printed in the record in its entirety.

Mr. GILMAN. Thank you, Mr. Chairman.

PROBLEM CREATED BY SUCCESSFUL COMBATING OF NARCOTICS TRAFFIC

One of the most critical issues confronting the bilateral relationships between Mexico and the United States is the significant illicit traffic of narcotics that has been crossing our border, a border that extends for some 2,000 miles. The success of the joint efforts of our two nations in combating this problem has unfortunately helped create yet another.

As of May 15, 1977, there were 579 U.S. nationals incarcerated in Mexican jails. These prisoners, of which about 80 percent are drug violators, have been subjected to alien justice and the hardships of cultural and language barriers that have led to severe strains on our bilateral relations.

In January of last year, I had an opportunity to visit the Lecumberri Federal Prison in Mexico City, where I talked to most of the 70 American inmates at that institution. I heard many complaints from them concerning their problems in understanding and receiving advice

concerning their rights under the Mexican legal system. They told of their frustrations and hardships caused by corruption behind prison walls, of a lack of and inadequate counsel, exorbitant legal fees, of being held incommunicado, of being tortured, and of being forced to sign confessions written in Spanish without the aid of any interpreter.

In February 1976, I had the privilege of addressing the Sixteenth Mexico-United States Interparliamentary Conference. At that time I stressed the need for our two nations to work together to relieve the growing tensions resulting from increased enforcement of our drug laws.

MEXICAN CONCERN ABOUT PRISON CONDITIONS

Both of our nations certainly require more attention to the problems of prison reform. I am pleased to note that there have been a number of indications that there is a growing awareness and concern within Mexico about the need to improve their prison conditions.

One of the noteworthy examples of this concern was the reform of the administration of Lecumberri Prison. The abuses and corruption at that prison had reached a level where the Mexican Government demanded rectification. Almost every complaint that I had registered with the Mexican Government following my visit was addressed.

The reforms at Lecumberri have been welcomed by all as an indication of a new awareness and a sincere attitude for reform by Mexican officials. Lecumberri Prison itself ceased to operate as a prison as of August 26, 1976. We hope that with its passing, we have seen the end of a pattern of extortion and brutality which became its trademark.

In other areas, there have also been significant improvements in both the living conditions of many Americans and the prospects for their early release as a result of the Mexican Government's initiatives with regard to parole and transfer of sanctions. These actions should further help resolve aspects of the overall problem.

On the 27th of last month, Mr. Chairman, I had the privilege of addressing my fellow legislators from Mexico at the Seventeenth Mexican-United States Interparliamentary Conference held in Hermosillo, Sonora. While addressing the need to seek a solution to the problems raised by Americans in Mexican jails, I sought to open a two-way street for mutual concern about all prisoners. I stated at that time:

> For our part we must not ignore the hundreds of Mexican nationals who are imprisoned in U.S. jails. Just as we seek to insure the full protections of the human rights for the U.S. prisoners abroad, we urge the other nations to become concerned about the human rights of their citizens abroad. We are committed to preventing the violation of basic human rights of any person in any country.

While attending the Interparliamentary Conference in Hermosillo, I took advantage of the opportunity to visit the Sonora State Prison and to talk with some of the American prisoners there.

In stark contrast to the Federal Lecumberri Prison in Mexico City that I visited a year earlier, I found a modern, clean penal facility. I talked at length with nine Americans who were being held at that institution. Unlike the horror stories of the past at Lecumberri, there were no complaints at this prison of discrimination, prejudice, or extortion. The complaints that the prisoners did have were allotted to

their early stages of arrest and to the difficulties in dealing with the Mexican legal system.

There are still tales of torture at the time of arrest, of being held incommunicado, without the opportunity of access by Embassy officials.

RATIFICATION OF TREATY BEFORE US

The Government of Mexico has acted quickly to complete needed actions to ratify the treaty before us. This action, completed in little more than a month after the initial agreement, demonstrated the sincere dedication of the leaders of that country to help resolve this source of friction that exists between our two nations.

It is hoped that the consummation of this treaty will help relieve some of the special hardships which fall upon prisoners incarcerated far from home.

In addition, it will help remove some of the strains on the diplomatic and law enforcement relations between our two countries that have surfaced as a result of the imprisonment of large numbers of each other's citizens.

While ratification of this treaty will not alone solve the many problems we face, it will provide some relief to the strain that the imprisonment of Americans in a foreign land has caused.

The Mexican Government and people have responded to our cries for help. In turn, we should respond with the same show of sincerity and conviction to seek every opportunity to resolve the problems that we both share.

Accordingly, Mr. Chairman, I urge the members of this committee and the entire Senate to support the ratification of this treaty between the United States and the United Mexican States on the execution of penal sentences.

Of course, the Americans in prison in Mexico are anxiously awaiting treaty approval. As a matter of fact, they have prepared a film and have shown that film to the American delegates that attended the last conference, appealing to us, as Members of Congress, to urge upon the Senate the early execution of this treaty.

So, too, is the Mexican Government awaiting approval of the treaty, as was expressed by the Mexican members of Congress who attended the Interparliamentary Conference, believing that the adoption of the treaty will help alleviate some of the pressures and tensions which now exist between our two nations.

Thank you, Mr. Chairman.

[Representative Gilman's prepared statement follows:]

PREPARED STATEMENT OF REPRESENTATIVE BENJAMIN A. GILMAN

U.S.-MEXICAN TREATY OF THE EXECUTION OF PENAL SENTENCES

Mr. Chairman: I welcome this opportunity for appearing before this distinguished body as it begins consideration of the Treaty between the United States of America and the United Mexican States of the Execution of Penal Sentences.

One of the most critical issues confronting the bilateral relationships between Mexico and the United States is the significant traffic of narcotics crossing our border. After the success of the closing of the French connection and the elimination of the Turkish heroin supplies, Mexico has become the source and transit country for more than 80 percent of all illicit drugs entering this country. The

success of the joint efforts of Mexico and the United States in combating this problem has unfortunately helped create yet another.

As of May 15, 1977 there were 579 U.S. nationals incarcerated in Mexican jails. These prisoners, of which about 80 percent are drug violators, have been subjected to alien justice and the hardship of cultural and language barriers that have led to severe strains on our bilateral relations.

It was with this understanding in mind that former Secretary of State Henry Kissinger presented the treaty before you in his Letter of Submittal to the President on January 17, 1977 stating:

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 institution 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.

I would like to make it very clear that in no way are my remarks intended to criticize the stringent enforcement or harsh penalties imposed upon drug traffickers in Mexico, but are intended to focus our attention upon some problems of human rights that have caused our nation concern. As was stated last year by Administrator Walentynowicz of the Bureau of Security and Consumer Affairs of the Department of State:

Successful drug interdiction, far from being in conflict with the guarantee of rights to prisoners, is in fact dependent upon such guarantees. Thorough law enforcement is ultimately dependent upon wholehearted cooperation of the public, and people will cooperate only when they are confident that their human rights are not threatened by the enforcement procedures. Unless there is public confidence in just treatment, law enforcement becomes difficult and even ultimately impossible.

Fundamentally a strong policy for the fair and decent treatment of prisoners leading to social rehabilitation of offenders is fully consistent with a strong, successful program of drug interdiction.

In January of last year, while in Mexico discussing the narcotics situation, I took the opportunity to visit the Lecumberri Federal Prison in Mexico City and talked to most of the 70 American inmates of that institution. During that visit, I heard many complaints concerning their problems in understanding and receiving advice concerning their rights under the Mexican legal system. They told of the frustrations and hardships of corruption behind prison walls, of a lack of and inadequate Counsel, exorbitant legal fees, of being held incommunicado, of being tortured, and being forced to sign confessions written in Spanish, without the aid of any interpreter.

My visit to Lecumberri Prison substantiated prior criticisms of the Mexican penal system. Unfortunately, it was also printed out that those Mexicans imprisoned in Lecumberri were often treated with more severity, as they were assumed to understand the consequences of their acts.

I discussed these problems at great length with Mexico's Attorney General, with high-ranking members of the Mexican armed forces and with members of the Mexican Congress. During two separate meetings with President Echeverria, I expressed concern that abuses of civil rights might lead to a cleavage in our joint efforts of seeking to prevent the use and abuse of narcotics in the United States and Mexico.

In February of 1976, I had the privilege of addressing the 16th Mexico-U.S. Interparliamentary Conference held in Atlanta. At that time I shared with the Mexican legislators my experiences resulting from my visit to Lecumberri Prison and the conclusions emanating from the congressional hearings on this issue. In stressing the need for our two nations to work together to relieve the growing tensions resulting from increased enforcement of drug laws. I stated that:

We must not allow the long friendships of our two nations and the success of our many joint endeavors, including international narcotics control, to be placed in jeopardy by this issue . . . an issue that can be resolved by signifying the importance that we attach to the protection of the human rights of all peoples. The protection of civil rights is not inconsistent with the proper enforcement of the laws regulating drug traffic and drug abuse. The proper enforcement of the law does not obviate the necessity for respecting the law and making certain

that civil rights—basic human rights are not violated . . . and in preventing the mistreatment and physical abuse of prisoners.

Both of our nations need to give more attention to prison reform. I am pleased to note that there is a growing awareness and concern within Mexico for improving prison conditions. One of the noteworthy examples of that concern is the reform of the administration of Lecumberri Prison. The abuses and corruption at that prison had reached a level where the Mexican Government demanded rectification. Almost every complaint I registered following my visit was addressed.

The Commandant was removed and the Chief of Guards imprisoned on charges of corrupt practices. The "Mayor" system of prisoner hierarchy has been abolished. Prisoners are no longer required to pay rent for their cells or for the retention of commissioned jobs. All of these reforms were accomplished by marked improvements in cooperation between the new administrators and our counsular officers.

The reforms at Lecumberri have been welcomed by all as an indication of a new awareness and a sincere attitude for reform by Mexican officials. Lecumberri itself ceased to operate as a prison as of August 26, 1976. Its inmates have been dispersed to more modern facilities. We hope that with its passing we have seen the end of the pattern of extortion and brutality which became its trademark. [See attached New York Times report of June 30, 1976, appendix A.]

There have also been significant improvements in both the living conditions of many Americans and the prospects for their early release, as the result of the Mexican government's initiatives in regard to parole and transfer of sanctions.

The adoption of new legislation in Mexico to extend parole to drug offenders on the same basis as other convicts has the potential of helping to remove some of the tensions that have generated from this issue. While such a bill failed to pass before their Congressional adjournment in December, it is hoped that favorable action may take place when the Mexican Congress reconvenes in September.

Recent reports have indicated that Attorney General Oscar Flores has eliminated another source of irritation with the decision of the Mexican Government not to press charges against persons found possessing small amounts of narcotics that are clearly intended for personal use. This decision could result in the release of a substantial number of Americans now being held on charges of such possession. In the future this action will help prevent abuses as the number of Americans arrested declines under the new guidelines. (See Washington Post article of April 16, 1977, appendix B.)

All of these actions should further help resolve aspects of the overall problem. Relief from current trends will continue to be welcomed as the arrests of Americans continue with improvements in narcotics enforcement programs. As we seek to increase our cooperation with the Mexican Government in interdiction efforts, we must also give thought to what happens to Americans that get caught.

On the 27th of last month, I once again had the privilege of addressing my fellow Mexican legislators at the 17th Mexico-U.S. Interparliamentary Conference held in Hermosillo, Sonora. At the May meeting I reviewed the progress that had taken place during the last year, including the advances of the treaty before you. While stressing the need once again to seek a solution to the problems raised by Americans in Mexican jails, I sought to open a two-way street for mutual concern about all prisoners, stating:

For our part we must not ignore the hundreds of Mexican nationals who are imprisoned in U.S. Jails. Not counting our state and local facilities, it is estimated that more than 1,200 Mexican nationals are held in Federal prisons across the United States. In the State of California alone there are between 400–500 Mexicans incarcerated.

Just as we seek to insure the full protection of the human rights for the United States prisoners abroad, we urge the other nations to become concerned about the human rights of their citizens abroad. In recent months we have noticed with enthusiasm an increase in the visits to our jails by Mexican consular officials. We will give prompt attention to any complaints expressed by your countrymen of possible abuse or wrong doing by any U.S. prison officials. We are committed to preventing the violation of basic human rights of any person in any country.

While attending the Interparliamentary Conference in Hermosillo, I took advantage of the opportunity to visit the Sonora State Prison. Accompanying me on the visit was Mexican Congressman Victor Manzanilla-Schaffer.

In stark contrast to Lecumberri, the Sonora Prison is a modern, clean penal facility. Both Congressman Manzanilla and I talked at length with nine Americans

being held at that institution. Unlike the horror stories of the past, without exception every man readily admitted that the prison conditions at Sonora were as good as can be expected in a prison. There were no complaints of discrimination, prejudice or extortion. The complaints that the prisoners did have were related to their early stages of arrest and to their difficulties in dealing with the Mexican legal system.

One of the major problems that we heard about was the need for early notification of arrest and for prompt access to the deltainee in accordance with the Vienna Convention on Consular Relations to which both our countries are signators. We are convinced that the Mexican Federal Government is in full accord with our position. Unfortunately, in practice, the implementation of this accord is uneven and spotty at the local levels. We all recognize the importance of not only sharing our concerns at the highest levels of government, but our thoughts and ideas to be effective must permeate the working levels of government. First the upper echelons of government must acknowledge the problem and then they must relay their concerns and programs to the lower bureaucratic levels in order to effectively and positively respond. It is at this level where they make the arrests, question the accused, and guard the prisoners. Accordingly, we should make certain that our thoughts and ideas are being communicated to this level to insure the protection of the rights granted to all prisoners, both Mexican and American.

As testimony to the sincerity and understanding of the Government of Mexico, they have acted quickly to complete all needed legislative actions, including Constitutional changes to ratify the treaty. This action completed in a little more than a month after the initial agreement, demonstrates the dedication of the leaders of that country to resolve this source of friction between our two nations in a swift manner.

Unlike the monumental tasks of restraining the hundreds of thousands of illegal aliens entering this country, destroying the thousands of acres of illegal poppy cultivation, or guaranteeing the absolute protection of every prisoner, the ratification of this treaty was seen as a clear way to reveal the true desire to help . . . a desire that is often masked by the frustrations of government bureauracy in a developing nation. If there was one message heard above all others at the recent interparliamentary meetings, it was that "on this issue we have acted, it is now up to you."

While we cannot bring about immediate change in the vast differences of our two cultures and peoples, and the differences in our respective laws, we do share the same desire to protect the human rights of all our citizens. We should increase our efforts in both of our nations to educate our youth about the horrors of prison life before they commit a crime. But, most important, we should bring pressure to bear on the governments of both our nations to insist on the fair and lawful treatment of all prisoners.

It is hoped that the consummation of this treaty will help relieve the special hardships which fall upon prisoners incarcerated far from home. In addition it will help remove some of the strains on the diplomatic and law enforcement relations between our two countries that have surfaced as a result of the imprisonment of large numbers of each others citizens.

Perhaps, some day there will be no need for such a treaty. But, as Secretary of State Vance stated in his March report to Congress on the status of United States Citizens detained in Mexico:

Unfortunately there are still substantial cases in which U.S. citizens are not receiving the full rights guaranteed to them under Mexican law. . . .

While it is true that the total number of cases of substantiated abuse represents a small percentage of the total number of arrests, we cannot be complacent. As was noted in our previous report, as long as one American citizen is not being accorded his human and legal rights under Mexican law, we will not be satisfied.

Clearly, real progress has been made in respecting the human rights of all United States citizens detained in Mexico, and the prospects for further progress are encouraging. However, I regret that I cannot report that we are fully satisfied with what has been accomplished thus far. Unfortunately, there are still many cases in which U.S. citizens are not receiving their full rights under Mexican law. While the ratification of this treaty will not of itself resolve the many problems we face, it will provide some relief to the strain that the imprisonment of Americans in a foreign land has caused.

The Mexican Government and people have responded to our cries for help. In turn we should respond with the same show of sincerity and conviction and seek

every opportunity to resolve the problems that we both share. Accordingly, I urge the distinguished members of this committee and the entire Senate to support the ratification of the Treaty of the Execution of Penal Sentences between the United States and the United Mexican States.

APPENDIX A

[From the New York Times, June 30, 1976]

Mexican Prisons Said to Improve

Washington, June 29.—Conditions for Americans imprisoned in Mexican jails have improved markedly in some respects since January, the Ford administration told Congress today.

However, in testimony before a House International Relations subcommittee, William H. Luers, Deputy Assistant Secretary of State, said some of the 607 American citizens jailed in Mexico are still subject to physical abuse.

According to Mexican authorities, about 83 percent of the Americans were arrested on narcotics charges.

Mr. Luers, who is responsible for Central American and Caribbean matters in the State Department's Bureau of Inter-American Affairs, said that while there have been "a number or real areas of improvement" in the Mexican jails, there were others where "no meaningful improvement can be reported."

COMMANDANT REMOVED

The foremost improvement, he said, was in the administration of Lecumberri prison in Mexico City, where the commandant was removed a month ago and the chief of guards imprisoned after corrupt practices, including extortion, were revealed.

Americans in Lecumberri have been given access to English-language books and periodicals for the first time and have been allowed to form football teams. American consular officers also have broader access to prisoners in Lecumberri, he said.

However, Mr. Luers indicated conditions remained poor in Mazatlan prison, and he also reported an incident in which two American prisoners were assaulted by Mexican guards.

He said that of 334 Americans arrested in Mexico since the beginning of the year, 61 cases of physical abuse had been substantiated—a rate of 18 percent.

The new American prisoners include 57 women, the administration has learned. The American prison population in Mexico has increased by 85 since June 1975.

"We are most concerned about the lack of significant improvement in the treatment of U.S. citizens in the period shortly after their arrest," he said.

Mr. Luers told the House subcommittee on international political and military affairs that the administration welcomed a Mexican proposal that the two countries study the possibility of exchanging prisoners so that they might serve out sentences in their homelands.

He said Ambassador Joseph J. Jova has been instructed to begin discussions with Mexican authorities on a transfer agreement.

APPENDIX B

[From the Washington Post, Apr. 17, 1977]

Mexicans Dropping Drug Cases Against Small-Use Tourists

(By Marlise Simons)

Mexico City, April 16—In a move that should make Mexico less perilous for American visitors, the Mexican Government has decided it will no longer press charges against persons holding small amounts of heroin, cocaine or marijuana that are clearly intended for personal use.

As a result, 15 Americans have already been secretly handed over to U.S. officials and sent across the border in the last 2 weeks.

Another 30 Americans should be released by the end of this month when the

authorities plan to drop charges against some 2,000 persons who have been arrested, but not yet tried, for possessing small quantities of drugs, said Mexico's new attorney general.

The attorney general, Oscar Flores, said in an interview that he is moving to solve another bilateral headache, the problem of aircraft and cars stolen in the United States and brought to Mexico. Owners have charged that Mexico was violating the 1936 U.S.-Mexican convention on return of stolen property.

Of almost 200 stolen U.S. aircraft listed as awaiting release or investigation, only 16 were returned in the last 3 years. But in the past month, Mexico has handed over 42 stolen planes to the U.S. embassy for return to their owners.

Officials are now tackling the enormous task of checking thousands of cars to see if they were stolen in the United States. "It looks like the Americans are more interested in collecting their insurance money rather than in collecting their car," said Flores. "People try to get their planes back, but they rarely bother with a car."

The aim of the drugs decision, Flores said, is to reduce the chances that people are subjected to arbitrary arrests and extortion by police and lawyers when caught with small amounts.

At present, he said, Mexico's tough anti-drug laws are lopsided, with too much punishment for the small user. "Even if the person does not get a long sentence, it may take 1 year for the trial to come up. And in that time, dishonest police and lawyers have often had a chance to bleed people for money."

Every year, almost 3 million American tourists come to Mexico. Many more cross the border for short trips. As marijuana smoking spread in the United States, the number of Americans caught here with the coveted "Mexican gold" increased. The 15 persons released this month, for example, were all arrested with only a few marijuana cigarettes and held for 3 to 4 months.

A treaty, permitting Mexicans and Americans arrested across the border to serve their sentences at home, awaits ratification and enabling legislation.

The unexpected Mexican policy change toward small drug users does not apply to traffickers. Of the 592 American currently held in Mexican jails at least half have been accused of transporting cocaine from South America or dealing in large amounts of Mexican marijuana or heroin destined for sale in the United States.

"We are not changing the law and not establishing any minimum amount permitted," the attorney general warned. "We'll look at everything case by case. Somebody with only five cigarettes caught selling at a school is a pusher, as far as I'm concerned."

A tough, outspoken and pragmatic man, Flores has brought considerable relief to U.S. embassy officials here who found it difficult to deal with the often antagonistic previous administration.

"I'll give you your prisoners, if you just move them out of the country, the same day," Flores told U.S. consular officials.

"Sure we'll take them," U.S. Consul General Vernon McAninch replied. For the 15 newly released Americans, the U.S. consolate hastily raised money from the prisoners' friends and relatives or made loans for the return tickets. "Of course we are very pleased with this new development," McAninch said.

OPINION OF PROPOSED TREATY AS DRAWN

The CHAIRMAN. Thank you very much, Congressman Gilman. Let me ask both Congressmen this question. Are you in favor of the proposed treaty as it is drawn?

Mr. STARK. Mr. Chairman, I would say that I am in favor of it. My only reservation, and I am not really competent to discuss it, is that the constitutional experts must make sure that we can, under the treaty, protect the constitutional rights of our own citizens. Other than that, I would say that yes, I am wholeheartedly in favor of the treaty.

Mr. GILMAN. Mr. Chairman, I would add that I certainly favor the objectives of the treaty to exchange our prisoners and to permit the prisoners of both countries to serve out the balance of their time in prisons in their own country. I think that the alien methods of treating prisoners have created a great deal of tension and have created a wide gap between our two countries at a time when we should be working very closely together on a very serious problem, the problem of illicit narcotics trafficking.

The CHAIRMAN. Senator Church, do you have anything at this time?

Senator CHURCH. Thank you, Mr. Chairman. I don't know if I have questions of the Congressmen, but I am very much aware of the problem. A number of my own constituents, families in Idaho, have children in Mexican jails. In some of these cases, Americans are being held for long periods of time without being charged and without being tried.

AMERICANS WHOM TREATY DOESN'T REACH

Now, as this treaty is written, welcome as it is in the objective it seeks to serve, I take it that the Americans who find themselves imprisoned, but without being charged and without being tried, would not be reached by this treaty.

Mr. STARK. Senator, that is quite right. It is a step in that direction, but more must be done somehow to encourage the Mexicans to obey their own laws, which prohibit the kinds of things that you mention.

Mr. GILMAN. If I might add, Senator, I think that the adoption of the treaty would help to expedite some of these cases that are long-lingering.

When I visited the Sonora Prison, I found three young college students from the Southwestern part of our Nation who had been lingering in the jail from November through May, having been charged with possession of some 50 grams of marijuana, some cigarettes that they had in their possession when they crossed the border or that they had picked up on the Mexican side of the border. They had not even been indicted at that point. When we raised the issue and the Mexican authorities looked into the problem, they discharged them within a few days thereafter. The Mexicans have now embarked on a policy of releasing those who are charged with just minor offenses, rather than incarcerating them for long periods of time.

EXPEDITION PROVIDED BY RATIFYING TREATY

I do think that the adoption of the treaty would help to expedite that situation. A great deal of it has to do with bureaucratic process and the slow manner in which some of these cases are being processed.

Senator CHURCH. I would hope that the adoption of the treaty would have that effect and that we could get some of the very vexing and really tragic cases attended to. I am inclined to agree with you, that if we ratify the treaty and put it into effect, perhaps that would help to move along the resolution of these other cases.

I think I have no further questions, Mr. Chairman.

The CHAIRMAN. Senator Javits.

COMMENDATION OF WITNESSES

Senator JAVITS. Thank you, Mr. Chairman. There is a feeling which I would like to express to both my colleagues, and especially to Congressman Gilman, whom I have known for so long.

This is a tremendous demonstration to me of why our people need to understand the Congress and what it does. You hear all about junkets. Here you two Congressmen have really put yourselves out in a major way to render a service to our country and its people. You have worked very hard on this and you are still at it. You are following through very admirably. I would hope that this is eloquent refutation to the nonsense about people not working. People don't have to work here; they can be on a junket right here by not attending to their business and doing nothing but going to vote or answering a quorum call.

Thank you both very much.

Mr. STARK. I thank the Senator for his kind remarks.

Mr. GILMAN. Thank you, Senator Javits.

ARE MEXICAN AND CANADIAN PROBLEMS THE SAME?

The CHAIRMAN. I noticed in your discussion and also in our outline that we are talking about both the Mexican and Canadian treaties. Are the problems essentially the same?

Mr. STARK. To my knowledge, Senator, we don't experience the problems of our citizens being denied human rights and process under the Canadian laws. Certainly it has never come to my attention that this is the case.

There has been some indication, but that is purely hearsay as far as we are concerned, that there seems to be less discrimination against Canadians in Mexico than there is against American citizens, but I really have no facts to support that.

Mr. GILMAN. I have not received any information or complaints with regard to any of the Canadians, Senator.

CONSTITUTIONAL QUESTIONS INVOLVED

The CHAIRMAN. Of course, the facts may be different, but there are constitutional questions involved, aren't there? These are the same with both countries. Is that not your opinion?

Mr. STARK. I would suspect so. It is my understanding that both our and the Canadian laws derive from the English system, and I believe they would have the same problems with the Napoleonic Code in Mexico. That would be my pedestrian guess, that they would be the same.

Mr. GILMAN. I am frank to say that I have not taken a close look at all of the constitutional issues involved in the treaty, so that at this point I am not able to respond to your question, Mr. Chairman.

The CHAIRMAN. You would think, though, even though you have not looked into it, that there would be constitutional questions involved. Would you not?

Mr. GILMAN. I have talked with I believe one of the constitutional consultants to this committee, who seemed to indicate that while there were some issues that had been raised with regard to the constitutional issue, there was thinking that these could be overcome by way of legislation.

Mr. STARK. I am concerned, as I mentioned earlier, Mr. Chairman, that there are constitutional problems. I guess I can resolve them in several ways.

I think that this committee in its deliberations is not going to deal with those capriciously and is going to get the best advice it can and design the treaty to protect the constitutional rights of our citizens. In the final analysis, I guess if I had to make the choice for our own citizens, I would feel a whole lot more comfortable about our protecting the rights of our own nationals if they were in this country. I think they would be accorded better rights and rights more consistent with the American tradition than they are now being accorded in Mexico.

So, if I had to take a chance on erring and make that decision for these people, I guess I would choose to bring them home, and then we could deal with them in ways more consistent with our own social and cultural code.

PROBLEM OF TRANSPORTATION OF DRUGS

The CHAIRMAN. With reference to the offenses, did I understand that the transportation of drugs is a problem?

Mr. STARK. We have a serious problem of narcotics traffic between Mexico and our country. Out of the 600 people incarcerated, I would suppose that two-thirds were in there on narcotics-related charges. However, out of those 400 in on narcotics charges, probably less than half a dozen are there on heroin-related charges, which is the really serious problem.

I know that in New York, the Senator's State, brown heroin is a pernicious problem, as it is in my own district in California. It is our understanding that most of this brown heroin is coming into this country through Mexico. These arrests do not deal with that problem. That seems to be another whole orbit of possibly organized dealers. Most of these people who were arrested had no criminal record, and those who were transporting narcotics were bringing either marijuana or cocaine on a first-time basis and were people who were first-time offenders.

So, it was a completely different sort of situation than is present in our most serious problem at this point, which is the importation of heroin from and through Mexico to this country.

Mr. GILMAN. Mr. Chairman, there is no question that the Mexican trafficking of drugs is a very serious problem. Over 80 percent of the heroin on our streets is derived from Mexican heroin, the brown heroin. There is no question that our country is concerned about the traffic that crosses this border.

The CHAIRMAN. That is the Mexican border.

Mr. GILMAN. The United States-Mexican border.

The CHAIRMAN. Does that exist at the Canadian border?

Mr. GILMAN. We also have a problem in the northwest, in the Vancouver area. I don't know how much is crossing that border. Our committee has not yet taken a good, hard look at those statistics. But Mr. Bensinger is here. He is the Director of our Drug Enforcement Administration and he, I am sure, would have that information for you in the testimony he will deliver later on this morning.

Let me just state this, Senator. It certainly is a very serious problem. Some of these young people were involved in transporting narcotics. But I think that our State Department Bureau of Security

and Consular Affairs Chief, Mr. Walentynowicz, best summed up the premise that we are proceeding on:

that successful drug interdiction, far from being in conflict with the guarantee of rights to prisoners, is, in fact, dependent upon such guarantees. Thorough law enforcement is ultimately dependent upon wholehearted cooperation of the public, and the people will cooperate only when they are confident that their human rights are not threatened by the enforcement procedures. Unless there is public confidence in just treatment, law enforcement becomes difficult, and even ultimately impossible.

He went on to say that:

fundamentally a strong policy for the fair and decent treatment of prisoners leading to social rehabilitation of offenders is fully consistent with a strong, successful program of drug interdiction.

So many of the critics of the exchange of prisoners say well, on the one hand you are seeking hard punishment, and, on the other hand you are saying let the prisoners be exchanged. Well, I say that there is no conflict between these two propositions. What we are merely seeking to do is to make certain that once they are arrested, their civil rights are protected. We are not critical of the harshness of the penalty. If the penalty is to be harsh, so be it. But let's make certain that in imposing that penalty, the rights of the individual are not being violated, both here in our country, and in Mexico.

The CHAIRMAN. Thank you very much. I fear I may have taken up too much time.

Senator Church.

CASE OF TERRY JOHN DIXON

Senator CHURCH. Thank you. Mr. Chairman, I have been reading a case. A letter has come to me from a young man whose parents live in Idaho. It gives an account of how he and his wife were treated, how they were arrested, how he pleaded guilty, under coercian, with the understanding that if he did so, his wife would be released. He told of how his wife was then released. Then he undertook to renounce the declaration that he had made in order to secure his wife's safety and return to the United States.

He sets out the facts as he claims they occurred, which show a classic case of entrapment. It may all very well be true. He has not been charged nor has he been tried. He has been in prison for months in violation of the laws of Mexico. Riots have occurred in the prison and the Americans have been singled out, beaten, and brutally treated.

Somehow we seem powerless to do anything on his behalf.

If the facts are as he relates them, he would not be in jail at all in the United States. I would hope that through the ratification of this treaty we could endeavor to secure the cooperation of the Mexican authorities to solve cases of this kind.

Senator JAVITS. Would the Senator yield?

Senator CHURCH. Yes, Jack. But first, Mr. Chairman, if I may, I would like to place this letter in the record. I think it is a typical problem of the kind that concerns us most. For that purpose, I would ask that it be included in the record.

The CHAIRMAN. Without objection, that will be included in the record.

[The information referred to follows:]

Jalisco State Penal
Guadalajara, Jal., Mex.

Terry John Dixon

My name is Terry John Dixon and for the past sixteen months I have been incarcerated in the Jalisco State Prison in Guadalajara, Jalisco, Mexico. As of yet I have no sentence.

I was arrested on Jan. 12, 1976 at a roadblock on Highway 15 about 3 miles south of Magdalena, Jalisco. My wife was with me and our immediate destination was Puerto Vallarta where we hoped to relax a few days on the beach. The Federal Police discovered a bag of marihuana in our car and asked us where it had come from. I spoke no Spanish and my wife very little. They made my wife and I strip naked beside the highway before taking us to Guadalajara, 80 miles away.

When we arrived at the Federal Palace in Guadalajara we were forced to sign confessions of buying and transporting marihuana. The American Council was not allowed to visit us until this was done. Two men, who identified themselves as DEA agents were called in.

#11 They told me that if I didn't confess Mexicans were going to rape my wife. Needless to say my wife and I both (signed confessions that stated we were intending to sell the marihuana in the U.S. I would have signed or done anything to protect my wife especially after I was told that if I took all of the blame my wife would be set free.

At the time of my arrest my wife was a captain in the U.S. Army Nurse Corps stationed at Fort Huachuca, Arizona. (The U.S. Army sent representatives to counsel her. A Major Cunningham from San Antonio, Texas flew to Guadalajara and my wife was released in his custody five days after our arrest.

After my wife was safely in the U.S. I made a new declaration stating what the circumstances actually were regarding the marihuana in our car.

I have a step-brother who lives in (Guadalajara and my Mother and Step-Father were coming down to visit him and his family.

#12 My wife and I had a few days off from work so we decided to surprise my (Mother and step-father by meeting them here in Guadalajara. Neither my wife or I had ever met my step brother Lajos or been to his house so when we arrived in Guadalajara my wife had lost his address.

I had a friend I had met in Puerto Vallarta some months before so my wife and I called him up on the evening of Jan. 11 and asked him if he could show us the city. He agreed and my wife and (I drove over to his home.

He took us to a open air restaurant where we stayed for a couple of hours. Then he asked us if we would like to visit Tonala, a small town noted for its pottery. We said yes and started for the town, a short distance from Guadalajara. Before we left Guadalajara my friend asked us to stop and pick up another of his friends. We did.

(After buying a couple of pieces of pottery in Tonala we stopped at a house of Ricardo's friends. Ricardo is the person

(#4) I knew in Guadalajara. We tried to communicate. but my Spanish was horrible -as we soon left. Before the four of us (left Ricardo's friends we were asked where we were going. We said Puerto Vallarta. and Ricardo friends asked if we would take a package with us. Some friends of theirs would pick it up at our hotel. We suspected nothing wrong and said it would be no trouble.

They placed a sack in the trunk of our car and we left. After dropping Ricardo and his friend off my wife and I returned to our motel.

The next morning, Jan 12, I packed our clothes in the trunks and we left Guadalajara. We stopped in Tequila, Jalisco, to buy a bottle of tequila and stopped at a rock shop in Magdalena, Jalisco, to buy some opals for our parents. We were completely unsuspecting that our lives were about to be shattered.

I have paid $3000 to a lawyer and still do not have a sentence. Mexican law states that a person must be sentenced within

Rev. John Dixon

(#5) twelve months. I have been here for 16 months and still have no sentence. I have never seen a judge and am at a complete loss as to how to prove my innocence.

On April 26 the prison began a three day riot in which over 20 people were stabbed, burned, or shot to death. The newspapers said 2 died, but this is not correct. The prison store, meat market, and fruit store were looted and burned.

The Americans were singled out as having money so we were threatened and one (American, Gary Goodwyn, was stabbed twice and received three (3) broken ribs while being relieved of 400 pesos.

The American Counsel removed 17 of the Americans here to protective custody at the Governor of Jalisco's maximum security jail. We were held there for a week before we learned we were being returned to the prison. We all believed we faced death if we returned to the prison so in desperation we attempted to escape. The situation in the prison was and is very dangerous.

#6

At 2AM on May 6 nine of us gained the roof of the jail. Seven people made it down the rope. Eight people made the rope. The eighth was caught by a guard so being as I was the ninth I had no where to go. I ran across the roof and jumped 35 feet to the ground. I broke my foot, tore the cartilage in my knees, and injured my back. I still am in severe pain and back in the prison with no medical care.

Tracy John Dixon

Before the beginning of this experience I was employed at Benson Hospital in Benson, Arizona. I am a registered nurse with a B.S. degree from Idaho State University granted in 1974. My life has been completely changed and all I have to hope for is the United States Government aiding its citizens in gaining their deserved justice and human rights. The pressure on the prisoners and their families is tremendous.

I pray for an end to this nightmare.

Tracy John Dixon
May 29, 1977

Senator JAVITS. Would you please yield, Senator Church?

Senator CHURCH. Yes, certainly.

Senator JAVITS. I have heard what you said. I am familiar with many of these cases and I have a great deal to do with Mexico, as all of the members of the committee know.

URGENT REPRESENTATIONS TO PRESIDENT LOPEZ-PORTILLO SUGGESTED

I really think that the time has come to ask the President of the United States to make the most urgent representations to the President of Mexico, Lopez-Portillo.

[Spontaneous applause by audience.]

The CHAIRMAN. We will have order in the committee.

Senator JAVITS. Lopez-Portillo is a new man, and I think he is a very decent man. I think it really is a question of whether the Mexican Government is superior to its police. I think that is really what it boils down to.

That, of course, is a personal opinion and facts may demonstrate to the contrary; but that is my impression. I feel that the treaty itself is going to take a while. It may have constitutional problems. I am hopeful that I will be persuaded as to its constitutionality. But in the meantime, I really believe that a lot is going on that there is absolutely no reason to condone.

Perhaps the committee, after it takes the evidence—and I would not do anything except as based on evidence, Mr. Chairman—might address a letter to the President asking him to take this up with the President of Mexico. I think much more effective and humane administration of justice can be established in Mexico, and it will do that country a lot of good, and it will do us a lot of good.

The CHAIRMAN. I think that is a good suggestion. I believe, though, that this committee will want to dig into the facts as best it can.

Senator JAVITS. Of course.

The CHAIRMAN. Then, as a part of our consideration of procedures, we might write such a letter, if the committee so decides.

Senator JAVITS. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, gentlemen. We appreciate your testimony this morning.

Mr. STARK. Thank you, Senator.

Mr. GILMAN. Thank you, Mr. Chairman.

The CHAIRMAN. Now we will ask the attorney general of the State of Texas, Mr. John L. Hill, to please come up to the witness table.

Judge Hill—I hope you don't mind my calling you Judge—we are very glad to have you with us.

Mr. HILL. Thank you, Senator.

The CHAIRMAN. Do you have a prepared statement?

Mr. HILL. Yes, I do, Senator Sparkman.

The CHAIRMAN. You may treat it as you see fit. It will, of course, be printed in its entirety in the record.

STATEMENT OF HON. JOHN L. HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, AUSTIN, TEX.

Mr. HILL. Very well. In the interests of the time of this distinguished panel, I will not say very much more about the contents of that statement.

I would like to thank you for the opportunity of appearing on this important matter.

First, why am I involved—a State attorney general? Our State has 137 prisoners in Mexican jails today, and as the chief law enforcement officer of my State, I am concerned about those individual citizens. California has 222 of those prisoners, and I have met with the Attorney General Evelle Younger of California—a good attorney general. He is a Republican and I am a Democrat, but we are both concerned about these individuals who are imprisoned in Mexico.

As a result of our concern, we discussed this matter with the State Department in March. We had a working session with the State Department in Dallas. Mr. Younger sent some of his staff people. We also asked for the cooperation of Bruce Babbitt, the fine attorney general of Arizona, and of Toney Anaya, the fine attorney general of New Mexico. The four border States have become involved from that time to the present trying to urge upon the Senate the ratification of this treaty and to become a constructive force in resolving some of the legal problems that are associated with it.

In our State, we have just come out of regular session, and I arranged for the adoption during that session of an amendment to our own code of criminal procedure that would be necessary in order for our State to cooperate in the implementation of this treaty.

So, we are legally prepared in Texas—and we are morally prepared in Texas—and we are anxious to have this treaty ratified at the earliest possible date. You may be assured of our total cooperation and continued concern.

MR. HILL'S VISIT TO SANTA MARTA PRISON

I visited the Santa Marta Prison for Women in March in Mexico City. I had gone to Mexico City to visit with Oscar Flores Sanchez, the new attorney general, a very fine gentleman, one who is concerned about this problem. I visited with him concerning other matters that are not relevant to this inquiry; but while there, we discussed the tensions that were building up between our two fine countries over this problem of the handling of prisoners. I reported to him that we had 75 Mexican nationals in the Texas Department of Corrections, and that after all, we recognized that maybe some of their citizens would desire to take advantage of this treaty and that we should just wait and see.

We had a very friendly exchange, and I said, "General, do you suppose it would be all right? We have four women from Texas at Santa Marta. I understand that it is just a few miles out of town. Could I go out and see these women?" He said it would be all right and he arranged for transportation.

I went out there and I will tell you, it was a moving and an emotional experience. When I walked out of that prison that night knowing that I was leaving there with my freedom, I could not feel very good about the fact that I was leaving behind four splendid young American women, all in their twenties. They had committed a crime and had freely acknowledged it. They were used as mules to transport a small amount of cocaine from Columbia back to the United States. They never should have done it. They realized that at a young stage in their lives they had made a mistake, either for excitement or for the desire to make a couple of thousand dollars, or for whatever reason.

They have been there now for 3 years, and one of them for almost 4 years. The sentences that they have are 7-year sentences. There is no provision for parole under the laws of Mexico. They had no prior record and they expressed a great desire to come home and go to high schools and to junior high schools to tell the young people of this country about the dangers of doing what they did and about the mistakes that they made which ruined years of their own lives and caused trauma to their families. They want to tell our other young people not to fool with this kind of situation, to stay out of the drug culture.

They could come home and would certainly be subject to rehabilitation. They could be a constructive force for this country.

If we don't ratify this treaty, they will stay another 3½ years in prison and that part of their lives will have been virtually wasted.

This is a very human and humanitarian thing about which we are talking. I promised those women that I would do what I could as just one State attorney general, limited in my authority and influence. I said that I would use whatever I had to urge the Senate respectfully to ratify this treaty at the earliest possible moment and to implement the necessary legislation. I think if we move expeditiously, hopefully by the latter part of the year, some of these young people can be home and have their freedom. I think that would be a very fine and constructive thing.

CONSTITUTIONAL POINTS APPLICABLE TO HABEAS CORPUS

Lastly, let me just briefly comment on the points that have been raised about the constitutionality applicable to the writ of habeas corpus. I have been a practicing attorney for almost 30 years. I came to this office out of a legal practice background and it is my responsibility as State attorney general to interpret constitutional issues from time to time, so at least you may accept that I have some degree of expertise in this matter.

We have briefed this, and we are perfectly satisfied that the waiver that is provided in the treaty itself for the suspension of the writ of habeas corpus is sound. Under this treaty, for example, if any of these women were brought home and were not released immediately and they challenged their continued confinement in an American prison under the writ of habeas corpus, it is provided that they, as a condition for their transfer, must waive that privilege and they would have to assert that right in the courts in Mexico. If not, the integrity of the treaty could be impaired.

We believe that that is a practical answer to the problem and we think the Supreme Court would sustain it. We are leaving with you a brief—some notes which we prepared in our office—which is not a

92-305 O - 77 - 3

part of my statement. I would like to leave that with you as an addendum to my testimony. In it, we give you our legal opinion for whatever it is worth, that we believe our Supreme Court would sustain that.

If we are wrong, what really have we lost? Should we tarry now to debate the refinements of that legal argument while people who should be brought home have their freedom delayed? I think not.

I think the better legal position is that we can proceed this way and that our Supreme Court would sustain it.

I am open to any questions that you may have.

The CHAIRMAN. Thank you.

We would be glad to have the brief that you referred to, and without objection, it will be printed in the record.

[Mr. Hill's prepared statement and the brief referred to follow:]

[Additional material submitted by Mr. Hill is in the committee.]

PREPARED STATEMENT OF JOHN L. HILL, ATTORNEY GENERAL FOR THE STATE OF TEXAS

My name is John L. Hill. I am the attorney general for the State of Texas. I am here today to urge ratification of the prisoner exchange treaty with Mexico. It is a carefully drafted document that offers a workable solution for a very difficult problem: The problem of detention of United States citizens convicted of crimes in Mexico and Mexican nationals convicted of crimes in the United States.

The problem is a very real one. It is estimated that there are 137 prisoners from Texas alone incarcerated in Mexican prisons at present.

Incarceration of one country's nationals by the other country has a detrimental impact on two levels:

The first is on the individual level. A person convicted of a crime in a faraway country faces special problems in adjusting to confinement and in beginning the task of rehabilitation. Usually, there is a language barrier making communication difficult. The individual is often far from family and friends, and is thus denied the emotional support and understanding that is essential to successful rehabilitation.

The second level of impact is much broader. Incarceration of large numbers of one nation's citizens by another places great strain on the diplomatic relationship between the two nations. The national news of the past several months is filled with reports of incidents and commentaries that evidence the tension and strain resulting from the existing situation.

The treaty goes far to lessen the detrimental impact of conviction of one country's citizens of a crime in the other country. It does so by providing a mechanism to transfer offenders to their home countries or communities so that they can pay their debts to society in a setting that doesn't have the additional obstacles to rehabilitation under a language barrier and cultural estrangements while insuring the integrity of the convicting country's judicial process.

It insures the integrity of the convicting country's judicial process by providing that a transfer will only be allowed if no appeal or collateral attack upon the offender's conviction and sentence is pending and the prescribed time for appeal has expired. Further protection is provided by article VI of the treaty giving the transferring state exclusive jurisdiction over any proceedings intended to challenge, modify or set aside a sentence.

The treaty promotes a number of very important interests.

It promotes the government's interest in dignity and sovereign integrity by requiring the consent of all governments affected by a given request for transfer before the transfer can be made.

It promotes the state interest in being free from civil liability to transferees by making transferred offenders the responsibility of the federal government in the receiving state.

It promotes the individual's interest in personal dignity and self-determination by requiring his consent before the transfer can take place. Sections 4107 and 4108 of the proposed act to implement the treaty specify that the required consent must be made voluntarily and with full knowledge of the consequences

of such consent. As an additional protection of the interests of the individual offender, section 4109 of the proposed act, givts the offender the right to advice of counsel, and specifies that counsel will be appointed if the offender is financially unable to afford one.

Perhaps the most important interest promoted by the Prisoner Exchange Treaty is our nation's interest in the well-being and safety of her citizens whether at home or abroad.

It must be remembered that Mexico has a valid interest in seeing that the laws of Mexico are respected and that the integrity of the Mexican judicial process is maintained. The United States has a vital interest in seeing that her citizens are accorded the dignity and respect that any human being is due.

The best way to give effect to both interests is to provide a way to bring those inmates home who wish to come home to serve out their sentence and to pay their debts to society. By providing a mechanism to bring United States citizens back to the United States, this Government is best able to insure that the conditions of imprisonment will accord with the requirements of due process and human rights, and that optimum conditions for rehabilitation are present.

The Prisoner Exchange Treaty provides the necessary mechanism. It does so in a manner that safeguards the interests of the sovereign governments and the individual offenders.

Therefore, as one of the State attorneys general who sponsored the Southwestern States Conference on Crime and the Border, I applaud the objectives of the treaty and urge that it be ratified and that the proposed enabling legislation be enacted as quickly as possible.

NOTES FOR ATTORNEY GENERAL JOHN L. HILL, JUNE 15, 1975

ON THE QUESTION OF HABEAS CORPUS

I believe that the Report of the Border Committee is correct in its conclusion that the question of whether or not the limitation on possible challenges to the validity of the offender's conviction is an unconstitutional suspension of the writ of habeas corpus must ultimately be resolved by the Supreme Court. Having said this, I think it is important to recognize that case law and policy considerations give guidance as to the likely outcome. Furthermore, I believe that the outcome will be that the provision of the treaty limiting challenges to the legality of an offender's conviction to the courts of the transferring nation will be upheld as constitutional.

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 stated that "(a) sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders." 354 U.S. 524, 529 (1937). 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. The Supreme Court's reasoning in *Neely* v. *Henkel* and *Wilson* v. *Girard*, leads one to the conclusion that in that situation the constitutional provision regarding the writ of habeas corpus would be inapplicable and the Mexican courts would have exclusive jurisdiction over the offense.

In passing on the constitutionality of the provision, it is important to keep in mind both the reason for the provision, to protect the integrity of the transferring nation's judicial process, and the purpose behind the treaty—to provide the offender with the optimum opportunity for rehabilitation. Unless some safeguard exists insuring that the integrity of the transferring state's judicial process is respected, it is extremely unlikely that any agreement to transfer offenders would be possible. Only with the kind of safeguard embodied in the present treaty can the salutary goals of the treaty be achieved.

Furthermore, it must be stressed that an offender may only be transferred if he consents. This consent must be made voluntarily and with full knowledge of the consequences of transfer. One of the consequences is that an offender waives any right he might have to test his conviction by a writ of habeas corpus. This waiver should be sustained as a valid, binding waiver. The Supreme Court, on a number of occasions, has recognized that an individual can waive a fundamental con-

stitutional right in order to assert another or in order to gain some tactical or procedural advantage. For example, in *Faretta* v. *California*, the Supreme Court ruled that an accused could waive his right to counsel in order to assert his right to represent himself. In deciding whether a waiver of an important right is valid, the Supreme Court has looked at two primary factors: Voluntariness and knowledge. If a waiver is made voluntarily with knowledge, it is upheld. See, for example, *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) or *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

The proposed statute to implement the treaty insures that both factors are present before an offender can be transferred. The statute imposes a duty on a United States Magistrate to determine that the consent of the offender is made voluntarily and with full knowledge of the consequences of such consent. Section 4108(a). Furthermore, the offender is given the right to advice of counsel. Section 4109. Clearly, the requirements for a valid waiver must be fulfilled before a transfer may take place, and therefore, the provision should be valid.

TEXAS PROPOSED LEGISLATION TO IMPLEMENT EX. D, 95–1

[Supplied by John L. Hill]

By ---------- ----------. B. ----------

A BILL TO BE ENTITLED

AN ACT

relating to the authority of the governor under a treaty between the United States and a foreign country for the transfer of convicted offenders, amending Chapter 42 of the Code of Criminal Procedure, as amended.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Amend Chapter 42 of the Code of Criminal Procedure, as amended, by adding a new article 42.17 to read as follows:

"Article 42.17. Transfer Under Treaty. When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted offenders who are citizens or nationals of foreign countries to the foreign countries of which they are citizens or nationals, the Governor is authorized, subject to the terms of such treaty, to act on behalf of the State of Texas and to consent to the transfer of such convicted offenders."

SEC. 2. The importance of this legislation and the crowded condition of the calendar in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended; and this rule is hereby suspended and that this act take effect and be in force from and after its passage and it is so enacted.

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 Attorney 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, 1977, 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.

Dallas Times - Herald 2/

Mexico prepared for prisoner swap

By BOB DUDNEY
Times Herald Washington Bureau

WASHINGTON — Mexican President Jose Lopez Portillo says his government is prepared to begin immediate repatriation of several hundred American prisoners now held in Mexican jails, but he said the United States must first act on a reciprocal agreement.

"We are ready now," Lopez Portillo told an overflow crowd Tuesday during a question-and-answer session at the National Press Club. He noted, however, that the United States has not yet ratified a prisoner exchange treaty signed last November.

The treaty, formulated largely in response to American accusations that the Mexican prison system was riddled with brutality, corruption and unsanitary conditions, permits U.S. and Mexican nationals to serve their sentences in their own countries.

Mexico quickly adopted the arrangement.

The White House later said President Carter, who has been meeting with Lopez Portillo this week on mutual U.S.-Mexican problems, sent the treaty to the Senate for ratification. The matter will be referred to the Foreign Relations committee, probably sometime next week, Senate officials said.

Carter press secretary Jody Powell said that in addition to simple ratification the treaty will require additional legislation since the exchange may increase costs in the U.S. prison system. He said this is because some Mexican nationals may choose to remain in American jails.

Authorities estimate there are about 600 Americans currently imprisoned in Mexico, the largest share on drug-related charges. There are nearly 1,200 Mexican nationals jailed in this country.

Lopez Portillo, who took over the presidency last December, is in his third day of a four-day state visit to Washington. He is the first foreign head of state to visit the White House since Carter was inaugurated.

Lopez Portillo also said the U.S. could help stop the flood of illegal Mexican immigration across the border by undertaking measures which would help the Mexican economy.

"A country of immigrants (such as the U.S.) must not be surprised by these people who come to the U.S. wanting work," Lopez Portillo said. "It is a result of Mexico's general economic situation."

U.S. authorities believe as many as five million aliens enter this country illegally each year, and that most come in search of jobs due to the high level of unemployment in Mexico and other Latin American nations.

Lopez Portillo said Mexico's current economic situation could be improved with a lowering of U.S. trade barriers to Mexican imports. Mexico has a chronic $2 billion balance of payments deficit with the United States alone and more than $25 billion worldwide.

Despite Mexico's growing role as a petroleum producer, the Mexican president said his nation has no plans to join the Organization of Petroleum Exporting Countries (OPEC).

Mexico's reserves are estimated conservatively at 11 billion barrels, largely untapped, and it could become the major supplier of crude oil and natural gas to the U.S.

The Mexican chief executive indicated, however, that his country intended to wring a good price out of its petroleum.

The CHAIRMAN. Senator Church, do you have any questions?
Senator CHURCH. Yes; thank you.

MR. HILL'S PROPOSAL

Mr. Attorney General, would you review again for me the proposal you made? Is this in the form of a reservation, or is it an amendment to the treaty? What exactly are you proposing?

It is not our prerogative, as you know, to change the treaty. We can either ratify it or refuse to ratify it, or ratify it subject to a reservation. But we cannot change the terms of the treaty.

Mr. HILL. May I extend my remarks for about 3 minutes to place this in the record? I think it is rather important.

Senator CHURCH. Yes; I think it should go into the record.

Mr. HILL. This comes out of our Border Law Conference, Senator, which was held just recently in San Diego, and which was attended by the Honorable Griffin Bell and by the attorney general of Mexico. I participated in our subcommittee meeting. That was a Border Conference involving Mexico, the United States, and our border States, both on the American and the Mexican side. We will follow that up on October 3 and 4 in El Paso with an additional meeting.

Out of that meeting came a report of the Border Committee on this treaty in which we all, the attorneys general, applauded the purposes of this treaty and asked for its ratification. I am authorized to have that in the record, and I believe it has been submitted as part of the record. If not, it will be a part of my addendum.

With that background, let me read my notes on the question of habeas corpus into the record.

The CHAIRMAN. May I ask you something? You just referred to an agreement among three attorneys general?

Mr. HILL. Four.

The CHAIRMAN. Was that included in the brief that you presented earlier?

Mr. HILL. No, sir.

The CHAIRMAN. That is all right. I just wanted to be sure that there would be two separate insertions, and there will be.

Mr. HILL. Yes, sir; I will insert notes for Attorney General John L. Hill of June 15, 1975, on the question of habeas corpus, and I will insert the resolution adopted by the Border States at their conference in San Diego.

The CHAIRMAN. Let me say that we have received statements in support of the treaty with Mexico from the attorneys general of New Mexico and California and that the matter to which you referred is included in their brief and that is a part of the record.

Mr. HILL. Very well.

Are the cases included? I don't want to transgress on your time. I think what I am going to read is important to the record and I don't believe it is duplicative, Senator Sparkman, of the other reports.

Shall I take the time to do it?

The CHAIRMAN. Let us take it and we will have the staff check to make sure that nothing is omitted from the record. All of your statements will be in the record, of course.

Mr. HILL. Very well.

[The information referred to follows:]

PREPARED STATEMENT OF TONEY ANAYA, ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO

Members of the committee, as attorney general of the State of New Mexico, I wish to express the support of this office for the proposed prisoner exchange treaties with Canada and Mexico. We understand that the proposed treaty with Canada is in most respects parallel to the one between the United States and Mexico. The treaty with Mexico is of particular concern to this State inasmuch as we are informed that there are at least nine New Mexico citizens currently imprisoned in Mexico who possibly could benefit from the treaty with Mexico.

Our support is based upon the following considerations:

1. The proposed prisoner exchange pursuant to the treaty is essentially a humanitarian effort to permit individuals confined in alien jails to be returned to their country of citizenship where they would then serve the sentenced imposed.
2. The treaty maintains harmony between the respective governments party to the treaty inasmuch as the sentences imposed by each are given complete effect except to the extent that the parole laws of the receiving government affect the duration of confinement.
3. No prisoner is transferred against his will. He must consent to the transfer.
4. Inasmuch as the proposed implementing legislation allows each State to reach suitable agreements with the Federal Government pertaining to the custody of transferred prisoners in State institutions, the exchange will have a controlled impact on State penal systems.
5. When this treaty becomes effective the exchange of prisoners pursuant to it should remove existing friction between the United States and the Republic of Mexico in the area of citizens confined in foreign prisons.

I regret that I cannot appear personally and testify before the Senate Foreign Relations Committee, but I hope that this statement of support will assist the committee.

STATE OF CALIFORNIA,
OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF JUSTICE,
Sacramento, Calif., June 10, 1977.

Re Prisoner Transfer Treaty with Mexico.

Senator JOHN SPARKMAN,
Chairman, Committee on Foreign Relations, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR SPARKMAN: The prisoner transfer treaty with Mexico 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:

"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, 1977, 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."

It should be emphasized that our satisfaction with the language of the treaty is predicated upon resolution of our concerns that the legal and financial burdens of the treaty will be borne by the Federal Government rather than by the State governments. This resolution took the form of language in the March 14, 1977 draft of the implementing Federal statute submitted by the State Department. Our support for the treaty is therefore conditioned upon enactment by the Congress of an implementing federal statute which accommodates our concerns in the same manner as provided in that draft. A copy of the March 14, 1977 draft statute is enclosed.

Sincerely,

EVELLE J. YOUNGER,
Attorney General.

REPORT OF THE PANEL ON THE TREATY FOR THE TRANSFER OF PRISONERS

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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, 1977, 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.

PRELIMINARY DRAFT—3-14-77

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.

SEC.
4100. Scope and limitation of chapter.
4101. Definitions.
4102. Authority of Attorney General.
4103. Applicability of laws of the United States.
4104. Transfer of offenders on probation with suspended sentence.
4105. Transfer of offenders serving sentence of imprisonment.
4106. Transfer of offenders on parole; parole of offenders transferred.
4107. Verification of consent to transfer from United States.

4108. Verification of consent to transfer to United States.
4109. Transfer of juveniles.
4110. Prosecution barred by foreign conviction.
4111. Loss of rights and disqualification.
4112. Status of alien offenders transferred to foreign country.

§ 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 convicted offenders to and from a foreign country pursuant to such a treaty.

(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 and 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 18 years of age the consent shall 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) A sentence imposed in a foreign country may be executed in the United States only if and to the extent that the sentence could be executed in the country in which it was imposed.

§ 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 a violation of the laws of the United States or of a foreign country committed by a person under 18 years of age which would have been a crime if committed by an adult;

(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;

(e) "parole" means any form of conditional release from imprisonment before the expiration of the sentence;

(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;

(h) "transfer" means a transfer of an individual for the purpose of the execution in one country of a sentence of adjudication of juvenile delinquency by the courts of another country.

§ 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 such treaty;

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

(3) to transfer prisoners, offenders on parole or on probation with a suspended sentence 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 nationale of foreign countries to the foreign countries of which they are citizens or nationals;

(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 providing for such transit;

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

(10) 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 the treaty or this chapter provide otherwise.

§ 4104. Transfer of offenders on probation with suspended sentence

(a) Prior to consenting to the transfer to the United States of a convicted offender who is on probation with a suspended sentence, 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 from the authorities of the foreign country who is on probation with a suspended sentence 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 as though probation with a suspended sentence had been imposed by the United States District Court.

(d) The probation may be revoked by the United States District Court under whose supervision the offender is placed. A violation of the terms of probation shall constitute grounds for revocation. Rule 32(f) of the Federal Rules of Criminal Procedure shall be applicable. If probation is revoked the suspended sentence imposed by the sentencing court shall be executed.

(e) The provisions of section 4105 and 4106 shall be applicable to an offender whose suspended sentence has been ordered executed.

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

§ 4105. Transferred offender serving sentence of imprisonment

(a) 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 towards service of the sentence for any days prior to sentencing spent in custody in connection with the offense or acts for which the sentence was imposed.

(c) The transferred offender shall be entitled to all credits for good time, for labor, or any other credit towards the service of the sentence which had been given by the transferring country as of the time of transfer. Subsequent to the transfer, the offender shall be entitled to credits for good time as provided in section 4161. 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. If good time allowance is provided for in the country from which the offender has been transferred the basis for computing the good time allowance under section 4161 shall be the length of the sentence remaining to be served at the time of transfer. A transferred offender may earn industrial good time and meritorious good time deductions authorized in section 4162. All credits towards service of the sentence other than credit for time in custody before sentencing may be forfeited as provided

in section 4165 and may be restored by the Attorney General as provided in section 4166.

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

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

(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. Section 4201–4201; 4205(a), (d), (e), and (h); and 4206–4215 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) subject to the provisions of section 4205(h).

(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

Prior to the tarnsfer of an offendtr from the United States, the fact that the offender consents to such transfer and that such consent is voluntary and in full awareness of the consequences thereof shall be verified by a United States Magistrate of the district in which the offender is confined or of the district in which supervision of the offender is exercised.

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

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 in full awareness 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.

§ 4109. Transfer of juveniles

An offender transferred to the United States because of an act which would have been a juvenile delinquency had it been committed in the United States shall be subject to the provision of Chapter 403 except as otherwise provided in the relevant treaty or in an agreement pursuant to such treaty between the Attorney General and authority of the foreign country.

§ 4110. 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 political subdivision 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.

§ 4111. 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 or civic rights nor incur any disqualification other than those which under the laws of the United States or a State result from the fact of the conviction in the foreign country.

§ 4112. Status of alien offender transferred to foreign country

An alien subject to deportation but eligible to be granted the privilege of voluntary departure under the immigration laws who is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have voluntarily departed this country.

An alien subject to deportation and not eligible to be granted the privilege of voluntary departure under the immigration laws who is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have been deported from this country.

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

(*f*) A judge of the appropriate United States District Court may assign a magistrate of the district to 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 courts of 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 such courts;

(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 execution 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 as respondent.

(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.

(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 as respondent.

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

"§ 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 concur with the Attorney General in the transfer to said foreign country of 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 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."

CONSTITUTIONAL PROVISIONS RELATING TO HABEAS CORPUS

Mr. HILL. *In Neely* v. *Henkel*, the Supreme Court of the United States held that the constitutional provisions relating to the writ of habeas corpus 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." The citation will be contained in my notes.

In *Wilson* v. *Girard*, the Supreme Court stated: "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders." So, 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. It seems to us that the Supreme Court's reasoning in *Neely* and *Wilson* leads one to the conclusion that in that situation the constitutional provision regarding the writ of habeas corpus would be inapplicable and the Mexican courts would have exclusive jurisdiction over the offense.

In passing on the constitutionality of the provision, it is important to keep in mind both the reasons for the provision, to protect the integrity of the transferring nation's judicial process, and the purpose behind the treaty, to provide the offender with the optimum opportunity for rehabilitation.

Unless some safeguard exists in insuring that the integrity of the transferring State's judicial process is respected, it is extremely unlikely that any agreement to transfer offenders would be possible.

Only with the kind of safeguards embodied in the present treaty can the salutary goals of the treaty be achieved. Furthermore, it must be stressed that an offender may only be transferred if he consents. This consent must be made voluntarily and with full knowledge of the consequences of transfer.

One of the consequences is that an offender waive any rights which he might have to test his conviction by a writ of habeas corpus. This waiver, in our opinion, should be sustained as a valid, binding waiver.

The Supreme Court of the United States, on a number of occasions, has recognized that an individual can waive a fundamental constitutional right in order to assert another or in order to gain some tactical or procedural advantage. We cite cases there. In deciding whether a waiver of an important right is valid, the Supreme Court has looked at two primary factors: voluntariness and knowledge. If a waiver is made voluntarily with knowledge, it is upheld.

The proposed statute to implement the treaty insures that both factors are present before a person can be transferred. The statute imposes a duty on a U.S. magistrate to determine that the waiver is made voluntarily and with full knowledge of the consequences of such consent.

Furthermore, the offender is given the right to advise with counsel. Clearly, then, the requirements for a valid waiver would be fulfilled before a transfer may take place, and therefore we believe the provisions should be valid and upheld.

PROPOSED WAIVER PROCEDURE

Senator CHURCH. I think you have answered my question by indirection. You would propose that this waiver procedure be included in the statute that would implement the treaty?

Mr. HILL. Yes, sir. I believe that is so proposed at this time in section 41–08(a).

Senator CHURCH. I take it, however, that any American citizen who would be transferred from a Mexican prison to an American prison under the terms of the treaty would be eligible for a pardon?

Mr. HILL. Or parole.

Senator CHURCH. Or parole.

Mr. HILL. Under our law.

Senator CHURCH. I see.

Mr. HILL. Senator, excuse me, but I believe I have spoken incorrectly. Pardon is not included. It is only limited to parole.

I apologize for my misstatement. But I know that my last reading of the treaty and the implementation indicated that paroles are provided for under our laws. Once the prisoner is transferred here, he or she is eligible to apply for parole. That process would be the same as it would be for any other prisoner.

Senator CHURCH. Thank you.

The CHAIRMAN. Senator Javits.

Senator JAVITS. Thank you, Mr. Chairman.

NECESSITY OF RESOLVING PROBLEMS

Mr. CHAIRMAN. I believe there may be constitutional problems. These may be soluble. I hope and pray they are, and I will use my utmost talents, whatever God gave me, to find a way to end up on the affirmative side of the Constitution. I really believe this is a very sane and wise way to proceed. But I cannot foretell in advance what this will produce.

I worry about whether, if we do have the treaty and it breaks down because of court decisions, we may not, in fact, worsen our situation. Only one thing is clear to me: The fact that the treaty has been negotiated gives us a beginning, a new plateau upon which to proceed.

What I said a minute ago, which was not at all said to be sensational, was intended toward utilizing the opening thus presented. One way, or another—with a treaty, and I want it very much, or without it, if we have to—we must resolve this problem. This is simply unacceptable. Mexico is a sovereign state, of course, but is still bound by the dictates of humanity. What we all know about it now, based upon all of this evidence, simply indicates that the most basic human values are being affronted, defied, and outraged.

We will find a way, I can assure you, Mr. Attorney General.

Mr. HILL. Senator Javits, if I might please be permitted a personal comment to you, sir, for whom I have enormous respect, your reputation as a constitutional scholar is well known. Certainly your demeanor as a U.S. Senator reflects your humanitarian instincts almost every time that you speak or act. Your relationship with Latin America and Mexico puts you in a special role of leadership in matters of this type. I feel confident that you will do what you can to see the treaty through.

The constitutional questions, although real, I think are soluble, and it behooves us to come down on the side of trying rather than accepting the possibility in advance that the courts might strike it down. I would hope that you could see fit in that direction.

Senator JAVITS. I accept fully the responsibility which you put on me and asure you that I will try not to fail it.

Mr. HILL. Thank you, Senator.

The CHAIRMAN. Thank you very much, Mr. Attorney General.

Mr. HILL. Thank you very much, Mr. Chairman.

INSERTIONS FOR THE RECORD

The CHAIRMAN. I believe I did say that we would insert into the record the statements of the two attorneys general, along with your own testimony.

Mr. HILL. If I can secure a clean copy of my documents from my staff people, I will give it to the committee staff.

The CHAIRMAN. Very well.

The next witness is Barbara M. Watson, Administrator, Bureau of Security and Consular Affairs, Department of State.

I see on our agenda we have four witnesses who I think could very well serve as a panel. May we call to the table Herbert J. Hansell, Peter Flaherty, and Peter B. Bensinger. Gentlemen, please come up with Ms. Watson.

Mr. Hansell is the Legal Advisor of the Department of State; Mr. Flaherty is the Deputy Attorney General of the Department of Justice; and Mr. Peter B. Bensinger is Administrator of the Drug Enforcement Administration of the Department of Justice.

We are very glad to have all of you here today.

Ms. Watson, we will hear from you first.

You haven't been in this job for very long, have you?

STATEMENT OF HON. BARBARA M. WATSON, ADMINISTRATOR, BUREAU OF SECURITY AND CONSULAR AFFAIRS, DEPARTMENT OF STATE

Ms. WATSON. It has only been since April, Mr. Chairman.

The CHAIRMAN. Yes. I remember your confirmation hearing.

Ms. WATSON. You were very kind to me at that time, sir.

The CHAIRMAN. We are very happy to have you back.

We have a copy of your statement and it will be printed in the record in full. You may proceed as you see fit. In fact, I say that to all of you at the table.

Ms. WATSON. Mr. Chairman, since mine is such a very brief statement, I would hope you would permit me to read it.

The CHAIRMAN. Very well.

Ms. WATSON. It is a pleasure to appear before you, Mr. Chairman, and members of the committee, to provide testimony on the treaties on the execution on penal sentences which the United States has recently negotiated with the Governments of Mexico and Canada.

The welfare of American prisoners in foreign jails is of great concern to the Department of State. In 1972, 240 Americans were imprisoned abroad. Today this number has soared to about 2,200, with approximately 600 imprisoned in Mexico. The majority have been arrested on drug related charges.

PROBLEMS OF PRISONERS IN FOREIGN PRISONS

The situation in Mexico is well known. Congressional hearings have highlighted the prisoners' problems, including abuses in the pretrial process, failure to notify consular officers, and physical mistreatment of those arrested.

In spite of recent improvements, there is much that we still find unsatisfactory.

There are special hardships involved in being in a prison abroad. It is difficult or impossible to maintain contact with one's family. Dietary and living conditions are different than those found in the United States. Ignorance of the language is a difficult obstacle to overcome, and basic cultural differences make adjustment extremely difficult. All of these factors make rehabilitation of prisoners in foreign prisons an exceptionally difficult task. Prisoners cannot be reintegrated into the civilian environment at the end of their term.

Comparable problems exist for Mexican nationals in the U.S. prisons, even though we hear less about these cases. They, too, experience real hardship. The food and the climate are unfamiliar, and particularly in small institutions, nobody speaks their language or understands their culture. They, too, should be our concern.

TREATY WITH CANADA

We have also negotiated a treaty on the execution of penal sentences with Canada. The Canadian Government suggested such a treaty. It is appropriate to have an agreement with both of our immediate neighbors, even though there are fewer problems regarding U.S. prisoners in Canada.

Our treaties with both Canada and Mexico have the same humanitarian end—the most effective rehabilitation possible for the prisoners concerned.

HOW TREATY WITH MEXICO WOULD WORK

In considering many approaches to resolving this program, we discussed a treaty on the execution of penal sentences with the Government of Mexico. This treaty, and a similar one with Canada, are our concern today. I would like to describe briefly how the treaties would work for American prisoners in Mexico.

The Mexican Government would draw up a list of the prisoners it deemed eligible for transfer under the treaty. Some offenses are excluded, such as violation of immigration laws, political and military offenses, and prisoners with less than 6 months to serve. Prisoners whose names were not on the list could submit a request for consideration. Prisoners would not be transferred unless they so consented. No transfer will be made unless all three parties agree—the prisoner, and the sending and receiving countries.

Prisoners to be transferred would be interviewed by a U.S. magistrate or other official to insure that the consent to the transfer was freely and intelligently given.

The place of confinement in this country will be determined by several factors, including the proximity to the offender's home, the need for security, and health problems. Sentences to be served in the United States will be measured by the balance of the Mexican sentence, diminished by work credits and good behavior in Mexican institutions. United States parole rules will apply.

DEPARTMENT OF STATE RECOMMENDATION

The Department of State recommends without reservation that the treaties on the execution of penal sentences with Canada and Mexico

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be ratified. This kind of treaty is unprecedented in the history of the United States. We know that effective implementation will not be free of problems. But we firmly believe that the humanitarian goal of these treaties, the rehabilitation of Americans imprisoned abroad, is a compelling reason for approval.

That ends my statement. Thank you.

The CHAIRMAN. Thank you very much. We are very glad to have your statement.

Next we will hear from Mr. Hansell, of the Department of State.

We are very glad to hear from you. We have your statement.

Mr. HANSELL. Thank you, Mr. Chairman.

With your permission, I will submit my prepared statement for the record and will deliver only a portion of it. I would prefer to use part of my time to comment on some of the discussion that has occurred here this morning.

The CHAIRMAN. Very well.

Please proceed as you see fit.

STATEMENT OF HON. HERBERT J. HANSELL, LEGAL ADVISER, DEPARTMENT OF STATE, ACCOMPANIED BY DETLEV VAGTS, LEGAL ADVISER STAFF, DEPARTMENT OF STATE

Mr. HANSELL. I think the discussion today has indicated that there may be some misunderstandings as to what these treaties do and do not do. It seems to me that it is important, as we begin this discussion, to clarify those misunderstandings.

So, with your permission, I will read only a portion of my prepared statement, but will submit the entire statement for the record.

CONSTITUTIONAL QUESTION

I do want to touch just briefly on the constitution question, which is raised primarily by article VI of the Mexican treaty. I will confine my remarks to the Mexican treaty, although in general, they will apply as well to the Canadian treaty.

The basic provision that creates the constitutional question, article VI of the Mexican treaty, reads as follows:

> The Transferring State, which is Mexico, 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.

The effect of that provision, therefore, is that any proceedings to challenge or modify or set aside the sentence imposed by a Mexican court would have to take place under that provision in the Mexican courts.

This clause was an essential part of the treaty arrangement, as negotiated. Mexico has a long history of sensitivity to foreign interference with its legal system, a history that it shares with other Latin American countries. The Mexicans could not accept review of Mexican judgments by an American court.

The negotiators of the treaty also concluded that our own Senate probably could not be expected to give its advice and consent to an

arrangement under which Mexican courts would sit in judgment on the findings of U.S. courts. In addition, the problems that would be involved in holding hearings in a U.S. court to determine precisely what happened in a remote Mexican police station might well be insurmountable.

It is obvious that there will be challenges to the constitutionality of that provision. This treaty is, as Ms. Watson has said, with respect to the United States, a novel one and the issue is new. We have given careful study to this question, which has also been reviewed, of course, by the Department of Justice, and by scholars outside the administration. We would not have caused the treaty to be signed if we had not concluded that it was constitutionally defensible.

Briefly, the grounds for that conclusion are two: First, what we have called the "conflicts of law" ground, and second, what we call the "waiver" ground.

Under the first, we start from the premise that the prisoner's trial was conducted in a foreign country that lawfully had jurisdiction over the offender and the offense. The courts have repeatedly said that the U.S. Constitution has no applicability to the conduct of a foreign trial for a foreign offense.

The U.S. action, under this treaty—and I think it is important to understand that this is a limited action—is the acceptance of custody over the offender. That action is really only ancillary to the action of the Mexican court. The legal history of the United States is that U.S. authorities have consistently been upheld in turning over persons to foreign courts for trials not consistent with our Constitution. In our judgment, the type of procedure that is contemplated by this treaty in receiving foreign prisoners does not deprive them of rights they have previously had. Indeed, we confer on them the protection of the constitutional provision against cruel and unusual punishment.

Many prisoners in the United States are transferred from one State to another, or from State to Federal institutions without it being thought that the receiving State adopted the sentence or made it its own.

The waiver argument, as has already been suggested by the attorney general of Texas, proceeds on the basis that nobody will be transferred against his or her will. Extensive precautions have been written into the implementing legislation to assure that the consent to transfer will be as free and as fully informed as possible. The question of providing counsel will have to be settled in the implementing legislation, and we expect to work with the Department of Justice in resolving that matter.

The decisions of the Supreme Court give wide effect to guilty pleas and other choices by the accused in the criminal process. This particular choice stands on even firmer footing.

TREATIES ARE LIMITED SOLUTION

I think, Mr. Chairman, on the constitutional questions I will limit my comments to those that I have given. I will be glad to answer your questions, of course, but would wish to add one additional comment in respect to the discussion that has occurred thus far.

I think it is important to recognize that these treaties are a limited solution to some of the problems that have been discussed this morning, problems that I think we are all deeply concerned with in the Congress and in the administration.

The treaties do not represent a means of dealing with the full spectrum of concerns that have been discussed this morning, and we do not want to create false hopes among the families of prisoners in Mexico and in Canada that it is a solution to all of those problems.

The treaties will not deal directly with the treatment of prisoners prior to conviction. These are, as has already been indicated, arrangements for service of a sentence after the sentence has been imposed.

The treaties will not, in fact, result in the freeing of most U.S. citizens who have been incarcerated in Mexico and Canada. There may be, in a few instances, the result that a prisoner in a foreign country may gain his or her freedom, but that would be the exception, rather than the rule under these treaties.

We want to be very sure that we are not creating false expectations of raising hopes that will not be realized by these treaties. We think they are an important step forward in our relationships with both Mexico and Canada. We think that they will enable us to deal with some of the concerns that we have about the treatment of our own citizens in foreign courts. But we have a way to go before we would be able to respond to all of the concerns that have been voiced here this morning.

I think, Mr. Chairman, with that I will conclude my affirmative presentation.

[Mr. Hansell's prepared statement follows:]

PREPARED STATEMENT OF HERBERT J. HANSELL, LEGAL ADVISER, DEPARTMENT OF STATE

Mr. Chairman and members of the committee: I am pleased to have this opportunity to be with you today to discuss legal and constitutional aspects of the Mexican and Canadian prisoner transfer treaties. They were negotiated by the State Department's Legal Adviser's office, in cooperation with the Department of Justice and other bureaus of the Department of State. The Legal Adviser's office is primarily responsible for its legal aspects. We have also participated in the drafting of proposed implementing legislation, but the primary responsibility for that work has been undertaken by the Department of Justice.

Miss Watson has given you a general description of how the treaty would operate. I will focus on some special and complex legal issues. My remarks will concentrate on the Mexican version, but in general they apply to the Canadian situation as well.

CONSTITUTIONALITY

A key question is that of Article VI which provides that all challenges to the validity of the underlying sentence shall be addressed to the courts of the country where the sentence was handed down. Let me note that the Canadian treaty uses the words "conviction or sentence" whereas the Mexican treaty uses only the term "sentence." No difference was intended, but we were advised that there are no separate Mexican equivalents for the two terms. This clause was an essential part of the arrangement. Mexico has a long history of sensitivity to foreign interference with its legal system, one it shares with other Latin American countries. It could not accept review of Mexican judgments by an American court. We also concluded that the Senate could not be expected to give its advice and consent to an arrangement under which Mexican courts could sit in judgment on the findings of United States courts. Furthermore, the problems involved in holding hearings to determine precisely what happened in a remote foreign police station would be insurmountable. We know that

the Mexican constitution provides safeguards not very dissimilar from those afforded in the United States and that the Mexican courts afford direct review and collateral review by way of the writ of amparo. Thus, that provision was agreed to.

It is obvious that there will be challenges to the constitutionality of that provision. The treaty is, with respect to the United States, a novel one and the issue is new. We have given careful study to this question, which has also been reviewed by the Department of Justice and by outside scholars. We would not have caused the treaty to be signed if we had not concluded that it was constitutionally defensible. Let me state briefly the grounds for that conclusion. The first ground may be called the "conflicts of law" ground and the second the "waiver" ground. Under the first approach we start from the premise that the prisoner's trial was conducted in a foreign country that lawfully had jurisdiction over the offender and the offense. The courts have repeatedly said that the United States Constitution has no applicability to the conduct of such a trial. The United States action, the acceptance of custody over the offender, is only ancillary to the action of the Mexican court. United States authorities have consistently been upheld in turning over persons to foreign courts for trials not consistent with our Constitution. While extradition typically involves foreign fugitives, surrenders under the Status of Forces Agreements do involve American citizens—service personnel. It seems no greater deference to and no deeper an involvement in a foreign criminal process to receive prisoners when the process is completed.

Indeed, it involves less of an intrusion than extradition, which will subject them to a non-American trial. In receiving foreign prisoners, we do not deprive them of any rights they have previously had; indeed, we confer on them the protection of the constitutional provision against cruel and unusual punishment. Many prisoners are transferred from one state to another or from state to federal institutions without it being thought that the receiving state adopted the sentence or made it its own.

The waiver argument proceeds on the basis of the fact that nobody will be transferred against his or her will. Extensive precautions have been written into the implementing legislation to assure that the consent to transfer will be as free and as fully informed as possible. The question of providing counsel will have to be settled in the implementing legislation, and we will work with the Department of Justice in resolving this matter. The decisions of the Supreme Court give wide effect to guilty pleas and other choices by the accused in the criminal process. This particular choice stands on an even firmer footing. In this case the offender is offered a genuine benefit, one to which he had no prior entitlement. In return he is being asked to give up something to which he was never previously entitled—an American court review of his underlying conviction.

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

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

FEDERALISM ISSUES

In general, the Treaty creates a relationship between the federal authorities of the two countries. However, states may, if they choose, elect to consent to have some of their prisoners transferred. The number of state prisoners in Mexico is not large since most offenses relate to drugs, and drug offenses are federal. However, the states in the United States probably hold substantially more prisoners of Mexican nationality than do our federal prisons, although we do not have much detail on this.

Especially since many of the 1500 U.S. federal prisoners from Mexico are excluded by the exception in Article II for immigration offenses, it might be that the states of the United States will provide the largest contingent of prisoners headed south. Upon arrival in their home country, prisoners will be the responsibility of the federal authorities. However, in the U.S., the state authorities may be asked to receive some of the prisoners if no suitable federal prison space is available. Contract arrangements will be worked out for those cases—similar to those arrangements used for domestic federal prisoners. We

have consulted extensively with the Attorneys General of the border states, and they inform us that they regard their interests as fully protected by the treaty and the implementing legislation.

COLLATERAL EFFECTS OF CONVICTION

Finally, I should say a few words about a provision—Article V(6)—that readers have found confusing. The problem involved is the fact that Americans in Mexican jails are concerned about having "a record" if they are returned under the Treaty. It turns out that the question of having "a record" is a complex one. There are many rules which penalize persons convicted of crime. For example, there are statutes that increase penalties for those who have previously been convicted of crimes. There are rules which bar certain types of employment to convicts or prevent them from having licenses to own firearms, or from serving on juries.

Some are state and some are federal. These statutes vary in their treatment of foreign convictions; some explicitly include only convictions in the United States. Others clearly cover convictions anywhere. Yet, others are ambiguous. All that the treaty tries to do is to insure that nobody will be worse off in these collateral respects if he elects to return to the United States than if he elects to stay in Mexico. He is still to be regarded as having only a foreign conviction.

Mr. Chairman, this concludes my formal presentation. I will be pleased to try to answer any questions the Committee may have.

The CHAIRMAN. Thank you, Mr. Hansell.

Our next witness is Mr. Peter Flaherty, Deputy Attorney General, Department of Justice.

STATEMENT OF PETER FLAHERTY, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. FLAHERTY. Thank you, Mr. Chairman. I am appearing before the committee today on behalf of the Department of Justice to join with the Department of State in recommending that the Senate give its advice and consent to the two treaties between the United States and Mexico and the United States and Canada.

The Department of Justice is of the opinion that these treaties are within the scope of the treatymaking power, and are constitutional, and can be implemented constitutionally.

The CHAIRMAN. May I ask a question at this point which would apply to all the witnesses? When you say that you are in favor of the ratification of the treaty, do you mean without reservation? I would like to clear that up.

Mr. FLAHERTY. Yes, sir.

Mr. HANSELL. [Nods affirmatively.]

REQUISITE IMPLEMENTING LEGISLATION

Mr. FLAHERTY. The two treaties before this committee are not self-executing. Before any action can be taken to implement them, the requisite implementing legislation must be enacted. Proposed legislation for this purpose has been prepared and has been introduced in the Senate by Senators Biden and Bentsen, and in the House by Judiciary Committee Chairman Peter Rodino.

NOVELTY OF TREATIES

The principle that it is desirable to permit a penal sentence imposed by the courts of one country upon a citizen of another country to be executed in the country of which the offender is a citizen is not new. However, the present treaties represent the first endeavor by the United States to realize that objective.

The treaty with the United Mexican States is novel in that it represents the first known proposed prisoner transfer treaty between a nation with a civil law system and a nation with a common law system. Despite the differences resulting from the historical development of these two systems, we believe there is a sufficient commonality of observance of constitutional principles between the two systems to warrant ratification of the treaty with Mexico.

The Canadian legal system also differs in many respects from ours, but there is a greater similarity between these two systems than there is between the Mexican and the U.S. system. There is, therefore, sufficient concordance of our respective criminal justice systems to recommend the ratification of the Canadian treaty also.

NO IMPINGEMENT ON SOVEREIGNTY

The treaties do not impinge on the sovereignty of any of the contracting parties. The transfer of an offender may occur only with the consent of both the transferring and the receiving countries. The organic structure of the government of each party is respected. The States and Provinces of the parties may consent to offenders against their laws being transferred, but they are not obligated to do so.

The sentence imposed remains in effect in the sentencing jurisdiction. It is not converted into a sentence in the receiving State. The right to a pardon, to grant amnesty, or to ameliorate the sentence is reserved to the country which issued the sentence.

The courts of the receiving State are not given any authority to pass on the validity of the sentence. This function is reserved exclusively to the country in which the sentence was issued.

BENEFITS OF TREATIES AND IMPLEMENTING LEGISLATION

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 of an offender may be accomplished only if he or she consents with full knowledge of the consequences of the transfer. Recognizing the potentially coercive situation in which offenders find themselves, every effort has been made in the proposed implementing legislation to guarantee that the consent required by the treaties will, in fact, be voluntarily and understandingly given.

Therefore, it can be truly said that the treaties and legislation will provide a positive benefit to the offender; namely, the voluntary serving in the country of which he is a citizen, and to which he has closer ties, of a sentence imposed by a foreign country.

Other benefits also accrue to the offender who is transferred. First, the treaties and the proposed legislation provide that the sentence, for the execution of which the offender is transferred, shall operate as a bar to further prosecutions in the receiving State to the same extent as if the sentence had been issued by a court of the particular jurisdic-

tion seeking to prosecute. This provision, in effect, is the extension of the policy behind the double jeopardy clause of the Bill of Rights to a situation to which that clause otherwise would not be applicable.

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

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

IMPLEMENTATION OF TREATY WITH MEXICO

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

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

First, the requisite implementing legislation must be enacted.

Second, in order to assure the voluntariness of the decisions by the Americans convicted by Mexican courts to serve their sentences in Federal prisons and be subject to the Federal parole system, it is essential that the U.S. Government representatives meet with each prisoner who is presently eligible for transfer, or who will be eligible for transfer upon termination of any pending appeal of his Mexican conviction.

At these meetings the prisoners will be advised of the ramifications of their consent including, among other things: The criteria for the selection of the Federal institutions at which they will serve their sentences; their parole eligibility; the earliest dates at which they can hope for favorable parole consideration; to the extent permitted by the positiveness of their identification, the pendency of warrants for their arrest in the United States; their right to consult counsel prior to the transfer verification proceedings; and, the effect of their consent to transfer on their ability to attack their Mexican convictions.

It would appear that such meetings will have to take place at each of the Mexican jails or correctional institutions in which these American prisoners are held. As is readily apparent from the fact that there are presently over 500 Americans in Mexican prisons throughout all of Mexico who will be eligible, or who will become eligible upon the conclusion of their appeals, conducting these briefings is going to be a major, time-consuming task. While we may make every effort to allocate sufficient manpower to conduct these briefings as expeditiously as possible, we are not now in a position to determine the time lag between the effective date of the Mexican treaty and the initial transfers of prisoners under it.

CONCLUSION

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

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

[Mr. Flaherty's prepared statement follows:]

PREPARED STATEMENT OF PETER F. FLAHERTY, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the committee. I appear before this committee today on behalf of the Department of Justice to join the Department of State in recommending that the Senate give its advice and consent to and pass a Resolution of Ratification of two treaties concerning the Execution of Penal Sentences, one the Treaty between the United States of America and the United Mexican States, the other the Treaty between the United States of America and Canada.

The Department of Justice is of the opinion that these treaties are within the scope of the treaty making power, are constitutional, and can be implemented constitutionally.

The two treaties before this committee are not self-executing. Before any action can be taken to implement them, the requisite implementing legislation must be enacted. Proposed legislation for this purpose has been prepared, and has been introduced in the Senate by Senators Biden and Bentsen (S. 1682) and in the House by Judiciary Committee Chairman Peter Rodino (H.R. 7148).

The principle that it is desirable to permit a penal sentence imposed by the courts of one country upon a citizen of another country to be executed in the country of which the offender is a citizen is not new. However, the present treaties represent the first endeavor by the United States to realize that objective.

The treaty with the United Mexican States is novel in that it represents the first known proposed prisoner transfer treaty between a nation with a civil law system and a nation with a common law system. Despite the differences resulting from the historical development of these two systems, we believe there is a sufficient commonality of observance of constitutional principles between the two systems to warrent ratification of the treaty with Mexico.

The Canadian legal system also differs in many respects from ours, but there is a greater similarity between these two systems than between the Mexican and United States systems, and there is, therefore, sufficient concordance of our respective criminal justice systems to recommend the ratification of the Canadian Treaty also.

The treaties do not impinge on the sovereignty of any of the contracting parties. The transfer of an offender may occur only with the consent of both the transferring and the receiving countries. The organic structure of the government of each party is respected. The states and provinces of the parties may consent to offenders against their laws being transferred, but they are not obligated to do so. The sentence imposed remains in effect in the sentencing jurisdiction. It is not converted into a sentence of the Receiving State. The right to pardon, grant amnesty or ameliorate the sentence is reserved to the country which issued the sentence. The courts of the Receiving State are not given any authority to pass on the validity of the sentence. This function is reserved exclusively to the country in which the sentence was issued.

We believe the treaties and the proposed implementing legislation will im-

prove the administration of criminal justice, while safeguarding and insuring that the humanitarian purpose of these treaties will not be subverted. A transfer of an offender may be accomplished only if he consents with full knowledge of the consequences of the transfer. Recognizing the potentially coercive situation in which offenders find themselves, every effort has been made in the proposed implementing legislation to guarantee that the consent required by the treaties will in fact be voluntarily and understandingly given. Therefore, it can truly be said that the treaties and legislation will provide a positive benefit to the offender—namely, the voluntarily serving in the country of which he is a citizen and to which he has closer ties of a sentence imposed by a foreign country.

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

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

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

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

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

First, the requisite implementing legislation must be enacted.

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

It would appear that such meetings will have to take place at each of the Mexican correctional institutions at which there are American prisoners. As is readily apparent from the fact that there are presently roughly 500 Americans in Mexican prisons throughout all of Mexico who will be eligible, or who will become eligible upon the conclusion of their appeals, conducting such briefings will be a major, time-consuming task. While we will make every effort to allocate sufficient manpower to conduct such briefings as expeditiously as possible, we are not now in a position to determine the time lag between the effective date of the Mexican treaty and the initial transfers of prisoners under it.

In closing, let me again stress that the Department of Justice believes that these treaties represent an extremely worthwhile opportunity to ameliorate the hardships of imprisonment far from one's family and friends, which presently result from conviction in a foreign country of violations of its criminal laws, and to enhance the rehabilitative potential of our respective criminal justice systems. Therefore, the Department of Justice strongly urges that the Senate give its advice and consent to these treaties, and expedite their ratification at the earliest possible date.

The CHAIRMAN. Next we will hear from Mr. Peter B. Bensinger, Administrator, Drug Enforcement Administration, Department of Justice.

STATEMENT OF HON. PETER B. BENSINGER, ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION, DEPARTMENT OF JUSTICE

Mr. BENSINGER. Thank you very much, Mr. Chairman.

I support this treaty without reservation. I do so, Mr. Chairman, having been the head of a large State prison system for the State of Illinois and recognizing that in our own country we have, to my knowledge, at least three dozen interstate compacts which address the problem of the gradual reentry into society of an individual who may be arrested and incarcerated in one jurisdiction, but who is eventually going to lead his or her life in another jurisdiction and geographic territory. I think there will be salutary implications of such a treaty and I support it.

DEA EFFORTS TO REDUCE DRUG SUPPLY

The Drug Enforcement Administration is the principal Federal agency which enforces the Controlled Substances Acts in the United States. We work with foreign governments and police agencies to limit the supply of narcotics and dangerous drugs into the United States.

In foreign countries we work in each and every case under the direction of the U.S. Ambassador, and we work to provide training and exchange of intelligence, and to provide a reduction in the total overall supply of drugs either grown in that country or transited through that country.

DIFFERENCE BETWEEN CANADA AND MEXICO AS DRUG LOCATION

Mr. Chairman, the comments earlier that were directed to Congressman Gilman raised a question that perhaps I could address as to the differences between Canada, as a drug location, and Mexico.

I would ask that my statement, if it can, be inserted in the record in its entirety, and would address myself just to that issue. Then I would be happy to answer any questions.

The CHAIRMAN. Without objection, it will be incorporated in its entirety in the record.

Mr. BENSINGER. Thank you, Mr. Chairman.

Mexico represents a major source country for our country's number one drug priority, heroin. It is also a source country for marijuana and a transiting country for cocaine and some dangerous drugs.

Canada, on the other hand, represents a transit country and, to a certain extent, a user country. The narcotics, the heroin that principally goes through Canada into the United States does come through

the Northwest part of our country, that is, the greater Seattle area. Vancouver is a major city in Canada, and that is generally supplied from Southeast Asia, as opposed to Mexico. So, the heroin description would be different.

The Royal Canadian Mounted Police and the Department of Justice's Drug Enforcement Administration have worked closely, as have the Mexican Federal Judicial Police in the exchange of information and targetting of major organizations which deal in the principal drugs.

CLASSIFICATION OF PREPONDERANCE OF U.S. PRISONERS IN MEXICO

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

Mr. Chairman, I would be happy to respond, as I know my colleagues would, to any further comments or questions which you might have.

Thank you, Mr. Chairman.

[Mr. Bensinger's prepared statement follows:]

PREPARED STATEMENT OF PETER B. BENSINGER, ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE

It is a pleasure to appear before this Committee to discess DEAs activities in Mexico and Canada and our view of the respective prisoner exchange Treaties.

In Canada, which is not a source country for opiates, there is a long tradition of drug enforcement cooperation with the U.S. drug enforcement agencies. DEA's activities there relate only to liaison, intelligence exchange and the development of conspiracy investigations.

In Mexico, where there is also very close cooperation, all of our activities are bilateral and conducted in concert with Mexican authorities under the overall direction of the U.S. Embassy. DEA is involved in four aspects of the Mexican drug control effort: investigations, training, intelligence development and opium eradication.

In the investigative area, we conduct inquiries with the Mexican Federal Judicial Police (MFJP) and provide information and expertise that frequently result in drug arrests and seizures.

The data that DEA provides the MFJP relate to how, when, where and whom to target: for instance, the techniques of undercover negotiations, the location of violators and drug caches and the location of fugitives.

On the sixth of this month, for instance, in a cooperative Mexican/DEA investigation in Calexico, Mexican authorities, acting on information provided by DEA, arrested three individuals. Seized were 15 kilograms of cocaine and 28 kilograms of heroin—one of the largest heroin seizures ever made in Mexico. On June 9, as part of the same investigation, another 27 kilograms of heroin were seized at San Luis. The investigation started when three subjects negotiated for a three-ounce sale to a DEA undercover agent on this side of the border.

In formal training programs from fiscal year 1969 through 1976, DEA has trained 480 Mexican police officers: 18 in the United States and 462 in Mexico. Represented in this group are all levels of rank and expertise of Mexican officials involved in drug law enforcement.

In the area of intelligence, we provided drug-related strategic and operational intelligence to the Mexican authorities and assist them in drug data collection, collation and dissemination. We also cooperate with the MFJP in the development of official sources of drug information, such as airport managers and port captains. Through our investigative/intelligence programs, we have referred to the MFJP information concerning major networks currently distributing drugs of Mexican origin.

DEA participation in the Mexican opium eradication program has been given the code name, "Operation TRIZO." In this effort we have provided pilots, observers, aircraft and intelligence on a seasonal basis to enable our Mexican counterparts to locate, monitor and verify the destruction of the illicit poppy fields. To destroy these opium fields, since December 1975 (when the TRIZO program commenced), the Mexican government has been using an ecologically-safe herbicide.

For Phase I of TRIZO 1977—which began in January 1977 and concluded last April—DEA provided a total of six fixed-wing aircraft, a limited communication system and a personnel force of 28 on temporary duty in Mexico. Phase II is scheduled to commence on August 15 and run through November 1977, the second of the year's growing season.

We also assist the Mexican effort in the areas of management assessment and technological and legal support. Let me reemphasize that the eradication program is a Mexican Government program run by the Mexican Attorney General's Office and the MFJP. The helicopters that do the spraying are flown by Mexican pilots. We have helped to train the Mexican personnel involved and to locate the fields.

During the year-round 1976 campaign, 28,230 poppy fields (covering approximately 6,710 hectares) were destroyed. Had this crop been harvested, it could have produced approximately 78 metric tons of heroin (six per cent pure). During Phase I of the 1977 program (from January 1 through April 10, 1977), 25,479 poppy fields (approximately 6,222 hectares) were destroyed. This crop ultimately could have resulted in the distribution of 73 metric tons of six per cent-pure heroin throughout the United States.

In all countries in which DEA has programs, we have imposed many limitations upon our activities. In Mexico, these limitations encompass three of the aforementioned areas of DEA involvement—investigations, intelligence development and opium eradication. For instance, in the area of investigations, we do not:

Conduct unilateral investigations;
Engage or participate in arrests;
Target individuals by nationality, including U.S. citizens;
Pay bounties for the work done by the MFJP;
Have any police powers;
Undertake any unusual activity which has not been approved by DEA Headquarters, the U.S. Mission and the host government; or
Take any action that is contrary to Mexican and/or U.S. laws.

In the area of intelligence, we do not:

Install telephone intercepts;
Seek any intelligence not related to drugs; or
Perform unilateral intelligence probes without the consent and knowledge of the MFJP.

Our activities in support of the Mexican eradication program are likewise limited; that is, we do only what I mentioned previously and we do not:

Spray poppy fields;
Participate in arrests of farmers, make laboratory seizures, etc.;
Purchase or recommend types of herbicides to be used; or
Participate in roadblocks or any direct police arrest action.

In no foreign country do we engage or participate in any direct police arrest action; neither do we involve ourselves in any foreign police actions where any physical use of force can reasonably be anticipated.

Restrictions such as the above, which have been traditional DEA policy, were formalized in the revised version of the DEA Foreign Guidelines which was implemented on July 1, 1976. The Guidelines were promulgated as a result of the enactment of the Mansfield Amenment to the "International Security Assistance and Arms Export Act of 1976," Public Law 74–329.

We have also developed specific guidelines concerning DEA activities in the more than 40 countries where we have personnel assigned, as well as those countries in which we only conduct liaison.

DEA's Foreign Guidelines outline other prohibitions, including one that specifies that DEA personnel will not encourage or participate in cruel or inhuman treatment of any detained or arrested individual. Since 1975, there have been only seven instances where allegations of improper actions by DEA per-

sonnel in Mexico have been made; in all but one case, upon investigation the allegations proved unfounded. In the one founded case, the agents in question received a 3-day suspension for unnecessary use of force.

The foregoing—what we do and what we do not do (in Mexico or any other country)—is an important issue. However, the bottom line of the most impressive-sounding program is, Is it effective? In other words, have our joint investigations, training programs, technical assistance and intelligence activities in Mexico from where most of the heroin on our streets originates been successful?

Success I believe can be at least approximately assessed by an accounting of the availability on our streets of the most serious drug of absue: heroin.

Last year for the first time we established measurable criteria to assess this availability and, therefore indirectly, the success of DEA in curbing drug abuse in this country. The criteria established are: 1) the national average heroin purity at the retail level; and 2) the number of heroin-realted deaths.

National average heroin purity is measured by DEA's laboratory analyses of seizures made by DEA and the domestic police departments that utilize DEA laboratory services.

Heroin fatalities are reported to the Federal Government by medical examiners in the 21 Standard Metropolitan Statistical Areas that account for 80 per cent of the nation's addicts. This reporting network—the Drug Abuse Warning Network (DAWN)—has been in operation since July 1973. DAWN also monitors drug abuse nationally through reports of drug abuse "episodes" received from hospital emergency rooms, inpatient treatment facilities and drug crisis centers.

While the heroin purity and fatality statistics I believe provide a fairly accurate assessment of our progress, what really matters is the heroin supply on the street, in our cities, suburbs and rural area. An article in the Detroit *Sunday News*, June 5, reports that officials in that city have noted a reduced quality and availability of heroin. They report that prices are higher and the purity of the heroin—which is cut with everything from strychnine to lactose—is as low as one per cent.

Supply is affected by many factors—in addition to DEA's efforts—including:

The workings of the criminal justice system; that is, will the violator be immobilized and go to jail?

Prosecutional resources;

Bail;

The priority the U.S. Government affords to international drug control;

The attitudes, resolve and capabilities of foreign governments;

The penetrability of U.S. borders;

The appropriateness of U.S. drug control policy and strategy concerning assessment of responsibility, the allocation of resources and the coordination of effort; and

State and local law enforcement efforts.

For the first three months of 1976, heroin availability, as indicated by the average purity of retail heroin nationwide, was at the highest level since 1971. During this period, retail heroin purity averaged 6.6 per cent (it averaged 9.6 per cent in 1970 and 7.5 per cent in 1971).

In the course of a year, heroin purity dropped from 6.6 per cent to 5.8 per cent—only .6 per cent away from the recent record low of 5.2 per cent during the 1973 heroin shortage following the Turkish poppy ban. Preliminary indications are that this trend has continued in the last two months.

Heroin fatalities nationally decreased 21 per cent from the first to the second half of 1976. This represented the first such decline since 1973.

A similar, and even more dramatic, decline occurred in heroin-related injuries. During the first quarter of last year, 4,336 heroin-related injuries were reported; the figure for the first quarter of this year was 3,021—a 30 per cent drop.

Naturally, we are concerned that these trends be maintained, and our concern must be reflected in our position on the issue being discussed today: the prisoner exchange treaties with Mexico and Canada and the proposed legislation.

Maintaining this level of effectiveness requires that we continue to concentrate our efforts on major traffickers, a practice which we urge other governments to continue as well. According to our recent reports, many of the Americans imprisoned in Mexico on drug charges are charged for minor offenses of drug possession.

From our point of view, an exchange of prisoners would not limit DEA's ability to cooperate in any of the programs I have described. Moreover, as a former

correctional director familiar with the workings of interstate and intercountry compacts, I believe that the provisions of the Treaty will work. The Attorney General of Mexico has assured me that the Treaty with Mexico will receive the full support of the Mexican Government.

The CHAIRMAN. Thank you very much.

I have a few questions to pose to you. It may very well be that they have been generally covered, but in order that we may boil down the testimony, I would like to present the questions to you. If you are not ready to answer them at this time, perhaps you could give us a written answer which we would place in the record.

INFLUENCING MEXICAN REWRITE OF DRUG LAWS AND PAROLE TERMS

Was the Drug Enforcement Administration or any other agency involved to any extent in influencing the Mexican Government to rewrite its drug laws and parole terms?

[Scattered audience applause.]

The CHAIRMAN. We will get along much better if the audience will refrain from any demonstrations.

Please go ahead, sir.

Mr. BENSINGER. Mr. Chairman, I have been Administrator of the Drug Enforcement Administration since January 23, 1976. At no time since I have been Administrator have we, I personally, or our agency in Mexico made representation to the Mexican Government for a change or revisions in its laws.

It is my information that its predecessors, neither formally nor informally sought revisions to parole provisions regarding drug offenses.

CHARACTER OF U.S. DRUG PRISONERS

The CHAIRMAN. Of the U.S. citizens currently held in Mexican prisons, how many were what you might call big time traffickers, and how many were convicted for small amounts of drugs or for acting as one-time couriers?

Mr. BENSINGER. I would characterize the vast percentage of the U.S. drug prisoners, the overwhelming majority, as couriers or users as compared to major traffickers. There are exceptions and there are several major violators, but they are in the vast minority.

In addition, Mr. Chairman, I would like to point out that the Drug Enforcement Administration is not responsible for the arrest of U.S. citizens. The Mexican Government enforces its own laws. We do not dictate to it the provisions of those laws nor alert them in each and every case as to who may be bringing in contraband into their country or in fact into the United States. There are instances, particularly involving heroin, and to some extent cocaine, where we will have information, from Colombia, for example, that a courier is passing through Mexico, and that information will be passed on to the Mexican Federal Judicial Police.

The CHAIRMAN. If any other member of the panel has something to say about these questions, please feel free to do so. Let us know your interest in them.

Ms. WATSON. Mr. Chairman, I agree with Mr. Bensinger, that the great majority of the American prisoners in Mexican jails are those

who are less sophisticated. They are users, and perhaps one-time mules. But the majority of the prisoners are not the "big time" traffickers. The traffickers seem to be a little bit more clever.

U.S. CITIZENS INVOLVED IN DRUG TRADE IN MEXICO

The CHAIRMAN. How many Americans are currently involved in the drug trade in Mexico? Will the onset of Americans and their imprisonment continue to be as large a problem as it is at the present time? Will ratification of the treaty seriously damage DEA's efforts to curb the drug traffic?

Mr. BENSINGER. Mr. Chairman, it would be difficult to speculate as to how many Americans are involved in the drug traffic in Mexico. There is considerable involvement of American citizens, for example, in the marihuana traffic, as users and couriers, rather than in heroin. There are a good number of Hispanic-American organizations dealing on an international basis from Mexico and other points into the United States. I would not characterize the individuals in Mexican prisons, or U.S citizens, to represent that jurisdiction, although there are a certain number. There are also certain other foreign nationals in Mexican prisons. I can think of Alberto Cecelia Falcone, whose organization was responsible for bringing in on a regular basis kilo quantities of cocaine and over 150 tons of marihuana. His organization now has in Swiss bank accounts, which have been frozen, over $25 million, and his resources are incredible and awesome. That organization has not utilized, though, the Americans and the prisoners who are incarcerated in the Mexican jails in any large fashion whatsoever.

EFFECT OF TREATY ON DEA EFFECTIVENESS

With respect to the treaty, I don't believe, Chairman Sparkman, that this will impede DEA and the Mexican Federal Judicial Police in being able to reduce the effectiveness of curbing the narcotic traffic, and in particular the heroin traffic.

I have met several times with Oscard Flores Sanchez, the Mexican attorney general. He is committed to have a serious effort against drug traffickers. They are not selecting or preselecting Americans, believe me. Many of the people who are incarcerated in Mexico and in the United States have Hispanic-American backgrounds. But there are 5,000 witnesses, Mr. Chairman, that are not represented at this hearing. They are the Americans who died last year from overdose drug deaths. The efforts of the Mexican Government to spray poppy fields that are cultivated by their own citizens has, in fact, had a considerable impact on reducing the heroin overdose deaths in the United States, and that reduction was 21 percent in the last 6 months, as compared to the first 6 months, and we have seen a reduction in the purity level as well.

Those activities are the principal activities of this Mexican Government and the assistance and interest which we have is directed toward heroin.

I have talked with Oscar Flores Sanchez, and he does not believe this treaty would impede his effectiveness nor our effectiveness, and in fact he has urged me to urge you to ratify it.

EFFECT OF PUBLICITY ABOUT MEXICAN TREATMENT OF U.S. PRISONERS

The CHAIRMAN. Has the pubicity about Mexican treatment of U.S. prisoners decreased the number of Americans dealing in drugs in Mexico?

Mr. BENSINGER. I am not sure that I could say that it has.

The major criminal organizations will recruit couriers and sacrifice individuals who are recruited, and sacrifice large quantities of drugs—heroin and cocaine—to protect themselves. Many of the criminal organizations and their leadership can best be reached through conspiracy cases built on the testimony of others at a lower level, who are at the distributorship or dealership level. Some of those individuals will not be reluctant to continue to try to get heroin and other drugs from Mexico because of the conditions of prisoners in that country. I think it will have an effect and has had an effect on users, both in Mexico and in Colombia. In fact, the Colombian Government put out a film which gives advance notice warning to tourists coming into that country that their drug laws and their prison programs are vastly different than those of the United States. They are trying, in a sense, to forewarn tourists and traffickers.

I think the criminal organizations are interested in making profits and will do so in any jurisdiction in which they can obtain drugs illegally and bring them into the United States.

DEA INVOLVEMENT IN MEXICAN ARRESTS OF U.S. CITIZENS

The CHAIRMAN. To what extent do agents of the DEA become involved in the arrest of U.S. citizens in Mexico? Specifically, have DEA agents ever been present at the arrest, interrogation, or confession of any American citizen?

Mr. BENSINGER. Chairman Sparkman, DEA agents are prohibited from participation in arrest action in foreign countries. Our own foreign guidelines issued last year, following the Senate's enactment of the Mansfield amendment, were distributed in July of 1976. The U.S. Embassy in Mexico and the Deputy Chief of Mission, Herbert Thompson, has informed me personally, as well as our Domestic Regional Director, that there has not been a complaint since July of 1975 of a direct arrest action by a DEA agent.

I can tell you, sir, that since I have been Administrator, there has not been a DEA agent that has been accused of wrongdoing at the time of an arrest in Mexico. There have been guidelines issued; there have been investigations of allegations.

I would be happy to return to this committee to respond to any other comments or questions which it may have on this matter.

The guidelines with respect to interrogation are clear, and I would like to make them a matter of record for this committee, if I might do that, sir.

The CHAIRMAN. Is that the complete list of guidelines that you referred to [indicating]?

Mr. BENSINGER. Yes, sir.

The CHAIRMAN. Very well. We would be very glad to have those. They will be printed in the record of this hearing.

92-305 O - 77 - 5

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Deputy Administrator, Assistant Administrators, Directors, Office Heads, Division Chiefs, Regional Directors, Criminal Investigators, Narcotics Intelligence Officers, and Pilots

DATE: July 30, 1976

FROM : Peter B. Bensinger, Administrator

SUBJECT: DEA Functions and Guidelines Relating to Operation in Foreign Countries

On June 4, 1976, the first publication of DEA Functions and Guidelines Relating to Operation in Foreign Countries was distributed to all DEA employees in foreign countries and to those employees in the United States who are reasonably expected to perform a function in a foreign country.

On June 30, 1976, the Internal Security Assistance and Arms Export Control Act of 1976 was signed into law (Pub.L. 94-329). This Act specifies that:

> "Notwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts."

Consequently, it has been necessary to modify the guidelines issued June 4, 1976.

Attached is a copy of the revised guidelines dated July 30, 1976. Inasmuch as most DEA special agents and narcotics intelligence officers may be assigned to perform a function in a foreign country, we have made wide distribution of the revised guidelines.

All headquarters and field personnel in series 1811 and 132 are required to acknowledge receipt of these guidelines to their regional directors and division chiefs on the attached form.

Attachments

TO: Regional Director, Region No. _____

This is to acknowledge receipt of copy of DEA Functions and Guidelines Relating to Operation in Foreign Countries, dated July 30, 1976.

Date _____ _____
(Employee's Signature)

_____
(Name Printed)

DRUG ENFORCEMENT ADMINISTRATION

U.S. DEPARTMENT OF JUSTICE

FUNCTIONS AND GUIDELINES RELATING TO OPERATION IN FOREIGN COUNTRIES

JULY 30, 1976

(REVISED)

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DRUG ENFORCEMENT ADMINISTRATION FUNCTIONS AND GUIDELINES RELATING TO OPERATIONS IN FOREIGN COUNTRIES

INTRODUCTION

Since many of the serious drugs of abuse in the United States originate in foreign countries, DEA places a high priority on encouraging the greatest commitment from other governments to concentrate on all aspects of illicit production and distribution of drugs. The primary mission of the Drug Enforcement Administration in foreign countries is to assist host government officials in preventing supplies of illicit drugs from entering the illicit traffic affecting the United States.

To accomplish this mission, with the permission of the respective host governments, DEA representatives are assigned to many countries. The purpose of this paper is to present guidelines and functions for DEA representatives stationed abroad.

I. GUIDELINES FOR DEA FOREIGN ACTIVITIES

A. Directions from United States Ambassadors.

1. General direction. DEA representatives,* like all other official U.S. personnel abroad (excepting certain military commands), are under the full authority of the Ambassador.* The Ambassador is expected to assist and give policy guidance to DEA activities in such a way as to assure that the DEA mission is realized to the maximum extent possible. He may also seek to minimize publicity involving the presence of DEA representatives in the host country. The Narcotics Control Program is a high priority issue, and the U.S. Government supports as vigorous an approach as possible. However, each country presents its own unique situation in this respect.

2. Daily operations controlled by DEA. Day-by-day DEA operations in foreign countries are under the chain of command of DEA. Regional Directors and Country Attaches will operate within the policies established by the Ambassador in that country. Whenever a planned DEA activity could jeopardize host country relations with the United States, the decision of the Ambassador shall be determinative; however, any major difference with the Ambassador will be referred to DEA headquarters.

B. Agreements with Host Governments.

1. Historical perspective. The vast majority of host countries and their police agencies have set forth informal guidelines and parameters for the activities of DEA. Other host countries have formal agreements with DEA. Ambassadors at posts where DEA representatives serve have been requested to establish guidelines for DEA personnel under their authority. DEA representatives are required to inform themselves of all these guidelines.

2. No unilateral enforcement operations. DEA representatives will not engage or participate in unilateral enforcement operations or activities outside the scope

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* See definitions, pages 10 and 11

of the agreement developed between the United States and the host government without the approval of a responsible host government official.

3. Determination of authority of host country officials.* On or before September 1, 1976, all DEA Regional Directors in foreign countries shall establish and maintain on a continuous basis a list of the officials in host countries who are empowered by their governments to permit DEA representatives to function in the host countries under these guidelines.

C. DEA Personnel Assignments in Foreign Countries.* DEA foreign activities differ from and are more sensitive than those normally carried out in the United States. Consequently, DEA will select and assign personnel who have demonstrated the ability, particular skills, and adaptability necessary for such assignments. Since Regional Directors and country attaches are members of the Mission staff, and must work closely with the Ambassador, DEA will provide biographical data for those persons in a timely manner to the State Department, prior to the assignment of SAICs and above. These assignments will be made following advice and the concurrence of the Ambassador.

D. DEA Conduct in Foreign Countries.

1. Low profile. DEA involvement in foreign countries will be limited to a low profile role consistent with maximum effectiveness. This role encompasses matters ranging from assuring minimum adequate investigational staffing to the exercise of great care should the occasion arise to release to the news media information relating to DEA activities and conditions relating to drugs in the country. On the latter point, any dealings by DEA personnel with news media representatives should be with the guidance of the Ambassador and the advice of the Mission's Public Affairs Officer.

2. No violations of U.S. or foreign laws. No DEA representative shall carry out any activity prohibited by United States laws, regulations or executive orders. Additionally, no DEA representative shall engage in any activities prohibited by the host government.

3. DEA exclusive employer. DEA representatives shall not be employed by any other agency, organization or service, and shall not be directed by any other agency, organization or service to undertake any action which would be in conflict with the orders, instructions and policies of DEA.

* See definitions, page 10

E. Focus on Major Trafficking. To achieve maximum impact, DEA representatives will focus their enforcement and intelligence efforts on those high-level traffickers believed to be involved in the international narcotic traffic affecting the United States. DEA personnel should avoid becoming involved in investigations strictly of a local nature, except in response to special requests from host country officials for on-the-job training or other investigative expertise warranting an exception to the rule.

F. DEA Representatives Precluded from Engaging in Direct Police Arrest Actions. On June 30, 1976, Public Law 92-329 was enacted. The bill "International Security Assistance and Arms Export Act of 1976", provides in section 504 as follows:

> (c)(1) Notwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotics* control efforts.

1. Application in strict sense. The Congress intends that this provision be applied in its strict sense and that DEA representatives shall not accompany host country police officials in any situation where the DEA representative will be present and directly involved in any foreign police arrest action.

2. No presence if violence* is foreseen. Further the Congress intends to preclude DEA representatives from intentionally becoming involved in any activity in a foreign country in which violence is reasonably foreseeable, irrespective of whether an arrest is to be made.

3. No incidental involvement, except when life is in jeopardy. Additionally, when a DEA representative is accompanying a host country official in a situation that is planned in such a way as to avoid any involvement of DEA representatives in a direct police arrest action, e.g., under the provisions of paragraph 6 of this section, and unexpected violent action is directed against the host country official, DEA representatives shall avoid becoming involved in any direct police arrest action unless the life of a DEA representative or a cooperating host country official may be in jeopardy.

* See definitions, page 11

4. General rule when in doubt. The general rule established by DEA in complying with P.L. 92-329 is that if a DEA representative should have any doubt as to the meaning of the law or the guidance in this section, the doubt will be resolved in favor of his not being present at the site of host country police arrest actions.

5. Examples of prohibited involvement. Examples of instances in which DEA representatives are prohibited from engaging or participating in host country arrest actions are as follows:

(a) DEA representatives will not accompany host country police officers to an arrest site for the purpose of actually assisting host country police officers in making an arrest, i.e., to exert physical force or contact against a person to be arrested.

(b) DEA representatives will not accompany host country police officers to act as an auxillary force.*

(c) DEA representatives will not accompany host country police officers under any circumstances where it is reasonable to foresee that violence will ensue, or where it can be anticipated that the host country police officer might reasonably expect to request assistance from the accompanying DEA representative in order to effect the arrest.

6. Permissible passive presence.* Consistent with the provisions of P.L. 92-329 and the above guidance, DEA representatives may be passively present in the vicinity* of an arrest by foreign officers under the circumstances listed below. Thus, where host country police operations which are likely to result in arrests are planned in such a manner as to avoid any involvement of DEA representatives in a direct police arrest action, a DEA representative may be passively present in the vicinity of the arrest action under these following special circumstances:

(a) When it is necessary for a DEA representative to be in the vicinity solely to identify the person to be arrested, and where other means of identification are not practical;

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* See definitions, page 11

(b) When host country officials authorize the presence of a DEA representative to be in the vicinity to operate technical or scientific equipment;

(c) When host country officials authorize the presence of a DEA representative to be in the vicinity to assist in training local officers in investigative techniques;

(d) When a DEA representative is authorized by host country police officers to operate in an undercover capacity to acquire intelligence or evidence regarding the international traffic in illicit drugs affecting the United States;

(e) When DEA agents are working with host country officials in connection with illicit crop destruction and the host country officials receive a request for assistance from other host country authorities, DEA representatives may transport them to the vicinity of illicit crop eradication and/or arrest site;

(f) When host country officials authorize the presence of DEA representatives in the vicinity strictly for post-arrest activities such as interviewing persons under section I, G of these guidelines; to collect intelligence under section II, E of these guidelines; and to provide technical knowledge peculiar to the illicit drug operation, which knowledge is not possessed by the host country officials.

G. Presence of DEA Representatives During Interview of Prisoner Following Arrest. When information important to U.S. illicit drug control efforts may be obtained, a DEA representative may seek to interview a prisoner following an arrest by host country officials. For the same reason, it may be beneficial for a DEA representative simply to be present during questioning of the prisoner by host country officials. If so, DEA representatives will be guided by the following conditions:

1. Under no circumstances will any DEA representative tolerate cruel or inhuman treatment* of any arrested person. If such action should occur, the DEA representatives should protest and withdraw in a definitive fashion and promptly report the incident to the Regional Director and United States Ambassador.

2. Prior to interviewing a prisoner, DEA representatives will in each case obtain permission from host country officials through host country channels and, in the case where a prisoner refuses to be interviewed, the DEA representative will not insist on access to the prisoner.

3. In all cases where a prisoner is an American citizen, DEA representatives will inform the prisoner of their true identify.

4. The DEA representative shall inform the American citizen that he has a right to confer with a U.S. consular officer.

5. If there is a likelihood that a statement made by the American citizen being interviewed will be utilized against the person in a prosecution in the United States, the DEA representative will inform the person of his Constitutional Rights against self-incrimination in accordance with Section 6641.12E of the DEA Agents Manual. Inasmuch as there is no U.S. jurisdiction for appointed counsel or funds available to provide private counsel in a foreign country, the DEA representative will terminate the interview if the person subject to interview does not waive his right to counsel.

6. If a DEA representative learns of the arrest of an American citizen in a foreign country, the matter will be immediately reported to the appropriate consular officer.

H. Carrying of Firearms.

1. General rule. Authority for DEA representatives to possess and carry firearms in a foreign country can be granted only by officials of the host government. Firearms regulations for aliens vary from country to country, and DEA Regional Directors are responsible for determining what is permitted for DEA representatives in the countries within their areas of responsibility. Decisions in this matter shall be within the guidelines approved by the Regional Director and Ambassador.

* See definition, page 11

2. Extra precautions. DEA representatives authorized to carry a firearm in a foreign country must use extra precautions so as not to display or use the firearm except as authorized. As is the rule in the United States, firearms are to be used in foreign countries strictly as defensive weapons.

3. DEA precluded from hazardous activities when unarmed and protection is inadequate. Whenever an operation in a foreign country appears to warrant carrying a firearm for personal safety, even though violence is not immediately forseeable, and authority cannot be obtained to carry a firearm, DEA representatives will assess the security to be provided by the host country officials and, if deemed inadequate, will decline to engage in the activity.

II. DEA'S SPECIFIC FUNCTIONS

A. Role of Relationships with Foreign Enforcement Agencies. The Drug Enforcement Administration was designated by Reorganization Plan No. 2 of 1973 as the Federal agency to deal with foreign drug law enforcement officials under the policy guidance of the Cabinet Committee on International Narcotics Control and the U.S. Ambassador assigned to each country. In carrying out this key role, DEA activities should give priority to producing disruptive effects on the foreign supply of drugs which severely affect the United States.

B. Development of Foreign Control Capability. DEA representatives in foreign countries will give constant attention to encouraging and assisting the host government to establish self-sustaining, highly skilled drug law enforcement units and to influencing it to devote the required human and material resources to drug law enforcement efforts. This institution-building activity is particularly important where the cultivation, production, transitting or trafficking of illicit drugs are destined for the United States.

C. Advisers to United States Ambassadors. DEA Regional Directors and Country Attaches are the principal advisers to the Ambassador and his staff with regard to drug law enforcement and control matters. In such capacity, they work closely with the Embassy's Narcotic Control Coordinating Committee. DEA representatives are responsible for analyzing the drug law enforcement and control capabilities in foreign countries to which they are assigned and assisting the Mission in drawing up the Narcotics Control Action Program (NCAP) for submission to the Regional Interagency Narcotics

Control Committee of CCINC in Washington for consideration of appropriate funding and action. These programs generally include the following types of action:

1. Training Foreign Officials. DEA representatives will help the Embassy Narcotics Coordinating Committee identify training needs for foreign officers, assist in providing on-the-job training or more formalized training programs, either in-country or in the United States under CCINC funding. DEA representatives will help evaluate the host government personnel responsible for drug law enforcement and identify those persons who would benefit from executive briefing programs or training in-country or in the United States. DEA in-country representatives will make special efforts to keep in touch with trainees, to continue their development and attempt to assist them in their continued and increased contribution to the common effort. For long-range effectiveness the provision of proper training to drug control officials is a high priority function. While the immediate goal of training is to transfer certain knowledge and skills, the ultimate goal should be to develop host government institutions for narcotics training. Accordingly, all training decisions should be made with this in mind.

2. Technical Equipment and Assistance. DEA representatives will help the Embassy Narcotics Coordinating Committee to identify needs of foreign drug control agencies for technical equipment and assistance necessary for the development of the needed foreign drug control capability. To the extent requested and permitted by the host government and in conformity with the country action program planning, DEA representatives will assist in training foreign officers in the use of technical equipment.

3. Illicit Crop Eradication. In certain countries, DEA representatives may be asked to help monitor crop eradication and should advise and assist in income replacement programs being carried out. In this regard, DEA representatives will avoid any direct involvement in foreign police actions where violence can be reasonably anticipated. They are responsible to help assess the specific needs of the program and report to the Regional Director and Ambassador on problems, progress and results. They should submit recommendations in the same way for improving the effectiveness of the programs.

D. Cooperative Enforcement Activities. Consistent with section I, F, and where such activities are within local guidelines established by the Regional Director, the Ambassador and host country officials, DEA representatives may assist host country authorities in investigating international trafficking affecting the United States. To that end, DEA representatives should:

1. Develop sources of information. Assist in developing sources of information and the interviewing of witnesses not only among drug traffickers, but among other persons who are knowledgeable about illicit cultivation, production and transportation.

2. Utilize undercover operations. Provide direct assistance by operating in an undercover capacity to acquire intelligence and to further investigations regarding the international traffic in illicit drugs affecting the United States.

3. Conduct surveillance. Assist in conducting surveillance of the activities of drug traffickers to develop evidence against major traffickers of illicit drugs affecting the United States. Basic to this objective is that DEA representatives avoid involvement in relatively minor local cases with which host government law enforcement officials are expected to be concerned. The procedures established by the Attorney General governing the conduct of DEA representatives in foreign countries relating to electronic surveillance will be followed.

4. Provide information to host countries. Provide to the extent possible appropriate information obtained by DEA which will enable host government officials to carry out investigations of or operations against international illicit drug traffickers.

5. Pursue investigative leads. Participate with host country officials in pursuing investigative leads, for example, checking hotel records, public and private organization records, airport and shipping records, and passport records.

6. Obtain drug samples. Receive and transmit to the United States samples of illicit drugs seized by host country officials for use in conducting laboratory studies in regard to the origin of drugs found in the United States traffic.

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7. Coordinate extraditions, expulsions and rogatories. Coordinate as appropriate matters regarding extraditions, expulsions, joint prosecutorial efforts, and requests for judicial assistance.

E. Collection of Intelligence. All DEA representatives in foreign countries are assigned a high priority to collect, report and exchange drug intelligence. Intelligence collection is not only seizure and arrest oriented -- it should include strategic information such as host country capabilities relative to suppression of illicit cultivation and trafficking. Intelligence should also be collected relative to routes and methods of trafficking, the vulnerabilities of traffickers, and any other information that will clarify the overall drug situation and the ability of host government officials to deal with it. DEA representatives will also give a high priority to analyzing drug intelligence as fully as possible in order to integrate it with enforcement activities in foreign countries and the United States.

1. Couriers, routes of traffic and methods. Special emphasis should be placed on identifying couriers who smuggle illicit drugs into the United States, discovering new methods of smuggling, developing profiles of such offenders and furnishing all other information that may be beneficial to the United States Customs Service in its primary interdiction responsibilities.

2. Proper intelligence indoctrination. Regional Directors, Country Attaches and Special Agents-in-Charge are specifically charged with the responsibility for assuring that the narcotic intelligence responsibility is understood by all DEA Special Agents and that their efforts in this connection are properly coordinated.

III. DEFINITIONS

A. As used in these guidelines:

1. The term "Ambassador" means the chief of the U.S. mission in a foreign country having jurisdiction over the activities of DEA representatives.

2. The term "authorized by host country officials" means the officials on the list established and maintained by the DEA Regional Director, who are empowered by their governments to authorize DEA representatives to function within the host country under agreements with DEA and under these guidelines.

3. The term "auxiliary force" means helping or aiding, or giving support or supplementary power in a police arrest action, or on an illicit crop destruction.

4. "Cruel and inhuman treatment" means conduct endangering life, limb, or health or creating reasonable apprehension of such danger.

5. "DEA representatives" means an employee of the Drug Enforcement Administration, who is appointed in the civil service of the executive branch of the United States Government.

6. "Foreign country" means foreign territories, continental or insular, outside the jurisdiction of the United States.

7. "Illicit drugs" means all controlled substances listed in the schedules of the Controlled Substances Act.

8. "Narcotics" means all controlled substances listed in the schedules of the Controlled Substances Act.

9. "Passive presence" means inaction in an observer capacity at a location sufficiently removed from the arrest site so as to avoid direct involvement in the arrest.

10. "Vicinity" means near or close at hand as distinguished from being squarely on the spot where the arrest is being made. It does not depend on distance or topography, but denotes that the DEA representatives must be sufficiently removed from the arrest site so as to not be a part of the arrest activities.

11. "Violence" means the exertion of any physical force against persons who are in defiance of the constituted authorities of the host country, or by drug law violators who oppose the constituted authorities.

ALLEGATIONS CONCERNING RIGHTS ABUSE AND TORTURE

The CHAIRMAN. Serious allegations have been made about the abuse of the rights of Americans, and even the torture of Americans, by Mexican law enforcement officials. Is the DEA aware of these problems and what has been done to prevent such actions?

Mr. BENSINGER. The DEA is not present during the arrest of individuals, U.S. or foreign nations, at the time of an arrest action. If a DEA agent is aware of mistreatment of a U.S. citizen, our guidelines direct that that officer must report that improper treatment to the U.S. Embassy and the U.S. Mission, and further, that the U.S. agent, if he is asked to be briefed by an individual in the custody of Mexican authorities, he is required to identify himself to any U.S. citizen.

I would like to further add, Mr. Chairman, that our office in Mexico has 42 employees, 25 being agents. They are house in the individual consulates and in the Embassy itself in Mexico. Their activity does not involve DEA agents in the spraying of poppy fields nor in the arrest or seizures of laboratories. We do not purchase or recommend the type of herbicide nor participate in roadblocks or police direct arrest action.

We do not target citizens by nationality. We do not have policy powers. We do not take any activity which has not been approved by a U.S. Mission and our host government.

We do not install telephone intercepts nor seek intelligence not related to drugs.

BUDGETARY IMPACT OF ADMINISTERING TRANSFER PROGRAM

The CHAIRMAN. What will be the budgetary impact of administering the transfer program and incarcerating additional inmates in federal prisons?

Mr. FLAHERTY. We don't have that figure for you yet, Mr. Chairman. Probably we will get it in the implementing legislation, and it will depend upon what that implementing legislation involves. Obviously it will have an impact, though, on our budget.

The CHAIRMAN. All right, then. You can get that information to us when you have it.

[As of the date of publication, the information referred to had not been supplied.]

The CHAIRMAN. Let me ask the Department of State this question.

Would the Department have any objection to an understanding preventing the deposit of the instruments of ratification of these treaties until such time as the implementing legislation has been enacted.

Mr. HANSELL. We would not, Mr. Chairman.

The CHAIRMAN. Very well.

Let me return to the Department of Justice with a question.

DEA PRESENCE AT POSTARREST HEARINGS OR PROCEEDINGS

You said that no DEA agents had been present at the time of an arrest. What about postarrest hearings or proceedings?

In other words, after the arrest has been made, have DEA agents been present at such occasions?

Mr. BENSINGER. Guidelines provide if the Mexican Federal Judicial Police has requested that we provide a person to sit in on an interrogation or get a debriefing, that we will attend such a debriefing, and we have.

In the instance where, and the guidelines spell this out, there is treatment of an offender, if it is not in concert with appropriate U.S. law that the DEA agent will withdraw.

There have been to my knowledge seven instances where allegations of improper actions by DEA personnel in Mexico have been made. In all but on case, upon the investigation of these allegations, the allegations were proved to have been unfounded.

We have an internal security branch, Mr. Chairman, that includes 52 criminal investigators. As a matter of fact, I increased the number of criminal investigators from 29 to 52 upon taking office. These individuals make unannounced inspection audits of every district office in the United States and abroad at least twice a year. We have had as Acting Chief Inspector during the time of a number of these allegations, the individual who is presently the Special Watergate Prosecutor, Mr. Charles Ruth. A number of cases which were brought to the attention of DEA occurred prior to my assumption of the role of Administrator. But believe me, each and every case that is brought to our attention is investigated. We do not want to be party to, nor do we want to be connected with, any type of treatment to a prisoner which is improper and which would reflect cruel or inhuman treatment.

IS THERE GOING TO BE A SERIES OF TREATIES?

The CHAIRMAN. At this time we are dealing only with two treaties, one with Mexico and one with Canada. But certainly there must be problems arising with reference to American citizens being arrested in other countries of the world.

Are we going to have a whole series of treaties?

Ms. WATSON. Sir, there are some other countries which have expressed an interest in entering into treaty negotiations with us. However, we are not pursuing this at the moment. We feel that it is more important that we have this treaty and that we be sure all the bugs are out before we approach any other countries to enter into negotiations with us in this regard.

The CHAIRMAN. Senator Pell.

Senator PELL. Thank you, Mr. Chairman.

I have no questions. I came in late and just want to welcome Ms. Barbara Watson up here again in her old role, which she does so well.

Ms. WATSON. Thank you, Senator.

Senator PELL. I will look forward to seeing her in a new role soon, as Assistant Secretary for Consular Affairs.

The CHAIRMAN. I believe that concludes for today what I think has been a very useful discussion on these treaties. Undoubtedly there will be other discussions tomorrow.

Mr. HANSELL. Mr. Chairman, I wonder if I might just make one concluding remark on behalf of the Department of State?

The CHAIRMAN. Of course.

IMPORTANCE OF RATIFICATION TO BILATERAL RELATIONS WITH MEXICO

Mr. HANSELL. For the Department, I think I would want to state for the record that the ratification of this treaty is important to our bilateral relations with Mexico. The Mexican Government proposed this treaty to the United States and has already ratified it. If we are to move forward with creating a stronger and more effective relationship with Mexico that will enable us to address the many problems of mutual interest between the two countries, such as narcotics, unlawful immigration, economic relations, and other similar matters, we think it is very important that the Mexican treaty be approved by the Senate.

[The following information was subsequently supplied:]

We attach equal importance to the Canadian treaty.

We are grateful for the committee's interest and would be happy to provide any additional information and to work with the committee in any way that we can to assist in the ratification process.

Thank you, sir.

The CHAIRMAN. Thank you very much.

We may be in touch with you asking for some of that additional help. I hope that every member of this committee will read the transcript of this morning's hearing.

Thank you very much.

The next item of business is a matter which Senator Pell wished to bring before the committee.

Senator PELL. Thank you, Mr. Chairman.

[Whereupon the committee turned to other business.]

The CHAIRMAN. Very well. I believe that concludes the committee business for today.

We will adjourn until tomorrow morning.

[Whereupon, at 12:20 p.m., the committee adjourned, subject to the call of the Chair.]

[State Department responses to additional questions for the record follow:]

DEPARTMENT OF STATE RESPONSES TO QUESTIONS FOR THE RECORD

ARTICLE I

Question 1. Does the authority for acceptance by the United States of the transfer of prisoners from Mexico or Canada represent such an involvement in the proceedings of these countries as to render the Constitution of the United States applicable?

Answer. In the view of the Department, acceptance of the transfer of prisoners from Canada or Mexico would not represent such involvement in the prior proceedings in those countries as to render the Constitution of the United States applicable to them 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 Constitution applicable to foreign trials. Transfers within the United States have not been regarded as making the transferred prisoner subject to the criminal laws of the state to which he is moved. We would further note that cases on evidentiary questions show that direct involvement by American authorities in foreign procedures is required before American standards apply.

ARTICLE II

Question 1. Would a crime considered serious under Mexican or Canadian law, such as a felony, and a crime that is a misdemeanor under U.S. law qualify under the comparability of crimes provision? For example, several U.S. states have decriminalized the possession of small amounts of Marijuana or have reduced the sentences substantially.

Answer. Because the Treaties are remedial in character, the dual criminality clauses were deliberately drawn in a much looser and more encompassing fashion than comparable clauses in extradition treaties which operate against the interests of the person accused. Article II (1) is intended to ensure that differences in the laws as to the quantities of marijuana required to be possessed in order to constitute a crime would not be a barrier to transfer. The American tendency to decriminalize possession of small quantities of marijuana is being paralleled by executive action in Mexico.

Question 2. Just what is meant by the term "the prescribed time for appeal"? Under Mexican and Canadian law, what is the prescribed time for appeal?

Answer. The term "prescribed time for appeal" refers to the time limit on filing a direct appeal against the judgment—as distinguished from collateral attack. The normal time is five days in Mexico and thirty days in Canada, but local court rules may vary that limitation.

Question 3. Would the almost continuous availability of a petition for a writ of *habeas corpus* for individuals in prisons in this country affect the "requirement that the time for appeal has expired"?

Answer. Both Mexican and Canadian systems distinguish, as does ours, between direct and collateral attack. It was concluded that transfers should not take place until direct appeals had been exhausted but that it would be inappropriate or impossible to cut off possible collateral attacks. The grounds available on collateral attack are, to varying degrees, narrower than on direct appeal.

Question 4. What would be the status of individuals admitted as resident aliens in the three countries under these treaties? Would they be considered "domiciliaries" even though they had not lived in the U.S.A. five years?

Answer. Article II(3) is designed to exclude from the program persons who have been thoroughly established in the other country for substantial periods of time; to be so excluded a person would have had to be present at least five years. Admission as a resident alien under immigration laws would not be determinative. Note that a citizen of a third country is not eligible for transfer even though he has been resident for five or ten years in the country to which he would like to be transferred. This limitation is due to the fact that Treaty is regarded as an extension of the right and duty of the states to protect their nationals abroad.

ARTICLE III

Question 1. This article, along with Article IV, Section 9, will require the adoption of implementing legislation. Describe what the basic responsibility and authority given the individual designated will be under the terms of the implementing legislation.

Answer. The implementing legislation, in the draft submitted by the Attorney General, designates the Attorney General as the authority referred to in the treaty and permits him to delegate his powers. Essentially, the powers relate to the capacity to select prisoners eligible for transfer in either direction. The treatment to be accorded to those transferred to the United States is quite specifically regulated either in the implementing legislation or in the general laws of the United States.

Question 2. What will be the method of processing applications for transfer under the implementing legislation, and how much time will be involved?

Answer. Under the Mexican Treaty the transferring state would draw up a list of prisoners eligible for transfer.[1] It would obtain an indication of their consent to being transferred and forward the list to the Receiving State which would then review them. The names surviving this process would constitute the list of those who would be brought to the transfer points. They would there be formally interviewed to establish their consent and actually transferred. The

[1] Note that somewhat different procedures apply as to the Canadian Treaty which calls for commencement of proceedings by a written application from the offender. Article II, Section 3.

authorities of Mexico and the United States are currently doing preliminary work to sort out the Mexican prison population so as to be prepared to execute transfers immediately, as promptly as possible after the exchange of ratifications. After the present backlog has been absorbed the flow will be a modest one and a schedule for the transfer of such prisoners will be developed. It should be possible to transfer Mexicans in U.S. federal prisons with equal speed, but it may be some time before state authorities are ready to process their cases.

Question 3. Will there be any procedure for the review or appeal of a decision to reject a transfer either way under the legislation?

Answer. The implementing legislation § 4104(g) contemplates that there would be no judicial review of decisions to reject transfers. Similarly, the Mexican authorities caused Article IV to be written in a manner that, in their view, excludes judicial review. It is not believed that issues involving individual agreements between two governments as well as penological judgments can usefully be subjected to judicial review.

ARTICLE IV

Question 1. Would the consent of a transferred prisoner act as a waiver of his rights under the Constitution? Specifically, would a prisoner waive his rights to contest in the U.S. courts any "due process" question or the right to file a *habeas corpus* petition?

Answer. The consent of a transferred prisoner does not act as a waiver of his constitutional rights in any general sense. He would, for example, still have the right to test the conformity of his confinement with the cruel and unusual punishment clause of the Constitution. However, he would waive any right to challenge the Mexican procedures in the American courts—a right which we believe he never had. This is spelled out in § 4107(b) of the implementing legislation.

Question 2. How many treaties of this type does the Executive Branch anticipate will be submitted? Since "social rehabilitation" is given as a reason for them it would appear as if an agreement should be concluded with every foreign country whose nationals are in U.S. prisons or vice versa.

Answer. The Department has taken the position that action towards further treaties should be deferred at least until we could obtain a clearer reading on the congressional attitude towards the two presently before the Senate. We would also like to have the initial experience with the treaty—and the inevitable judicial challenges—behind us before moving forward. There are substantial pressures in the direction of action with certain countries, in particular Turkey and Bolivia. There appear to be certain limits on the types of country with which we would conclude a treaty with a country which in our view was not sincerely attempting to protect the human rights of prisoners—as distinguished from countries which because of their differing legal and cultural background and level of social and economic development do not do things the way we do. Specifically, we could not agree to enforce sentences of such a length that they violated our conceptions of cruel and unusual punishment. There are also countries where the numbers involved and the severity of the problem would not justify the expenditures in question.

Question 3. Could treaties of this type be incorporated in a logical way in extradition treaties?

Answer. The first versions of prisoner transfer treaties—the European Convention and the first Mexican draft were heavily influenced by examples drawn from extradition treaties. With the United States insistence on a voluntary program it became clear, however, that there are major differences between the two types of transfers. Exclusions of categories of offenders work to their benefit in extradition cases but against them in prisoner transfer cases. There may be some economy in negotiating transfer treaties at the same time that we renegotiate extradition treaties but the documents should be kept separate.

Question 4. What precedents will these treaties set for the conduct of our foreign policy and for international efforts to control crime?

Answer. These treaties represent a move by the United States toward recognition that in the world of the 1970's the struggle against crime cannot be carried out by each country in isolation. Other moves have been the conclusion of an agreement with Switzerland for the obtaining of evidence in criminal cases and cooperation with Mexico in the suppression of narcotics traffic. We view the prisoner treaties as complementary to these other efforts and not in contradiction to them.

Question 5. Should the United States, through the United Nations, work for the expansion of this concept on a worldwide scale, and would this concept strengthen human rights efforts?

Answer. If practice supports the desirability of the concept of prisoner transfers, the United States should support its generalized adoption, just as the European countries which have had experience with similar arrangements support it in international meetings. By bringing more attention to bear on conditions in prisons, this movement should have a generally positive effect on the condition of prisoners as a whole. In its support for the concept, the United States should not, however, compromise its view that only voluntary transfers are consistent with our constitutional and humanitarian principles.

ARTICLE V.

Question 1. The treaties allow the Receiving State an opportunity to examine the consent of the prisoner. Please describe the methods to be used by the United States in determining the validity of consent.

Answer. As set forth in Section 4107 of the implementing legislation, the procedures for the verification of the consent of the offender to transfer involve an interview with a United States magistrate or another officer specially designated by the Attorney General. In the case of a person being transferred to the United States, that interview shall take place while the person is still in foreign custody. Conditioins will be such as to minimize the possibility of pressure being exerted upon the prisoner. The implementing legislation provides that in those proceedings the offender shall have the right to counsel and if he is financially unable to obtain counsel one will be appointed for him. We are still working out the ways and means of providing that counsel.

Question 2. Does the reservation to the transferring state, if it be Mexico or Canada, of the power to grant pardon or amnesty, operate as an unconstitutional restriction on the power of the U.S President to grant pardons?

Answer. The pardoning power of the President of the United States extends to offenses against the United States. We have construed that to mean that the power continues to extend to persons convicted by the courts of the United States but transferred abroad. We do not believe that the power extends to persons convicted by foreign courts of offenses against foreign statutes. Hence, the treaty does not provide for pardons by the Receiving State's authorities.

Question 3. Would not the Mexican law preventing parole for many offenders actually have the effect of extending the sentences of individuals transferred to Mexico in violation of the provision prohibiting extension of sentences?

Answer. Article V(3) provides that no prisoner shall be confined beyond the termination date fixed in the sentence of the court. It does not in our view prevent the confinement of a prisoner past the date on which he might have been eligible for parole in the sentencing jurisdiction. The parties recognized that parole practices differed from country to country. Of course, Mexicans held in the United States on drug offenses will be warned of this potential consequence of transfer and may be expected generally to refuse to exercise that option.

Question 4. Does continued incarceration after transfer constitute violation of the constitutional prohibitions of *ex post facto* laws or bills of attainders?

Answer. Since the underlying authority for the incarceration after transfer is the sentence by the foreign court subject to pre-existing foreign law, we do not regard the *ex post facto* or bill of attainder clauses to prohibit it.

Question 5. Does continued incarceration after transfer constitute cruel and unusual punishment in violation of the Eighth Amendment, especially in the case of an individual who received a much more severe sentence than would be imposed for the same crime in the United States?

Answer. Mexican and Canadian sentences do not seem to fall outside the very wide range of terms which are found in the practice of the United States. We do not, therefore, confront the problem, which might arise in regard to some other countries of dealing with a foreign sentence so much more severe than any in the United States that American courts would determine that execution in the United States would constitute cruel and unusual punishment.

ARTICLE VI

Question 1. Is it in accord with the Constitution of the United States to prevent a U.S. citizen from having access to the appropriate courts of this country if the individual is incarcerated in the United States?

Answer. As explained in the answers under Articles I and IV, the individual transferred to the United States would have access to the appropriate courts of this country to test the conformity of his transfer and his continued confinement here with the Constitution and the treaty and implementing legislation. What Article VI prevents is his use of a United States, rather than the foreign, court to attack the sentence and conviction handed down by the foreign court. This barrier is fundamental to the operation of the treaty and we believe it to be constitutional. As we have explained elsewhere, as in the prepared statement of Mr. Hansell, we base that belief: (a) on the proposition that the sentence is one of a foreign court to which United States constitutional provisions are not made retroactively applicable by the transfer; and (b) on the consent and waiver of the individual.

Question 2. Would compliance with the treaty require an unconstitutional withdrawal of the jurisdiction of the federal courts?

Answer. As stated in the previous answer, the American courts, specifically the federal courts, will continue to have jurisdiction over many issues raised in the course of transfers, although they will not have jurisdiction over the validity of the foreign conviction or sentence.

Question 3. How does Article VI of the Mexican Treaty and Article V of the Treaty with Canada relate to the provision requiring that the time for appeal has expired?

Answer. Article II(4) of the Mexican Treaty and Article II(a) of the Canadian Treaty require that all direct appeals be terminated before a transfer can be effected. These do not interfere with the provisions of Articles V and VI that preserve continuing, if limited, access to the sentencing state's courts by way of collateral attack.

ARTICLE VII

Question 1. Would this double jeopardy provision prohibit prosecution at the state or federal levels on a charge of conspiracy?

Answer. Because of the widespread differences between the Mexican and the United States conceptions of double jeopardy, the negotiators concluded that th most workable solution would be to have each country in effect apply its own double jeopardy rules to the foreign conviction. Thus, the double jeopardy clause in Article VII gives as much protection as that conferred by the United States. An American convicted in Mexico, but not transferred, would at present have no double jeopardy protection whatever in this country. Under our practice, which varies according to the jurisdiction, it is possible that the same events may be made the subject to more than one prosecution; one for the substantive offense, and one for a conspiracy to commit that offense. Several factors militate against widespread resort to that device: (1) it will generally be difficult to present admissible evidence of Mexican events to a United States court; and (2) the Department of Justice advises that those contemplating transfer will be told of pending warrants revealed by NCIC checks based upon identification information submitted by the offender.

ARTICLE VIII

Question 1. In the case of youthful offenders, provision is made for the consent of the parent or legal guardian. What provision is there in the case of a mentally ill individual incapable of informed consent?

Answer. Our negotiators felt that transfers of the mentally ill to the United States could ordinarily be handled, as a Health, Education and Welfare matter under the provisions of 24 U.S.C. 321 et seq., which has sometimes been applied to persons found guilty of criminal acts. We reserved the continuing application of that law in Article VIII(3). The Mexican negotiators believed that they might need further authority to handle such matters. Inquiries of our consular posts indicate that there are few cases of mentally ill prisoners and that those that do arise can normally be solved by informal means. We share the Committee's problems about obtaining a meaningful consent on the part of persons so mentally ill.

Question 2. Recent court rulings provide that patients in public mental institutions in the United States have a legal right to proper professional attention and care. Would it be fair to transfer an individual to another country where such treatment and facilities are substandard?

Answer. We agree fully that it would not be fair to transfer patients in mental

health institutions to places where they cannot be afforded treatment. We would not negotiate any agreement which would inflict such an undesirable result.

Question 3. Are the laws of Mexico dealing with youthful offenders designed to promote rehabilitation through education and counseling rather than mere punishment?

Answer. Mexico attempts to promote rehabilitation of youthful offenders through education and counseling. Their theory in this regard is advanced, and they have committed a generous portion of their resources to dealing with this problem. However, the means available to this end are by our standards extremely limited. Advice from our consular posts indicates that the Mexican authorities have uniformly released persons under eighteen when their American citizenship is established.

DEPARTMENT OF STATE RESPONSES TO QUESTIONS ON THE DIFFERENCES IN THE PRISONER EXCHANGE TREATIES WITH CANADA AND MEXICO

Question 1. Why is there no provision in the Canadian treaty comparable to the section in the treaty with Mexico which allows the transfer of mentally ill individuals?

Answer. Both the United States and Canada felt that action through mental health channels along the lines authorized in 24 U.S.C. 321 et seq. should suffice to cope with problems that arise along these lines. The Mexican authorities believed that they might need further powers and, hence, asked for the inclusion of Article VIII(2). Any agreement entered into under that clause would pay heed to the concerns expressed in Article VIII questions 1 and 2.

Question 2. Does the change in the Canadian treaty which requires the prisoner to initiate the transfer process, rather than the Transferring State as in the Mexican treaty, reflect differences in Mexican and Canadian law or problems with the provisions of the treaty with Mexico?

Answer. The format of Article IV(1) is due to a philosophic difference in legal systems whereby the Mexican authorities did not wish to grant a prisoner a right to initiate the transfer due to concern that this could be construed as a legal right which could be subject to judicial enforcement against the Executive. Neither the Canadian or the United States authorities shared that concern, although we also believe that review is not desirable. Note that under the second sentence of the cited section a prisoner in Mexico can submit a request for consideration to the Mexican government.

Question 3. Why was Article VII of the treaty with Canada included in this treaty and not included in the Mexican treaty? Is it foreseeable that either the United States or Canada may enter into any agreements with other nations that would bring the terms of Article VII into effect?

Answer. After the treaty with Mexico was signed, we became aware that there was an interest in a Canadian-Mexican treaty. It then occurred to us that we should facilitate traffic across the United States in connection with any such potential arrangement. Canadian officers are already allowed to transport prisoners across the United States in certain circumstances under Article I of the Treaty of 1908, 35 Stat. 2035, T.S. 502. Aside from the Canadian-Mexican negotiations, we know of no other.

Question 4. Will the implementing legislation be sufficient to deal with any differences in the two treaties?

Answer. The implementing legislation has been drafted to accommodate both treaties and, if other treaties are concluded, ought to accommodate them as well. Of course, it is likely that modifications will be necessary as practical experience illuminates this novel area.

Question 5. Is the inclusion in the treaty with Canada of a specific reference to the transferability of offenders serving a life sentence or an indefinite sentence as habitual or dangerous criminals an admission that such offenders would not be eligible for transfer under the terms of the Mexican treaty which requires that the individual be serving a definite sentence?

Answer. The Mexican authorities expressed considerable concern about the enforcement of indefinite sentences, which are unknown in this country and insisted on their exclusion. Life sentences for Mexicans in the federal system in this country are improbable. If the problem proves a real one, a life sentence could be commuted by the Transferring State to a suitable term of years.

Question 6. What is the significance of the use of the term citizen in the treaty with Canada and national in the Mexican?

Answer. In both negotiations, the United States pressed for the inclusion of nationals who are not citizens. We did so out of caution since the category of those who are nationals but not citizens according to 8 U.S.C. 1101 (a) (22) and 1408 is narrow and there is not likely to be a case involving such a person, Article I(d) of the Canadian Treaty accomplishes this goal by defining "citizens" to include American nationals.

Question 7. Why are political offenders excluded in the treaty with Mexico and not in the one with Canada? What are the political offences included in the Extradition Treaty of 1899 with Mexico?

Answer. The Mexicans were of the view that political offenders should not be subject to transfer, proceeding on the analogy of extradition. The Canadians believed that since all transfers are voluntary, a political prisoner should not be deprived of what is, in this context, a benefit rather than a burden. We acceded in both cases to the views of the other country. The problem is not a realistic one: (a) since our records indicate that no Americans in either Canada or Mexico have been imprisoned for crimes we regard as political; (b) since the question of the political character of a crime is one raised by the offender, he would never raise it if he desired to be transferred; and (c) if there were a political offense in the other country it would in nearly all cases be barred by the dual criminality clause in Article II(a) of the Canadian and II(1) of the Mexican treaty.

PENAL TREATIES WITH MEXICO AND CANADA

THURSDAY, JUNE 16, 1977

UNITED STATES SENATE,
Committee on Foreign Relations,
Washington, D.C.

The committee met, pursuant to notice, at 10:30 a.m., in room 4221, Dirksen Senate Office Building, the Honorable John Sparkman (chairman of the committee) presiding.

Present: Senators Sparkman, Pell, Clark, Glenn, Stone, Sarbanes, and Case.

The CHAIRMAN. Let the committee come to order, please.

I regret the 30-minute delay in getting started this morning. Senators sometimes have a pretty hard time working in committee and on the floor of the Senate simultaneously. The Senate is in session and there is a very important measure being considered right now, one that is out of this committee, and some of our members are there working on it. But I think we should get started.

OPENING STATEMENT

We will continue to receive testimony this morning on the Treaties with Mexico and Canada on the Execution of Penal Sentences.

Our first witnesses will be two distinguished professors of law, Mr. Herbert Wechsler of Columbia University and Mr. Alan C. Swan of the University of Miami.

We will then hear from the authors of an extensive note in the May issue of the "Harvard Law Review" on the Treaty with Mexico. These are Mr. Richard Petree and Mr. Michael Chertoff.

These witnesses will be followed by a panel made up of families of prisoners and former prisoners in Mexican jails.

I will ask first for Mr. Herbert Wechsler and Mr. Alan C. Swan to come to the table.

Senator CASE. Mr. Chairman, may I first say a word, please?

The CHAIRMAN. Yes, indeed.

Senator CASE. With you, I regret the delay in the beginning of our panel this morning. I just hope that everyone will forgive us for having to be in several places at the same time.

COMMENDATION OF MR. WECHSLER AND MR. SWAN

I am happy to see that we have before us a fellow who goes back almost as far as I do at the Columbia Law School. He is a very distinguished man and a great friend, and I know that his companion on

CONTINUED

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the panel will match his eloquence and learning. We look forward to hearing both testimonies this morning.

Mr. WECHSLER. Thank you very much, Senator.

Mr. SWAN. Thank you, Senator Case.

The CHAIRMAN. Mr. Wechsler, we have your prepared statement. You may proceed as you see fit, either to read it, to summarize it, or to discuss it as you wish.

Your entire statement will be printed in the record, of course.

STATEMENT OF HERBERT WECHSLER, COLUMBIA UNIVERSITY LAW SCHOOL, NEW YORK, N.Y.

Mr. WECHSLER. Mr. Chairman, I shall not identify myself further because my biography is in my statement.

I am here, as you know, Mr. Chairman, because you were good enough to have asked me to come down to talk about the constitutional problems, if any, that these treaties may present.

IMPORTANCE, HUMANENESS, AND CONSTITUTIONALITY OF TREATIES

I think the treaties are very important and that the purpose behind them is humane and should be supported, if at all possible. From that point of view, I have undertaken myself to consider whether I believe that there are constitutional reasons why the Senate should withhold its advice and consent. To put the matter very simply, my conclusion is that the treaties are consistent with the Constitution and that neither on principle nor on authority is there any solid basis for doubting the validity of the proposals of both the treaties and the implementing legislation.

I will put forth my reasons very briefly.

First of all, I start with the proposition that the purpose and effect of the treaties is 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 hardships incident to their confinement abroad. The assurance of such reciprocal benefits for citizens or nationals of the contracting countries is assuredly an appropriate object of the treaty power. The matter is one of "international concern." Since it is a benefit, conferred with the consent of the individual involved, it seems to me implausible upon its face to perceive a potential violation of the Bill of Rights in such an exercise of the treaty power or the legislative authority of Congress to implement the treaty.

This is a simple common-sense view of the matter, and it may not, unhappily, exhaust the legal inquiry. But it does seem to me to be the proper starting point for any appraisal of the constitutional position.

DUE PROCESS CLAUSE OF FIFTH AMENDMENT

Turning to problems that may be perceived, we must recognize that 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. The question is, is there any constitutional impediment to such an exercise of the power of the U.S. Government?

The most significant suggestion that I have seen in the documents about this is that the due process clause of the fifth amendment should, or might be, construed to prohibit such imprisonment if the foreign conviction was obtained by procedures lacking those safeguards of the Bill of Rights in the area of criminal procedure that the Supreme Court has held that the 14th amendment imposes on the States of the United States by incorporation of the content or most of the content of the Bill of Rights.

On that issue, I can only say that this seems to me to be a wholly insupportable conclusion. The 14th amendment was designed, as we all know, to impose limits on the States, including, by process of interpretation, limits on their criminal procedures derived from what the framers thought fundamental and put into the Bill of Rights. But neither the fifth amendment nor the 14th amendment was designed to limit Mexican or Canadian criminal procedures, or the criminal procedures of any other foreign country.

The due process guarantee of the fifth amendment, after all, has been interpreted and must be interpreted in international affairs with due deference to the autonomy and jurisdiction of other members of the international community. This, it seems to me, has been the pattern of the most relevant decisions that we have.

Without going into detail, I will remind the committee of the extradition cases, the act of state doctrine, which of course Congress can and has altered by legislation, but in the absence of legislation, American courts have given effect to confiscation decrees that would obviously violate the fifth amendment if they were imposed here. And we have other important things. I think, for example, of the decision sustaining the occupation courts that President Truman established in Germany after the Second World War, which tried American citizens as well as German nationals for violation of the occupation ordinances. We had the surrender of service personnel to foreign countries without examination of their criminal procedures under the Status of Forces Agreement. In the *Girard* case, in 1957, at the time of war, alien enemies are subject to confinement without due process hearing or judicial review as to anything other than their status. The Supreme Court even sustained deportation without due process hearings of German enemy aliens after the Second World War based on Presidential order founded on the Eighteenth Century Alien Act of the Second Administration. We have the subjection of enemy alien property to seizure without compensation, and so on.

The point of all of this for me is nicely put in a sentence from Chief Justice Hughes which I think has a lot of bearing on constitutional interpretation generally. It goes this way: "Behind the words of the constitutional provisions are postulates which limit and control." The relevant postulates here, I submit, 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.

If you view it this way, it seems quite clear that nothing that Mr. Justice Black said in his plurality opinion in the court-martial cases—

as in *Reid* v. *Covert*, the trial of Army wives for murdering their military husbands—as to the application of the Bill of Rights to American trials abroad, or indeed, to all actions of the American Government, or subjection of the treaty power to the limitations of the Bill of Rights, really has any application here. These treaties take away no rights from these offenders. In the absence of the transfers contemplated, their convictions and their sentences remain in force in the countries in which they were rendered, and they have to serve their sentences there.

QUESTION BEFORE THE SENATE

If you put the question that way, and I think that is the way it should be put, I think the proper question before the Senate is simply this: Is it a reasonable exercise of governmental power to imprison or restrain at their election, or at their choice, individuals who otherwise would be imprisoned or restrained abroad, and to do so, subject to the mitigations that the treaties would bring in as to release procedures by making our parole laws and the like applicable, and subject also to the very important safeguards with respect to an informed consent that the legislation would provide? I just cannot see the room for two sides on the issue when it is put that way.

CONCLUSION

I will conclude by saying, if I might, that so far, I think there is no additional complexity introduced by the provision limiting collateral attack on the foreign convictions, because this is not a suspension of the privilege of the writ of habeas corpus. The writ remains available; it is simply a good return that the prisoner is held pursuant to the treaty, including, of course, his informed consent. I should suppose it would be right for an American court on the writ to entertain any allegations that the consent was not actually voluntary or informed, or that there was no consent, or that the treaty had otherwise not been complied with in the procedures followed.

That is the substance. There is a little more in my written statement, Mr. Chairman, but nothing that really need be said now.

[Mr. Wechsler's prepared statement follows:]

PREPARED 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 (L.L.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 appear by invitation of the Chairman to address the question whether the treaties and their contemplated legislative implementation are consistent with the Constitution. It is my view that they are. Neiher on principle nor on authority is there, in my opinion, any solid basis for doubting the validity of the proposals.

My reasons, briefly stated, as as follows:

First: The purpose and effect of the two treaties is 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 § 117). And since it is a benefit, conferred with the consent of the individual involved, it is implausible upon its fact 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 in 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 United States 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 parts Quirin, 317 U.S. 1 [1942]), the internment and deportation of alien enemies in time of war without due process hearings (*Luedecke* v. *Watkins*, 335 U.S. [1948]) and the subjection of enemy property to seizure without compensation (*Stoehr* 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 the 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;

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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 application 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 §§ 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 detailed 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 assmed 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 amelioration. 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 Senate to withhold its advice and consent to these two treaties.

The CHAIRMAN. Thank you very much, Professor Wechsler.

Now we will hear from Professor Swan, and then from Mr. Petree and Mr. Chertoff.

After the four of you have given your statements, I thought we might examine you as a panel.

Mr. Swan, please proceed.

STATEMENT OF ALAN C. SWAN, UNIVERSITY OF MIAMI LAW SCHOOL, MIAMI, FLA.

Mr. SWAN. Thank you, Mr. Chairman. I am very privileged to be here this morning. I must say that it is indeed a privilege to sit next to so distinguished a teacher and scholar as Mr. Wechsler. I think that we, in the profession, all respect him so very highly.

DEFENSIBILITY OF TREATY'S CONSTITUTIONALITY

Let me say that I agree with the conclusions that he reaches. I am responding briefly to the question by Senator Javits: Was the constitutionality of this treaty defensible? I conclude that it is readily defensible.

I come at these conclusions, I suppose, a little differently than Professor Wechsler, but nevertheless, let me go through the way in which I think the matter might well be viewed and how we arrive at those conclusions.

There are, of course, two major sets of issues with which we are dealing here. The first is the substance of the claim that some prisoners are undoubtedly going to try to offer, that their continued imprisonment in the United States is a violation of their due process rights. The

second, of course, is the problem with respect to the effort in the treaty to foreclose them bringing those appeals through habeas corpus proceedings in the American courts.

CLAIM OF VIOLATION OF DUE PROCESS

Let me turn first just to the merits. I puzzle and worry a little bit more, I suppose, about this problem. Consider the case of a prisoner who was tried and convicted on the basis of a coerced confession without effective assistance of counsel, perhaps after 1 year or more delay in the course of his trial. The impact of such a record, as I read it, is fairly clear. We have serious doubts about the guilt of such a prisoner. The record does not support that. We would normally have that reaction.

Now when we come, then, to the fifth amendment, I take it that one of the fundamental ideas that underlies the fifth amendment is that we just do not imprison people unless we have some reliable determination of guilt. In the face of a record where there are serious doubts about guilt, I suggest that there is some threshold engagement with our basic question of whether or not we can continue to imprison him.

I think we ought to keep an analytic point rather strictly in mind. When an American court is dealing with an individual case, with an individual prisoner, it has a choice. There may be consequences associated with that choice, but it has a choice. It can "free" him, and I use the word "free" advisedly here, because I think there may be some serious problems with the provisions in the legislation for extradition of prisoners who are free, should they be freed.

So. the court has a choice. I think we would not be doing fairness to the analytic problem if we did not face up to the fact that there is an exercise of American power by an American court, by an American penal institution, keeping a man in jail, where there may be serious questions as to his guilt. To me, that raises what I would choose to raise a threshold or a colorable constitutional claim. But it by no means ends the matter. These matters are, as Professor Wechsler has rather eloquently pointed out, a question of reasonable constraints. There is a total context in which these matters have to be viewed. Obviously, to free any of these prisoners will have some serious consequences, and the courts cannot ignore those consequences.

There are a number, and again, Professor Wechsler alluded to many of the problems. This problem partakes of the problems that we have handled through the Act of State Doctrine; it partakes of the problems of deference and of the kind of concerns that have allowed the courts to permit the exercise of Executive authority in wartime, as in deportation areas.

What occurs to me is perhaps the single most important thing to focus on at this point. That is the fact, from our testimony yesterday, that I think we can predict rather clearly that if a handful of these early prisoners were to be released by the American courts, that would abort the program. In a very real sense, I gather, from the position taken by the Execcutive and the record made by the Executive, the Mexicans particularly, and the Canadians presumably, would not continue to consent to or abide by the removal plan if the U.S. courts began to judge and review their sentencing.

That puts the case, it seems to me, in an interesting posture. We are not now in that case talking essentially about the rights of an individual against society as a whole, where our Bill of Rights speaks. We are in a sense talking now about the rights of one individual against the interests of a larger group that has suffered perhaps the same deprivations and the same kind of suffering that the one has. In a curious way, we might say that there are no private rights here.

That poses a difficult problem for me. But I do have a sense that the courts would be very loath to say that in this very-special context, one prisoner's rights involving the deprivation of his due process rights in a foreign country, the continued imprisonment of that person, when it is for an ameliorative purpose, should be set aside at the prejudice of assisting all the other people who are in a like position.

In that posture of the case, I think a very strong case can be made for the constitutionality or for setting aside the challenges that they would be mounting to their continued imprisonment.

FORECLOSURE PROVISION IN AGREEMENT

Let me turn at this point to the second of the issues, which is the question of the provision in the agreement which purports to foreclose the American returned prisoners from bringing their challenges. I quite agree with Professor Wechsler. This is a case which does not engage the suspension clause. This is a case where the Government is conferring a benefit upon the prisoners. It is not insisting that they take the benefit; they are given the right to accept or reject.

There is, however, a problem, it seems to me. There is a problem in the terms, and I think we have to be careful before we can assume that the Government can impose any condition it chooses on the grant of a benefit and then just say that because the person has accepted the benefit, he is stuck with it.

We do have some cases, in the pardon and parole area particularly, where the lower Federal courts have upheld conditions being imposed upon pardons which do trench upon the full and free exercise of constitutional rights. I don't find those cases terribly persuasive in this context. I would find it difficult, for example, to think of the President giving a pardon on condition that the recipient of that pardon forgo the right by habeas corpus to challenge the validity of the underlying conviction. I would suggest that his acceptance of the pardon might not even warrant upholding that condition. It is difficult.

But there is again this contextual matter. These cases do suggest that we ought to ask the question, whose condition is this? Again, the testimony yesterday, the record, as I heard it, was fairly clearly made that this condition was insisted upon by the Mexicans. Now, we may have wanted it, too, but we would not have gotten the treaty without this condition.

I think in that posture, the legal issue subtly changes. The question is no longer, can the U.S. Government, in granting a benefit, impose limitations on the exercise of constitutional rights. The question becomes, can the U.S. Government agree or acquiesce in the foreign government's demand that these rights be relinquished when that is the price the foreign government demands for its cooperation in assisting Americans abroad.

Senator CASE. May I interrupt you there?

Mr. SWAN. Yes, sir.

Senator CASE. Could that idea be turned around?

Does our government have the right to trick a foreign government into releasing a prisoner which it holds under its laws, presumably validly, and then turn around because we thought the thing was not fair and break our agreement?

Mr. SWAN. Senator, let me put it this way. The posture of the United States could not be a very good one in doing that. I have this reservation, however.

Senator CASE. This would be something like the position of promising somebody who has taken a hostage that he will go free upon release of the hostage, and then turning around and putting him right into the can.

Mr. SWAN. That is exactly right. It has those attributes.

Senator CASE. Excuse me, please, Professor and Mr. Chairman, for interrupting.

Mr. SWAN. I see my light is red, Mr. Chairman, so I will try to wind up.

Senator CASE. That is my fault. This was on my time, not on yours.

Mr. SWAN. I think I can wind up very quickly in any event.

The CHAIRMAN. Let me say that this light is a limitation on the time of the committee members, not on your time.

Senator CASE. That red light might be left over from yesterday, Mr. Chairman, because surely none of us has used up any time today.

Mr. SWAN. Let me close this way, Senators.

I feel that if you look at the issue in terms of can the United States acquiesce in this kind of condition when it is a demand of the foreign government, if you said no, if you said that the American Government cannot agree to such conditions, then, of course you would be imposing a potentially fairly expansive limit on the power of the American Government to move in terms of assisting its citizens abroad. That kind of expansive limit ought to be looked at very carefully, so let's look at it in this case. There is something unique and I think very characteristic about this case.

What is the effect of saying no? What if we did say that the American Government cannot accept this demand or pay the price that the Mexican Government is demanding? The result would be the American prisoner would stay in Mexico. There is something rather anomalous, perhaps even foolish, about the idea that we stand to defend the rights of prisoners and won't let the Government relinquish those rights when the total consequence of that is to leave the prisoners beraft of the very rights we are trying to secure them. In that context, it seems to me, our Bill of Rights is not a document of just hollow statement; it is an operative document. Since we are in that posture, I think that this condition that is imposed on this benefit poses no particularly difficult constitutional problem.

If the Senate feels that as a matter of policy and that for humanitarian concerns this treaty is a sound one, I perceive no important constitutional barrier to its implementation.

Thank you, Mr. Chairman.

[Mr. Swan's prepared statement follows:]

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TREATIES WITH CANADA AND MEXICO ON THE EXECUTION OF PENAL SENTENCES

Statement before
THE COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

by

Alan C. Swan*

The two treaties which the United States has signed with Canada and Mexico are, as the Committee is fully aware, a unique experiment in American diplomacy, and serve to raise a number of constitutional issues. The first set of questions concerns the merits of the claim, certain to be advanced by some of the returned prisoners, that because their foreign convictions were obtained in disregard of the basic rudiments of a fair trial, their continued imprisonment by the United States constitutes a deprivation of liberty without "due process of law." The second group of issues relates to the apparent effort (Mexican Treaty, Art. VI; Canadian Treaty, Art. V) to preclude such challenges from being presented to the American courts.

At the start, let me offer a few broad conclusions which I believe emerge from the discussion which ensues.

First, from what we now know, it seems likely that some returned prisoners will, if permitted, be able to present very strong threshold constitutional challenges to their continued imprisonment. Weighed against these claims, and ultimately determining whether they should be

* Professor of Law, The University of Miami. The author wishes to acknowledge the invaluable assistance that his colleague, Professor Irwin P. Stotzky, provided in the preparation of this statement.

vindicated, are the attendant consequences of doing so. These are of considerable moment and render the constitutional issue a very difficult one indeed; an issue on which opinion can, in the absence of judicial guidance, differ widely. Against this background, the fact that each returned prisoner's case will be different -- many will have no cognizable claim to advance -- and the fact that these claims can only be judged with the full record in hand, suggest that, in this facet of the matter, there is no compelling constitutional reason for the Senate to withhold its consent to the ratification of these treaties. Particularly with regard to the Mexican treaty, the reported suffering of some of the prisoners and the expectations that the treaty has already engendered, supply added reasons for granting that consent.

Second, there are quite persuasive reasons for suggesting that those treaty provisions which appear to preclude the returned prisoners from attacking their foreign sentences, can pass constitutional muster, provided the record on certain points is clarified. Whether these arguments will ultimately obtain judicial approval is difficult to predict. Nevertheless, because of these arguments and the humanitarian concerns just mentioned, I again suggest that there is no compelling constitutional reason for the Senate to withhold its consent to the ratification of these treaties.

Third, the first two conclusions combine to raise in my mind several broader concerns relating to our Nation's record on human rights, the protection of Americans who travel abroad, the attitudes and behavior of those Americans and the prospect of becoming involved in the criminal

justice systems of other countries. These concerns may not be particularly acute so long as we are limited to the two treaties now before the Senate, and should not stand in the way of their approval. But should these treaties succeed in their objective, the resulting incentive for the negotiation of like arrangements with other countries means, I respectfully suggest, that these are problems to which the Senate should even now address itself.

The Prisoners' Constitutional Claims

The signal fact in our problem is that it will have been foreign, not American, officials who initially deprived the prisoners of their liberty, and the constitution does not control what those officials do. Cast in "due process" terms, it may be suggested that the prisoners can assert no liberty interest guaranteed to them by the constitution. Yet, it cannot be denied that when the United States agrees to carry-out a foreign sentence imposed without a fair trial, it becomes, in some sense, implicated in that act. The question then is whether that complicity gives rise to dangers against which the Bill of Rights was intended to guard and whether those dangers, if present, are nevertheless to be tolerated. That the complicity can, in appropriate cases, make out a colorable or threshold claim under the Bill of Rights seems clear. The difficult question is whether the larger purposes of the agreement and the consequences of its breach will warrant denying that claim.

Consider, for example, the possibility of a foreign conviction predicated upon a coerced confession, obtained more than a year after

arrest without benefit of effective counsel.* The most immediate impact of such a record is to raise doubts concerning the guilt of the prisoner. Since protection of the innocent through a reliable guilt determining mechanism surely stands among the fifth amendment's more important purposes, any agreement of the United States to imprison the innocent is an offense against that purpose that cannot be summarily dismissed merely because the conviction was handed down by a foreign court. In order for the offense to be tolerated at all, other countervailing exigencies must demand it.

Other possibilities, such as an arrest or a search and seizure without probable cause, engage our commitment to other values protected by the Bill of Rights. Where such an arrest or seizure is accompanied by acts of brutality, concern for the integrity of that commitment becomes particularly acute. Surely, brutality in foreign law must inevitably brutalize our law whenever we agree to imprison its victims, unless that agreement is necessary to uphold the very humane values which the foreign system may have transgressed.

Of course, where American officials transgress basic constitutional standards, the integrity of our values and our institutions is more directly engaged than when foreign officials alone have committed the wrong. But this is only a matter of degree; it serves to attenuate the

* U.S. Citizens Imprisoned in Mexico: Hearing before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations, 94th Cong. 2d Sess. (1975-1976) at page 50-53.

intensity of our concerns, not to dissipate them.

Moreover, it is not analytically quite accurate to say that because the prisoners were first deprived of their liberties by a foreign system, they now possess no liberty interest of which the United States might deprive them. In the case of any one exchanged prisoner an American court can readily fulfill the ameliorative purposes of the treaty and forestall any further deprivation of that prisoner's rights, simply by freeing him. The court has a choice, and because it has a choice it must recognize that, from the perspective of our commitment to the individual which is the hallmark of the Bill of Rights, a decision upholding the treaty is a deliberate decision by American authority to deprive that prisoner of his liberty. The consequences that flow from freeing a prisoner may merit his continued imprisonment. But the court cannot deny that the imprisonment is an act of the American government merely because a foreign government precipitated the necessity of the choice.*

Turning then to the consequences of vindicating these threshold constitutional claims, they are without doubt substantial and threaten to make the decision in some cases a very difficult one indeed. Obviously, the courts of the United States do not take lightly the idea of invalidating the solemn international obligations of the Nation. Nor are

* Parenthethically we must also observe that there have been, in the press and elsewhere, recurring charges that American narcotics agents were instrumental in obtaining the Mexican arrest of some of the prisoners. If these charges are, in any case, proven to be true then in principle the American complicity in the denial of the prisoners rights becomes far more direct and may, on the basis of existing authority, serve to strengthen the threshold constitutional claim.

American judicial indictments of a foreign judicial system particularly designed to foster good relationships with the government of that country. In the case of Mexico, such pronouncements are not likely to encourage Mexican cooperation in controlling the flow of drugs into the United States. Far more telling, however, is the danger that, by freeing one or more prisoners brought to the United States, a court might jeopardize the return of all prisoners still in Mexico or Canada at the time the decision is made. And ther is, finally, the broader possibility that if some of the prisoners returned under these treaties are freed, that will doubtless impair if not totally foreclose the possibility of similar treaties with other countries. The courts do not lightly assume the burden of frustrating the political departments in pursuing what the latter regard as wise policy.

In sum, from what we now know of the record, the treaties could pose an extraordinarily difficult and unprecedented choice; a choice between vindicating, under quite insistent circumstances, some of the most cherished values of our society or, denying those values, in order that the government may meet a no less insistence demand for the alleviation of human suffering. How the courts will answer this dilemma, should it actually confront them, defies ready prediction. That the possibility exists, however, is a point that needs to be demonstrated from the cases.

A recurring idea in court opinions is that a denial of "due process" by a foreign government is of no constitutional concern to the United

States (e.g. Neely v. Henkel, 180 U.S. 109 (1900) and Holmes v. Laird, 459 F.2d 1211 (D. C. Cir. 1972). Thus, in Wentz v. United States, 244 F.2d 172 (9th Cir. 1957) the court answered the argument that defendant's arrest by Mexican police and subsequent transfer to American authorities for trial was a denial of "due process", with the following statement:

> No illegal act of a United States officer is related by [defendant]. In the affidavit no action of officers of the United States begins before the defendant is brought to them in the United States. Therefore the charge, if true, must be that the defendant was denied "due process" in Mexico by Mexicans. If true, that is no legal concern of an American court (at page 176).

It is, of course, true that the constitution does not operate directly upon foreign officials. But unfortunately more recent cases make rather clear that a denial of "due process" by foreign officials may be of legal concern to the United States. The statement in Wentz, in fact, may have little value beyond the immediate factual context of that case.

To better understand the controlling principles at stake here it is instructive to begin with the Second Circuit's recent decision in United States v. Toscanino, 500 F.2d 267 (2d Cir., 1974). There it was held that the narcotics conviction of a defendant fairly tried upon a regular grand-jury indictment would be overturned if he could prove, as alleged, that he had been kidnapped by American narcotics agents in Uruguay, who, after bribing certain foreign officials, held and tortured him for about three weeks, drugged him and placed him aboard an aircraft

to the United States where he was arrested upon arrival. The court acknowledged that it was departing from the traditional rule that a valid conviction would not be overturned under the "due process" clause merely because the defendant was brought within the jurisdiction on an American court by illegal means. Ker v. Illinois, 119 U.S. 259 (1886);* Frisbie v. Collins, 342 U.S. 519 1952)). Judge Mansfield, nevertheless, purported to find in the decisions since Frisbie a heightened sensitivity to the rights of the accused and concern for the integrity of our institutions which warranted a certain mitigation of that rule. The Judge first quotes Justice Frankfurter's assertion in Rochin v. California, 342 U.S. 165, 169 (1952) that the courts had an "inescapable duty" to "exercise judgment upon the whole course

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* If the Toscanino decision was a departure from Ker, read as laying down a broad rule, it was arguably very much in keeping with the underlying mode and sensibilities of that decision. In Ker the Court did in fact acknowledge that the mode of arrest outside the jurisdiction of the trial court could engage the "due process" clause. In that case defendant had been regularly indicted by a grand jury, a warrant had been issued for his arrest, and a request for his extradition from Peru had also been issued. This was wholly different, the Court carefully pointed out, from the case of an arrest without warrant or other finding of probable cause by a proper officer. In the latter event, the "due process" question would be far more difficult. As it was, the kidnapping in Ker was brought about because the effort at extradition had been frustrated by a revolution, and the Court viewed that kidnapping as a "mere irregularity" which when weighed against the fact that the defendant had been fairly tried was not a sufficient grounds for overturning his conviction. Unfortunately, this careful approach was totally ignored in Frisbie, where the challenge to the arrest was pre-emptorily dismissed on the authority of Ker.

of the proceedings" to ascertain their conformity with our basic "cannons of decency and fairness." Having thus defined the scope of judicial scrutiny, he invokes Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438 (1928). Pre-trial exercises of arbitrary power might indeed require aborting the results of an otherwise unexceptional proceeding, the Justice had said:

> . . .in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination (at page 484).

In the light of these principles the arrest in Toscanino -- brutal, violative of our treaties and of international law -- could not be allowed to stand.*

While the illegal acts in Toscanino were carried-out by American, not foreign, officials and the Second Circuit in United States v. Lira, 515 F.2d 68 (2d Cir. 1975), cert. denied 423 U.S. 847 (1976) has refused to extend Toscanino to arrests by such officials, it is the broader principles of the case that are important here. If fairness and decency in the "whole course of the proceedings" can, under appropriate circumstances,be essential to "preserving respect for law", then we

* The Second Circuit, of course, has not been alone in its sensitivity to these principles. Prior to Toscanino, the Ninth Circuit in United States v. Cotton, 471 F.2d 744 (9th Cir. 1973) cert. denied, 411 U.S. 931 (1973) thought that the official behaviour in the course of the arrest was not sufficiently "shocking" to warrant a departure from the Ker-Frisbie rule on the authority of Rochin. The Tenth Circuit in Hobson v. Crouse, 332 F.2d 561 (10th Cir. 1964), thought that adoption of such principles under the circumstances of that case would be to over-rule Ker and Frisbie. After Toscanino the Fifth Circuit in United States v. Herrera, 504 F.2d 859 (5th Cir. 1974), thought that the facts of the case did not bring it within the Toscanino rationale.

are working upon a continuum such that the line cannot be invariably drawn between illegal acts of foreign and illegal acts of American officials, in cases where the American system is somehow linked to the foreign. The concern for American justice may be more attenuated if foreign officials alone have acted illegally. But the test is, nevertheless, whether those acts sufficiently taint the American system to raise a threshold concern for the quality of our justice. If in the case of a foreign arrest followed by a fair American trial, that linkage is generally thought to be insufficient, that is a pragmatic judgment which cannot answer other cases. Certainly, if our system imprisons people wholly on the strength of a foreign proceeding without any intervening trial according to constitutional standards, it would be anomalous indeed if "fairness and decency" in those proceedings was a matter to which our constitution was indifferent. Let me offer some examples.

The principle in Wentz has no force whatsoever where there is an attempt in an American trial to use a confession obtained by foreign officials, with or without American participation or inducement, in violation of the fifth amendment. The fifth amendment itself forecloses use of the confession so that it is sometimes said that the offense occurs not when the foreign official coerces the confession, but when the prosecutor uses it (Bram v. United States, 168 U.S. 532 (1897), United States v. Welch, 455 F.2d 211 (2d Cir. 1972); Brulay v. United States, 383 F.2d 345 (9th Cir. 1967) cert. denied 389 U.S. 986 (1967). But there is more than this literal reading. The rule

also reflects a concern for the truth of any statement obtained by coercion. And our general abhorrence of compelling any person to convict himself would doubtless preclude the use of even a totally reliable statement. Viewed in these more functional terms, the rule is, at bottom, designed to preserve the integrity of our judicial system and, as such, recognizes the inextricable linkage that exists between the acts of a foreign official and that system.

Decisions involving the use in an American trial of evidence obtained by foreign officials in violation of the fourth amendment show a further erosion of the idea that foreign official acts are of no legal concern to an American court. We start with Birdsell v. United States, 346 F.2d 775 (5th Cir. 1965) cert. denied 382 U.S. 963 (1965) where the Fifth Circuit declined to bring within the fourth amendment's exclusionary rule a conviction based upon evidence which foreign officials, acting upon information received from American agents, had seized allegedly in violation of that amendment. Because the American agents had not sufficiently participated in the seizure, overturning the conviction would not, the court thought, serve the exclusionary rule's deterrent purposes. Nevertheless, Judge Friendly, sitting by designation, added the following note to his opinion:

> We do not mean to say that in a case where federal officials had induced foreign police to engage in conduct that shocked the conscience, a federal court, in the exercise of its supervisory powers over the administration of justice, might not refuse to allow the prosecution to enjoy the fruits of such action. (346 F.2d at 782 n.10)

Since Birdsell, Judge Friendly's reservation has been echoed in one form or an other by nearly all of the circuits which have considered the problem. (United States v. Manzano, 537 F.2d 257, 272 (7th Cir. 1976); United States v. Cotroni, 527 F.2d 708, 710 (2d Cir. 1975); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968) cert. denied 395 U.S. 960 (1969); and in a civil context Brennan v. University of Kansas, 451 F.2d 1287 (10th Cir. 1971)).

Arguably, the Judge's noted exception is designed only to deter American officials from precipitating foreign encroachments upon fourth amendment values. But that seems improbable. The absence of American participation makes it difficult to see how any deterrent purpose whatsoever could be achieved. If deterrance is the purpose, why limit it only to evidence obtained in a particularly "shocking" manner? The exception, in other words, appears rooted, instead, in a broader normative concern for the integrity of the American system of justice. The requirement that there be an American inducement to the foreign action serves only as a signal that the danger to our values is of sufficient intensity to warrant precluding the use of otherwise reliable evidence.

Viewed in this light, Judge Friendly's note is undergird by a venerable line of Supreme Court opinions. It evokes the basic rationale for the exclusionary rule found in the seminal decision of Weeks v. United States, 232 U.S. 383 (1914). It echoes the gravamen of Justice Brandies' Olmstead dissent. It is an idea that occurs

again in Wolf v. Colorado 338 U.S. 465 (1921) and in Mapp v. Ohio 367 U.S. 643 (1961); an idea that received its most eloquent expression in Rochin v. California 342 U.S. 165 (1952).

It is, of course, true that in more recent decisions the Court has tended to down-grade the rule's normative dimension, emphasizing its deterrent purposes instead (United States v. Calandra, 414 U.S. 338, (1974), Alderman v. United States, 394 U.S. 165 (1969); Walden v. United States, 347 U.S. 62 (1954). Nevertheless, there is ample evidence, I suggest, that the normative purpose remains a kind of brooding omnipresence that awaits only a proper factual setting to again reassert a controlling place in the judicial mind.

Stone v. Powell, 428 U.S. 465 (1976) makes the point. In holding that Federal habeas corpus was no longer available to review state court decisions regarding the fourth amendment's exclusionary rule, the Court, per Justice Powell, thought that such review was unlikely to enhance the rule's principal purpose, deterrence. This argument, however, is carefully prefaced by the observation that the "imperative of judicial integrity" remained an important justification for the rule and one with which the courts "must ever be concerned". The Justice also noted with approval Judge Friendly's suggestion that the rule be confined to cases of a "flagrant" disregard of fourth amendment values. He then emphasized that, in the case before him, the police had obviously made a good-faith effort to comply with that amendment, while two State courts and one Federal court had approved the police conduct before a Federal appellate court had reversed. In such circumstances, a concern for judicial

integrity was obviously misplaced, as the Justice points out. And in such circumstances, there is no indication whatsoever that police intrusions of the sort encountered in Rochin or in Mapp v. Ohio or even Weeks or Wolf would encounter a complacent Court. If this is so, then Stone v. Powell lends to both Toscanino and Judge Friendly's Birdsell note a rather contemporary sound. Surely we have come too far, even in the limited matter of foreign arrests and illegal foreign seizures, to rely entirely upon the broad statement in Wentz v. United States, 244 F.2d 172 (9th Cir. 1957), if it is shown that the foreign officials acted at the behest of American agents and in a manner offensive to our basic ideas of decency.*

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* Precisely how far we have come from the simplicity of Wentz is illustrated by the difficulties experienced by the Second Circuit in cases following Toscanino. In Lujan v. Genglar, 510 F.2d 62 (2d Cir. 1975) where the arrest was by foreign officials in the pay of American agents, the court refused to follow Toscanino only because those officials had not acted with the brutality alleged in the latter case. Shortly thereafter the Supreme Court appeared to breath new life into the Ker-Frisbie rule when it cited those cases as authority for holding that an illegal pre-trial detention would not void a subsequent valid conviction (Gerstein v. Pugh 420 U.S. 103 (1975). Subsequent to Gerstein the Second Circuit considered United States v. Lira, 515 F.2d 68 (2d Cir. 1975), where it was alleged that foreign officials after being bribed by American agents kidnapped the defendant and treated him with a brutality comparable to that alleged in Toscanino. Writing for two of the three members of the panel, Judge Mansfield simply refused to extend Toscanino to an arrest by foreign officials without any discussion whatsoever of the broader Toscanino principles. Gerstein had obviously had an effect, although it may be seriously questioned whether because of its wholly distinguishable context, this represented a necessary or even appropriate response to that decision. Nevertheless, the case was obviously a close one for the court. Concurring separately Judge Oaks thought the case fell "just barely" on the Lujan, rather than Toscanino, side of the line. It might have been different had the abduction been from an objecting country or in violation of a treaty, as was alleged in Toscanino. Then the Judge notes that perhaps we were in danger of forgetting Justice Brandies' "ringing phrases" in Olmstead. The time might come, he suggests, when the court should step in to preserve "respect for law" even at the expense of efforts at "stopping the international drug traffic."

Of course, if, in the foreign arrest and seizure cases just reviewed, the courts exhibited a reluctance to set aside the conviction, they did so principally because a person fairly adjudged guilty would otherwise have gone free. Carried too far the failure to punish such guilt can undermine the administration of justice no less than too great a tolerance for pre-trial abuses. Under the Mexican and Canadian treaties, however, no trial according to American constitutional standards will intervene between the foreign conviction and the American imprisonment. While, in this setting, there may still be a reluctance to free those whose guilt seems reasonably assured, concern for the integrity of our institutions must surely become more compelling if the foreign proceedings violated our basic standards of fairness and decency. Toscanino and Judge Friendly's Birdsell note, may, in other words, take on an immediacy in the prisoners' case exceeding anything derived from the context in which they were uttered. And certainly our constitutional values will be fully engaged if the lack of effective counsel or the use of a coerced confession casts doubts upon the prisoner's guilt. The cases make the point.

Acting under the mandate of the Second Circuit (United States ex rel. Dennis v. Murphy, 265 F.2d 57 (2d Cir. 1959), the Federal District courts in New York have at least twice struck-down State use of Canadian convictions under the New York multiple-offender statute. In each instance the Federal court, after carefully scrutinizing the record of the Canadian proceedings, concluded that, because the accused's lack of counsel cast doubt on the finding of guilt, the State courts attempted use of those proceedings was a violation of "due process" (United States ex

rel. Dennis v. Murphy, 184 F.Supp. 384 (N.D.N.Y., 1959); United States ex rel. Foreman v. Fay, 184 F.Supp. 535 (S.D.N.Y., 1960)).*

In Cooley v. Weinberger, 518 F.2d 1151 (10th Cir., 1975) a widow had been denied survivors' benefits under the Social Security Act because she had been convicted in Iran of murdering her husband. She then attacked that denial contending that in a number of particulars the deprivation of "due process" in the Iranian proceedings was so shocking that, notwithstanding the statute, the Iranian conviction should not be recognized by the United States. Apparently accepting her premise, the Tenth Circuit nevertheless denied her claim. The court held that it was required to sustain the findings of the administrative law judge before whom she had fully aired her indictments of the Iranian system, and who had found against her on each of the charges, concluding that the record "revealed a criminal process in Iran similar to that in the United States".

Here it is worth observing that some of the prisoners' cases may engage the sixth amendment's guaranty of a right to speedy trial. Because that right serves a variety of interests (Barker v. Wingo, 407 U.S. 514 (1972), United States v. Ewell, 383 U.S. 116 (1960)) the American courts' response to the problem will doubtless differ depending upon

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* It is true that these multiple-offender cases are distinguishable from the prisoner exchange situation. There New York sought to impose additional punishment on those already convicted of violating its laws. Under the Canadian and Mexican treaties, the United States seeks only to ameliorate the conditions under which the prisoners must serve out their foreign sentences. Nevertheless, in the latter case, the United States is continuing to deprive the prisoners of their liberties. Its purpose in doing so is relevant only as a possible justification for the deprivation, not for denying that the deprivation, if predicated upon a foreign conviction without "due process" of law, raises a threshold constitutional claim.

which constitutionally protected interests of the individual prisoner were imperiled by a delay in his foreign trial. If the delay only affected his interest in physical freedom (i.e. avoiding "undue and oppressive incarceration prior to trial," United States v. Ewell, supra) or his interest in minimizing the anxieties accompanying public accusation, his continued incarceration in this country would not appear to constitute any further deprivation of those interests. If the delay imperiled his ability to defend himself and thereby cast doubt upon his guilt, his imprisonment in the United States would indeed seem to be a matter of constitutional concern.

Finally, I turn briefly to cases involving extradition treaties and our Status of Forces Agreements (SOFA). Unfortunately, the Supreme Court has not been very forthcoming on the question of whether the transfer of an accused under such treaties or agreements may be constitutionally proscribed if the foreign system is unlikely to accord him the rudiments of a fair trial. The leading case on extradition is ambiguous, (Neely v. Henkel, 180 U.S. 109 (1900).* The only decision, Wilson v. Girard, 354 U.S. 252 (1957), dealing with a Status of Forces Agreement is a short per-curiam opinion which offers little guidance on the point.

* There the court dealt not with a treaty but a special statute authorizing extradition to foreign territories under the control of the United States, if a judge first determined that the relator would receive "a fair and impartial trial" in the territory to which he was being sent. While this did not necessitate, the Court thought, a foreign trial according to the "mode prescribed by this country," it was deemed adequate by Congress to meet "the ends of justice" and the Court refused to say that Congress had "abused its directives." At the same time there is broad language in the opinion to the effect that a United States citizen who commits a crime abroad, can not complain if held to the laws and modes of trial in that country.

On the matter of extradition, the Second Circuit has announced that ordinarily it would not inquire into the procedures that await the relator upon extradition. Nevertheless, it "would abandon this principle upon a sufficient showing that the relator would be subject to procedures or punishment . . . antipathetic to [the court's] . . . sense of decency." (Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960); Bloomfield v. Genglar, 507 F.2d 925 (2d Cir. 1974). And the fact appears to be that, under the SOFA arrangements, the fair trial guarantees, included at the Senate's insistence, have at once forestalled a potentially troublesome problem and enabled the lower Federal courts to dispose of most complaints by reference to those requirements. (Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971); United States ex rel Stone v. Robinson, 431 F.2d 548 (3rd Cir. 1970); May v. Wilson 153 F.Supp. 688 (D.D.C. 1956); but see Smallwood v. Clifford, 286 F.Supp. 97 (D.D.C. 1968), judg. vacated as moot (D.C. Cir. May 14, 1969)).

Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), is an exception that deserves attention. There the court upheld the Army's effort to return to Germany for imprisonment two service-men who had been tried and convicted by a German court allegedly in violation of both constitutional and SOFA guarantees. The court read Neely v. Henkel supra, as authority for the conclusion that the constitution did not operate to impair exercise by the United States of its obligations under the NATO-SOFA agreement. As preface to this conclusion, however, the court noted that the question was "intricately interwoven with contemporaneous

policies in regard to the conduct of foreign affairs," which behooved it to move with "circumspection." (Holmes v. Laird, supra at page 1215). It also thought that the question of whether Germany had violated the SOFA guarantees was foreclosed to the court once the Executive had decided to surrender the servicemen.

Putting to one side questions such as the court's reading of Neely and whether, as applied to the prisoner exchange situation, Reid v. Covert, 354 U.S. 1 (1957) might not be more apposite than Neely, the decision is plainly important. The court's apparent, although somewhat ambiguous, refusal to invoke the "political question" doctrine seems entirely correct. Its reflections upon the foreign policy implications of the case and its posture of circumspection are not only sound, but introduce what remains the critical point in dealing with the Mexican and Canadian treaties. The central difficulty with the decision is methodological; the failure to judge with care whether the alleged denial of the servicemen's rights offended our basic constitutional values, and how seriously the servicemen's return to Germany would constitute a betrayal of those values and then to balance these elements off against the policy consequences likely to attend the refusal of such a return. In this respect, the court might well have followed more closely the example of the Supreme Court in Reid v. Covert, supra*

* In Reid v. Covert the plurality struck down in rather categorical terms a provision in the agreement with Great Britain and the accompanying legislation calling for the court martial of military dependents. It was thought to violate the latter's right to a jury trial. Nevertheless the majority of the Court, including the dissent, engaged inter alia in a rather thorough weighing of the values and interests undergirding that right against the Government's claim, footed upon the power of Congress to regulate the armed forces and the necessary

and other cases with significant foreign policy and national security implications (e.g. New York Times Co. v. United States 403 U.S. 713 (1971); Toth v. Quarles, 350 U.S. 11 (1955); Duncan v. Kahanamoku, 327 U.S. 304 (1946).

Nevertheless, the very defects in Holmes v. Laird underscore how seriously the courts are likely to view the case against any one prisoner's constitutional claim; the danger of prejudicing the return of all remaining prisoners and the larger diplomatic consequences of breaching the treaty and of having American courts sit in judgment on foreign sentences. Unfortunately, apart from a general sense of the judicial disposition, the cases afford little that can be relied upon in predicting the outcome. Decisions such as Johnson v. Eisentragger 339 U.S. 763 (1950) do illustrate the judicial reluctance to foreclose the political departments from devices which the latter otherwise deem important to the conduct of foreign policy. And much in this matter evokes the rational underpinnings of the "Act of State" doctrine (Sabbatino v. Banco Nacional de Cuba, 376 U.S. 394 (1964)), although that doctrine is inapplicable. One can envision, in other words, some very difficult cases whose results are far from certain.

In light of this, some points by way of summary should be made.

It is likely that the cases posing the greatest difficulty are those in

*(f.note) (cont'd) and proper clause, that the provision was essential to the maintenance of military discipline abroad. Following this mode and concurring in the result, both Justices Frankfurter and Harlan suggested that the issue was one of "judgment not compulsion", analogous to the "issue of what process is 'due' a defendant in the particular circumstances of a particular case". (354 U.S. at page 75).

which the procedural defects of the foreign trial leave an American court in doubt about the prisoner's guilt, especially if the resulting sentence is a long one. Lack of effective counsel, use of coerced confessions and the absence of a speedy trial are the principle problem areas. Defects in the arrest or the use of illegally obtained, but reliable evidence, are not likely to engender much judicial sympathy, unless accompanied by proof of American complicity and extraordinary brutality. Defects which reflect procedural requirements unique to Anglo-American law (e.g. trial by jury and proof of guilt beyond a reasonable doubt In re Winship, 397 U.S. 358 (1970)) are likewise not likely to raise a cognizable constitutional claim. In this complex and sensitive matter, it would be remarkable if the courts were to view either requirement as impugning the reliability of the foreign conviction. And surely they are unlikely to suggest that virtually all civil law systems are so fundamentally unfair that the execution of their judgments would threaten the integrity of our institutions (Neely v. Henkel, 180 U.S. 1900, Cooley v. Weinberger, 518 F.2d 1151 (10th Cir. 1975); Gallina v. Fraser, 278 F.2d 77 (2d. Cir. 1960)). In sum, the intensity of the constitutional problem will vary greatly among the cases.

This, of course, raises the question of the number of serious constitutional claims likely to be advanced. Unfortunately, it is difficult for the Executive, the Senate or the courts to know until the record in all the cases is available. Nevertheless, some inquiries along this line by the Senate Committee could be useful and possibly of great value to the courts in discerning the depth of their quandry.

Foreclosure of Collateral Attack

Turning next to the apparent intent of the treaties, interpretive problems aside, to foreclose the returned prisoners from collaterally challenging their foreign sentences, one is constrained to begin with Art. I § 9 of the constitution:

> "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."

Without engaging the subtleties of the matter, let me just assume the hard case; namely, that there exists a constitutional requirement that some court have habeas jurisdiction over federal prisoners, so long as the required conditions for suspension are unmet. But this scarcely answers our problem. For many of the prisoners, removal to the United States will be of very substantial benefit. Since, therefore, the "privilege" of the writ may be waived by individuals in a goodly number of circumstances, the question becomes whether the government, as a condition of making available a benefit which the citizen is free to accept or reject, may require that he forego the "privilege". This question, in turn, divides into two parts; first, is the condition unconstitutional and secondly, if it is, might that not be cured by treating the prisoner's consent as a waiver of the "privilege", such that having accepted the benefit he may not revoke the condition.

In seeking answers to the first question, executive pardons and the closely related matter of parole immediately come to mind. The long established power of the President to commute a death sentence into a

lesser penalty is nothing other than the conferral of the benefit of a pardon on condition that the prisoner serve the alternative sentence specified (Schick v. Reed, 419 U.S. 256 (1974); Ex Parte Wells, 59 U.S. (18 How.) 307 (1855)). Parole, which had its origins in the pardoning power of the executive, likewise constitutes the conferral of a benefit upon a prisoner that is almost invariably attended by conditions. Yet, neither benefit can be extended upon conditions that may "otherwise offend the Constitution" (Schick v. Reed, supra at 266).

In spite of this broad proscription, the lower courts have held in the case of both pardon and parole that not every condition that may in some way trench upon the full and free exercise of a constitutional right is invalid.* While it is not always clear whether these decisions rest upon the absence of a right or upon the reasonableness of the infringement, they all depend heavily upon judging the governmental interest served by the condition through the unique perspective of the prisoner or parolee's situation; he is not quite like any other citizen but is also not without rights. (Berrigan v. Sigler, supra at 522).

*In Hoffa v. Saxbe, 378 F. Supp. 1221 (D.D.C. 1974) a pardon on condition that Mr. Hoffa not participate in any union management until 1980 was upheld against the alleged infringement of his first amendment rights of association; in Bricker v. Michigan Parole Board, 405 F. Supp. 1340 (E.D. Mich. 1975) a requirement that the parolee not work for specified firms was also upheld against first amendment attack; but see, Hyland v. Procunier, 311 F. Supp. 749 (N.D. Calif. 1970) where the requirement of parole officer approval before the parolee could give any public speech was held to be an invalid prior restraint on first amendment rights; in Berrigan v. Sigler, 499 F.2d 514 (D.C. Cir. 1974) the parole board's prohibition on travel to Hanoi was upheld against an alleged infringement of the parolee's constitutional right to travel.

Whatever may be the merits of this approach, it is far from certain that one can draw parallels between these cases and a condition that a prisoner forego the right, by habeas corpus, to challenge the validity of the very conviction or sentence with regard to which the pardon or parole relates. Indeed, there is in Schick v. Reed, 419 U.S. 256 (1974), an inconclusive, but nevertheless notable, warning that any benefit conditioned upon the total relinquishment of the "privilege" of habeas corpus may encounter a far more categorical objection than any of the partial infringements with which the courts have dealt thus far.*

Yet, in their emphasis on a careful contextual analysis the cases do suggest the need to ask whether we are dealing with a condition imposed by the United States. It is true that American governmental interests would probably be served by the condition, and that the Government readily agreed to it. It is also true that the government's acquiescence in the condition probably suffices to raise the constitutional issue even if it represented the price exacted by a foreign government for the benefit sought to be conferred upon the prisoners. But, if without the condition the treaty could not have been secured, then a decision invalidating that condition does not rest upon the rule which prohibits attaching unconstitutional conditions to the grant of a

* In Schick Chief Justice Burger employs as an example to make the point that the pre-revolutionary English practice had changed as needed "to avoid [the] abuse and misuse" of the power, the fact that Parliament had prohibited the issuance of pardons for anyone who transported a prisoner overseas to evade the Habeas Corpus Act. This prohibition, the Chief Justice explains, was imposed "because to allow such pardons would drain the Great Writ of its vitality." (419 U.S. at 260.)

governmental benefit. Rather, such a decision fashions a new rule forbidding the United States government from aiding its citizens abroad if the price exacted by the foreign power is a relinquishment of the citizen's rights. The implied paralysis of governmental power which such a rule entails makes it very suspect indeed if the citizen is given the option of accepting or rejecting the benefit.

Seen from this perspective, the weighing of interests which led the Court in Reid v. Covert, 354 U.S. 1 (1954), to invalidate an international agreement which infringed private constitutional rights, is instructive only by way of contrast. Even assuming that Great Britain had insisted upon the offending provision in that case, the American acquiescence was dictated by other governmental interests that placed the government at odds with the individual whose rights were being infringed. This, in turn, engaged the whole protective thrust of the Bill of Rights. In the Mexican and Canadian treaties, while removal of the prisoners may well serve wider governmental interests, it also serves the interests of the individuals whose rights are being infringed. In this sense the government and the individual are not at odds; both seek the same benefit from a foreign government that has exacted a certain price for its cooperation. If, in this situation, the returned prisoner is at odds with anyone, he is at odds with all the prisoners similarly situated who still remain in a foreign jail. While the court still has the opportunity to vindicate his rights, the case is somehow different if it means revoking the condition which alone gave rise to that opportunity and such revocation would prejudice all the other prisoners who remain abroad. While

possibly this state of affairs has been replicated somewhere in the long annals of American diplomacy, I know of no parallel that has reached the courts although the waiver cases discussed below are instructive.

Obviously this line of argument raises a rather basic factual inquiry. It is easy to assume that the continued sentence provision and the clauses forestalling collateral attack were essential to obtaining Canadian and Mexican agreement. Nevertheless, there is much in the hearings before the House Committee to suggest that the continued sentence provision may have been as much a matter of American design as foreign intransigence. Moreover, there is always the possibility that the foreign governments were less disturbed by the possibility of American judicial scrutiny of their sentences than the State Department. These impressions should, as I assume they can, be dispelled, and the matter of foreign insistence made clear.

Finally, the question arises whether any constitutional infirmity in the collateral attack clauses may be cured by treating the prisoners' consent as a waiver of their rights. In summary, it is my view that the prisoners' consent cannot be fitted within the basic concept of a waiver as our law understands it. If the condition is unconstitutional, the consent cannot save it. On the other hand, the fact a prisoner may accept or reject the benefits of the treaty upon the stated condition is an important factor in determining the constitutionality of that condition.

There are a number of situations in which a criminal defendant can waive the right to Federal habeas corpus review of any alleged constitutional defect in his conviction or sentence. It may occur if, in search

of strategic benefits, he deliberately "by-passes" orderly state court procedures. Fay v. Noia, 372 U.S. 391 (1963); Henry v. Mississippi, 379 U.S. 443 (1965); but see subsequent proceedings Henry v. Williams, 299 F. Supp. 36 (N.D. Miss., 1969)). A valid guilty plea may also, under proper circumstances,cut off a defendant's right to Federal habeas review (Tollett v. Henderson, 411 U.S. 258, 267 (1973); Brady v. United States, 379 U.S. 742 (1970); McMann v. Richardson 397 U.S. 759 (1970), but see Lefkowitz v. Newsome, 420 U.S.283 (1975); Blackledge v. Perry, 417 U.S. 21 (1974); Robinson v. Neil, 409 U.S. 505 (1973)).

In all these situations, however, a valid waiver occurs only if the decision to "by-pass" state procedures or plead guilty represents "an intentional relinquishment or abandonment of a known right or privilege" and was made "voluntarily after proper advice and with full understanding of the consequences." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Thus, two questions occur: can the prisoners' consent fit this conception of a waiver, and can it be viewed as voluntary. Since the cases dealing with the latter issue are helpful in answering the first, I turn to the problem of voluntariness.

In Fay v. Noia, 372 U.S. 391 (1963), the defendant failed to appeal his allegedly unconstitutional state conviction, fearing that upon a successful appeal he would be retried and possibly sentenced to death In that context, facing what the Court called a "grisly choice", his decision was not thought to constitute a tactical litigating choice which would otherwise result in a waiver of Federal habeas review. Broadly

the point of the case is clear; where a criminal defendant seeks a benefit (i.e. avoidance of a re-trial) which results in his waiving a constitutional right (i.e. foregoing habeas review by failing to appeal), he will be held to that choice unless the potential consequences of preserving the constitutional right are so enormous -- so "grisly" -- as to practically foreclose any choice at all. The idea plainly speaks to the voluntariness of the choice.

In United States v. Jackson, 390 U.S. 570 (1968), the Court held that a provision in the Federal Kidnapping Act under which only the jury could impose the death penalty, had an impermissible "chilling" effect on the defendant's "Fifth Amendment right not to plead guilty" and his "Sixth Amendment right to demand a jury trial." One can view this holding in two quite distinctive ways. It may be directed only at the legislature and designed solely to protect the integrity of the fifth and sixth amendments. It may, on the other hand, be read as generally applicable to the processes of criminal justice, so that if one risks death by exercising the rights guaranteed by those amendments, any waiver of those rights is not, in practical terms, the exercise of a choice but the result of a not too subtle coercion that deprives the decision of its essential voluntariness.

This latter reading was tested in Brady v. United States, 397 U.S. 742 (1970),where the defendant first pleaded not guilty but then changed his plea upon learning that his co-conspirator had also pleaded guilty and would testify against him. After the Jackson decision was handed down, Brady challenged his conviction alleging that upon learning

of his co-conspirator's plea the death penalty provision of the Act was the decisive consideration that caused him to plead guilty thereby waiving his constitutional right to a trial. The Act, in short, had precisely the "chilling effect", or as he put it "coercive effect", that the Court in Jackson had predicted. The argument was rejected by the Court which observed that, in Jackson, the reference to a "chilling effect" had been distinguished from a "coercive effect". The existence of the latter was, the Court said, to be gleaned from all the circumstances of the case. In Brady's situation the co-conspirator's plea and the attendant strengthening of the prosecutor's case was viewed as the overriding inducement for the plea. That, in turn, was the kind of inducement that normally and properly undergirds such pleas.

Superficially, some of the Mexican and Canadian prisoners may be thought to face so "grisly" an alternative that the benefits of removal to the United States work as a subtle form of coercion rendering the consequent relinquishment of their rights something less than voluntary. If viewed in this way, Brady may be distinguishable. The only reason for the prisoners' relinquishment of their rights is the treaty requirement that they do so. Moreover, Brady's rejection of the implications of Jackson was precipitated largely by the doubts those implications would have cast on all plea bargaining. This is a far cry from the prisoners' case.

This line of argument, however, fails to take account of a far more important factor. In all the cases discussed a genuine choice faced the criminal defendant; to stand on his constitutional rights or

relinquish those rights and gain some other benefit (e.g. tactical litigating advantage; avoidance of the expense and public notoriety of a trial). Waiver clearly implies choice, and voluntariness becomes legally significant only as a device to secure the reality of the choice. In the prisoners' case, however, there is no possibility that, by foregoing the benefits offered in return for relinquishing their rights, they will secure those rights. If they refuse to return to the United States because they do not want to forego their rights, they must remain in the foreign jail wholly bereft of any rights upon which to insist. Thus, the offer of benefits on condition that they relinquish their rights cannot be said to have induced or coerced that relinquishment since they had nothing to relinquish; no rights to be secured by rejecting the benefits. Or stated otherwise, by consenting to be removed to the United States upon the stated condition the prisoners waive no rights, since by withholding that consent they secure no rights. All that can be said is that, by their "consent" to removal, the prisoners prefer, given the conditions offered, to stay in an American rather than foreign jail. That the latter may be a grisly alternative only adds to the urgency of permitting the government to secure their removal. That they are asked to consent to the removal only serves to protect those that may prefer to stay abroad.

Thus, the question remains; is the condition unconstitutional. In this context, Jackson is broadly suggestive of the idea that conditions imposed upon the grant of a governmental benefit should be judged by whether they might impair the integrity of particular

constitutional values; a notion comparable to Parliament's fear, as Chief Justice Burger put it, of "draining the Great Writ of its vitality." In keeping with this idea, I find it somewhat difficult to say that the government may not aid its citizens abroad because the foreign government has demanded that they relinquish their constitutional rights, when the only effect of that prohibition is to leave the citizen bereft of all rights and possibly to suffer as well. All that must be secured to the citizen, in such circumstances, is the right to accept or reject the assistance. On this basis, I suggest that these clauses in the treaties can and possibly may be sustained.

Some Questions of Policy

Even if the clauses foreclosing collateral attack are ultimately upheld, the continued imprisonment of some, perhaps many, of the prisoners will remain predicated upon suspected violations of their fundamental rights, a suspicion they have not had an opportunity to test in an American court of law. Yet, if these clauses are upheld, the Executive's otherwise commendable desire to insulate the problem of Americans who get into legal troubles abroad from the larger concerns of our diplomacy, will be a strong incentive to negotiate comparable arrangements with other countries. It is this possibility which causes me some concern.

I worry about the prospect, over time, of increasing numbers of Americans being held in American prisons under these doubtful circumstances without having had their "day in court". Liberal grants of parole will alleviate, but not eliminate, the problem.

Such a situation will not, I suggest, enhance our record on human

rights. In time, the bitterness of the prisoners, the travesty of justice that their imprisonment represents and the suspicion that they remain in prison only because the American government does not wish to offend a foreign power, may come to dominate our own and the world's perception of this otherwise humane enterprise.

Also the treaties, it must be remembered, do not aid an imprisoned American until he has been tried and convicted by a foreign court. I worry, therefore, lest the availability of the treaty as an ameliorative mechanism should the American be convicted, will be used by foreign governments to resist pressures brought to secure to such a citizen a fair trial and fair treatment before trial.

While possibly this kind of treaty represents a sensible arrangement for the better administration of the penal laws of two very similar legal systems (e.g. United States and Canada), extended to countries whose practices differ widely from our own it may intrude upon certain realities that we cannot ignore. It may tend to enhance the already widespread, but quite mistaken, idea among Americans that when they travel abroad they occupy a specially protected position that relieves them from having to respect the laws and practices of the countries through which they are passing. To encourage such ideas is cruel because it is false, has serious consequences and does not serve the national interest. I also worry that because of the linkage that these treaties inevitably forge between our own and foreign systems of criminal justice, we will be compelled to concern ourselves with the quality of those systems at times and in ways that might not comport with what is effective or with what the totality of our interests may require.

Mr. SWAN. It would also, I might comment, have the effect of prejudicing, I suppose, if not foreclosing the making of treaties of this kind with other countries, if the experience with the treaties was that the courts were going to get into the game.

Senator CASE. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. I am sorry that Senator Javits is tied up on the floor of the Senate and cannot be here. He is particularly interested in the constitutional questions.

QUESTIONS FOR THE RECORD

Would you gentlemen be willing to answer any written questions Senator Javits or other Senators may submit to you for the record?

Mr. SWAN. I would be delighted to do so.

Mr. WECHSLER. Of course, Senator.

The CHAIRMAN. Thank you very much. Senator Javits will no doubt want to propound some questions to you because, as you know, he is very much interested in this particular problem.

HARVARD LAW REVIEW REPRINT

Senator CASE. I gather that this Harvard Law Review reprint does not disagree with either of you and that neither of you disagrees with it. It comes out on the same side of the issue on the grounds that a waiver is competent to take care of the sitaution.

Is that right?

Mr. WECHSLER. It reaches the same result by a very different road, I would say.

Senator CASE. I agree.

CONFINEMENT IN U.S. PRISON THROUGH UNCONSTITUTIONAL METHODS

The CHAIRMAN. We have a prepared question which we would like to ask you now.

The CHAIRMAN. I see that the two of you are in agreement on that principle.

Is that not right?

Mr. WECHSLER. [Nods affirmatively.]

Mr. SWAN. Yes, sir.

The CHAIRMAN. Senator Case, do you have any questions?

Senator CASE. Thank you, Mr. Chairman, but I think I have made the only intervention that I wished to make here.

I cannot dispute either of your conclusions. Perhaps Professor Wechsler got there a little more quickly than you, Professor Swan, but you got there, too. So I think everything is all right and we are in agreement.

Thank you very much. I do so appreciate the chance to hear from you.

Mr. WECHSLER. I kept my suffering out of my statement. I only put in the conclusions that I arrived at.

EFFECT OF ALLOWING PRISONER TO ATTACK CONVICTION

Senator CASE. This does raise a lot of philosophical as well as legal questions. I cannot come down on this in the end in any way except as you did. Permitting individuals ordinary access to our courts would result in destroying the process if one prisoner were allowed to attack his conviction on grounds that it is valid there, but not here. That would end the treaty and destroy its benefits for others.

Mr. Joel Gora, acting legal director of the American Civil Liberties Union, is quoted in the New York Times of April 30 as saying the principal question on the treaties was whether "someone can be confined in an American prison, having gotten there through methods that violate the American Constitution."

How would you respond to this question?

Mr. WECHSLER. I would say that it begs the question, of course. It begs it entirely. He is assuming that the due process clause, or the sixth amendment, or other things in the fifth amendment apply to the Mexican proceedings, and because there might not have been an indictment or the right to counsel might have been met in a different way, this was an unconstitutional conviction. The American Civil Liberties Union will simply have to recognize, along with the rest of us, that the United States of America, God bless it, is not the entire world and that there are other nations in the world whose autonomy and jurisdiction have equal status in international affairs.

I could make an even better case for the objection than he did. I think that is a foolish way to put it. One might say, as a colleague did say, that the question here is whether the U.S. Government is, in a sense, requiring complicity in improprieties occurring abroad if it undertakes to execute sentences that were imposed on the individuals who were the victims of those improprieties. That is one way to put it and it would have been tempting in the extradition cases for the courts to say no, we have to be satisfied before we send an American citizen abroad for trial, that the country that has demanded him and made a showing of probable cause respects the right to indictment and has a jury trial, maybe even a jury trial of 12 jurors, in the days when that was thought to be a constitutional requirement here, which is not very long ago. But the courts wisely refrained from doing that because they recognized that we, too, have to live in the world and the world is an international community, and therefore accommodations must be made. They must be made in terms of the spirit, the purpose, and the history, and the assumptions of the framers as they were given to us and as our statesmen and courts have dealt with them for over 200 years. I think we have done a pretty good job of doing that in this country. I think this would be approached in the same way.

The CHAIRMAN. Mr. Swan, did you have something to add?

Mr. SWAN. Yes, Mr. Chairman.

I have come to the same conclusion.

It seems to me that all that that statement does is to look at one piece of the problem. It is incomplete. I suppose we could say, as I tried to say, that yes, there is an American prison and an American court and we are doing something to the prisoner. But there is not only

the larger accommodations in the international community which Professor Wechsler has pointed out, but the whole context of the matter. These are not categorical things. The whole context of the matter is, if you were to release these prisoners, the first prisoner on some such theory, you will have, in fact, done damage and injury to a much larger group of equally deprived people when you begin to look at the thing in its larger context.

I have developed in my statement a little bit some of the questions which Professor Wechsler was referring to. We do have problems of abiding by our treaty. We do have problems of properly recognizing and accommodating to other systems. It seems to me that in that total context, the mere literal finding that he is being imprisoned by an American court is only the beginning of inquiry, not the end.

Senator CASE. You have always come out with the right answer if you put it in this major premise before you state your syllogism.

Mr. WECHSLER. That makes it a little too easy, Senator Case.

DEALING WITH UNJUST CONFINEMENT OR RESTRAINT

I think, also, that the committee has this well in mind, but it should be said for the record—indeed, it probably already has been. We have a long tradition in the matter of the denial of justice abroad to American citizens. We are witnessing an event of exactly that nature now, in which we are not exactly being silent, in the interrogration of a newspaper man in Moscow. It may lead to prosecution. But what has the tradition been? It has been a tradition of diplomatic intervention, insisting that denial of justice is a violation of international law. There are some fairly firm concepts on that matter in international law, as well as in the covenant which we have not ratified, but which many nations have, including Canada.

Congress, more than a century ago, directed the President by statute on claims of unjust confinement or restraint of an American citizen abroad to—and I think I am quoting the statutory language here—use such means, not amounting to acts of war, as he may think necessary and proper to effectuate the release of the citizen wrongfully detained; and there is the further obligation to report to Congress the facts of the matter.

That has been the mandate under which we have operated since, I think, 1968, when that statute was passed. Probably the practice had even antedated the statute.

While I am no expert on the matter, I have information in the books which indicates that on the whole the Department of State has done a pretty good job in that area. It does seem to me significant that these cases that came up on proposed transfers might provide an opportunity for that intervention if it had not taken place, if it is the kind of case that Professor Swan is supposing, where there was a real denial or justice.

The CHAIRMAN. I would like to ask that the article, to which I referred, in the New York Times quoting the American Civil Liberties Union, be included in the record of this hearing at this point.

[The information referred to follows:]

[From the New York Times, Apr. 30, 1977]

LEGAL ISSUES POSING FURTHER DELAYS IN MEXICO-U.S. PRISONERS' TREATY

(By John M. Crewdson)

WASHINGTON, April 29.—Potential constitutional difficulties with a five-month-old treaty that provides for an exchange of prisoners between the United States and Mexico are threatening to delay further its approval by the Senate and to cause a massive legal tangle in American courts if the treaty ever takes effect.

Justice Department lawyers, who have toiled since late last year to draft legislation needed to implement the treaty's provisions, now say they believe they have resolved the thorniest of the questions raised by the pact, which would deny returning Americans a chance to challenge the legality of their Mexican convictions in the United States courts.

But the department's legal draftsmanship will still have to be approved by the House and Senate Judiciary Committees, and some civil rights lawyers believe that further modification of the treaty itself may be required by the Senate Foreign Relations Committee before it becomes law.

One Justice Department official said this week that the draft legislation needed only to be approved by Attorney General Griffin B. Bell before being sent to the Congress, where it should arrive within a few days. But a Senate aide retorted that the department had been promising speedy delivery of the legislation "since last January."

LONG, COMPLICATED PROCESS

The legislative process, which is likely to include extensive hearings by at least three committees of Congress, promises to be long and complicated and seems certain to increase the anxiety and frustrations of the 600 or so Americans now languishing in Mexico's prisons and jails.

The treaty was signed by representatives of the two countries last Thanksgiving and ratified by the Mexican legislature a few days later. In February, President Carter called for Senate approval.

But Senate aides say that hearings by the Foreign Relations Committee on the issue alone probably cannot be held before June at the earliest because of the crowded Congressional calendar.

PRISONERS PLAN DEMONSTRATION

Last week, some of the Americans confined in Mexico, most of them young men and women convicted of narcotics charges, announced in an open letter to Mr. Carter that they would be begin on May 10 to demonstrate their "frustration" over Senate inaction.

Without specifying what steps they plan to take, the prisoners declared, "We will once again risk [our] health in order that we might at least bring before the American public the fact of its Government's irresponsibility and culpability in dealing with [our] problem."

Although the treaty calls for Americans who are returned to the United States to finish serving their sentences in Federal prisons, those who have served more than a third of the allotted time will be eligible under Federal guidelines for parole.

John Hill, the Attorney General of Texas, said last week that the draft legislation had become ensnarled within the Federal Office of Management and Budget. But Mr. Hill was quoted in San Antonio yesterday as saying that he had been assured by officials in Washington that it was possible for the entire package, treaty, legislation and all, to clear the Congress by September.

In interviews with reporters and in letters sent to friends and families in the United States, many of the American prisoners have alleged that they were arrested and searched in Mexico in a manner that would have violated American constitutional standards, or that they were tortured or otherwise coerced into signing confessions by the Mexican police.

The principal question, according to Joel Gora, the acting legal director for the American Civil Liberties Union, is whether "someone can be confined in an American prison, having gotten there through methods that violate the American Constitution."

"Under the American legal system, a defendant alleging that such rights have

been violated can apply to the courts for a writ of habeas corpus, something that the returning Americans would seem to be denied under the prisoner exchange treaty," Mr. Gora said.

In addition, he said, there is also a question of whether an American convicted and jailed lawfully in Mexico can be confined in an American prison when he or she has not been charged with any violation of the United States law.

VOLUNTARY SUSPENSION OF RIGHTS

Asked whether he believed that such thorny questions had been resolved by the draft legislation, a Justice Department official said that "the guy doesn't have to come back if he doesn't want to," and added that by returning to the United States to complete the service of a sentence an American would, in effect, be agreeing to suspend his constitutional right to raise questions of habeas corpus.

Although these issues are sure to be thrashed out in detail in Congressional hearings once they begin, it is too early to tell whether the exchange agreement will also meet with moral opposition from within the Congress or without.

The return of the Americans to the United States will depend in each case on the consent of the Mexican and American Governments as well as the individuals involved. There is no reason to believe that the Mexican Government which has softened its attitudes toward American drug offenders in recent months, will deny permission to any of them, and an American official said it had never "been contemplated that we would turn anybody down."

The treaty also provides for the return to Mexico of about 1,200 Mexican nationals now incarcerated in this country. For those serving time in state-run prisons, their release will also require the consent of state authorities. And under the terms of the treaty, it would be impossible altogether if they have been handed indeterminate sentences, a relatively common feature of American law that is unknown in Mexico.

The CHAIRMAN. Thank you very much, gentlemen.

Senator CASE. Will you be around for the rest of the morning, or are you going to be on your way?

Mr. WECHSLER. At the service of the committee, I would be glad to stay. When the hearing is over, I shall depart and shall attempt to go back to earning my living.

Senator CASE. I thought you had long since become above such things as that.

[General laughter.]

Mr. WECHSLER. I wish you would tell that to the president of Columbia University. He takes a different view.

[General laughter.]

Senator CASE. Anyone who enjoys so much what he is doing, I would think would prefer to stay.

The CHAIRMAN. We have two more legal witnesses to hear on this matter.

Senator CASE. I wonder if they would come up and sit with the distinguished men who have already presented testimony to the committee.

We have Mr. Petree and Mr. Chertoff. Are you the fellows who wrote the Law Review article? Is it an article, or is it a note?

Mr. PETREE. It is a note.

Senator CASE. It is very nice to have you here.

I wonder if it would be proper for me, as a Columbia Law School man, to suggest that you guys from Harvard are in any way the equivalent of the faculty which has been represented here this morning.

[General laughter.]

Mr. PETREE. We make no argument, sir.

Senator CASE. I would not, either. But it is very good to have you gentlemen here.

We appreciate your coming this morning.

Please proceed with your testimony in any way you see fit.

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STATEMENT OF RICHARD W. PETREE, JR., AND MICHAEL CHERTOFF, "HARVARD LAW REVIEW," HARVARD UNIVERSITY, CAMBRIDGE, MASS.

Mr. PETREE. Thank you.

Mr. Chairman, my name is Richard Petree and with me is Michael Chertoff. We are editors of the "Harvard Law Review," and the author and editor respectively of a note, entitled "Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty," published in volume 90, No. 7 of the "Review."

The note itself deals at length with matters we wish to raise only briefly today, and with the committee's permission, we would submit a copy of the note for inclusion in the record of these hearings.

Senator CASE. That will be included in the hearing record.

Mr. PETREE. The proposed treaty on the transfer of prisoners between the United States and Mexico represents a commendable attempt to alleviate the difficulties which arise when the nationals of one country are imprisoned in another. At least one aspect of the treaty raises serious constitutional questions. however.

ARTICLE VI PROHIBITION AGAINST CHALLENGING SENTENCES

Article VI of the treaty prohibits any American court from entertaining challenges by transferred Americans to the Mexican sentences being served. Because some of these challenges could be based on American constitutional grounds, article VI appears to deprive American courts of the power to hear a category of constitutional claims. Whether the Constitution countenances such a deprivation has been a principal focus of our research.

Broadly speaking, the procedural protections afforded by the Constitution in criminal proceedings are of two types: Those which seek to insure that no citizen is incarcerated on the basis of unreliable or unfair proceedings, and those which seek to deter official invasion of various "privacy" rights by discharging defendants whose convictions have been obtained by the use of improperly gained evidence.

The constitutional concern with the reliability of convictions has as its focus the grounds for imprisonment. The concern with privacy or other human integrity interests, on the other hand, centers on the particular example of offensive official conduct, which is constitutionally condemned whether or not it results in imprisonment; in order to prevent such violations, our courts stand ready to exclude evidence which would otherwise produce a reliable conviction.

It follows from this that when an American is imprisoned in this country, the reliability of the process by which his conviction was obtained is of vital constitutional import. And there is no reason in logic why the constitutional mandate of a reliable trial as the basis for imprisonment should not apply when a detention is predicated on a

foreign, rather than a domestic, proceeding. We therefore conclude that an American transferee who alleges conduct by Mexican authorities that derogates from the reliability of the underlying conviction will state a colorable due process claim.

On the other hand, allegations by transferees of intrusive searches and seizures, or of other conduct which seems mainly to implicate "privacy" without casting in doubt the reliability of the trial should not be grounds for relief in an American court.

Simply put, the Constitution extends no protection for invasions of individual privacy abroad. To the degree that exclusion of improperly gained evidence is justified by its deterrence of police misconduct, there is no reason to suppose that the post-hoc release of transferred prisoners would alter the behavior of Mexican officials. Indeed, the strictures of the fourth amendment are entirely without relevance for the conduct of foreign officials in their own countries.

If transfers would be also to state colorable due process claims related to the unreliability of their convictions, the question arises whether Congress, by implementing article VI of the treaty, may nevertheless bar any American court from entertaining such claims. The doctrine of judicial review has been an accepted part of our constitutional law at least since its forceful enunciation by Chief Justice Marshall in *Marbury* v. *Madison*.

While not explicitly mandated in any specific provision of the Constitution, judicial review is implied both by the structure of the Constitution and by the "supremacy clause." A fair reading of the debates of the Constitutional Convention also suggests that the Framers anticipated that courts would be available to hear constitutional claims. Indeed, by limiting the power of Congress to suspend the privilege of the writ of habeas corpus, the authors of the Constitution expressed a particular desire that the courts be open to those claiming illegal imprisonment.

Although the constitutional notion of habeas corpus may not comprehend an inquiry into the validity of the judgment of a competent court, the Framers' protection of the privilege of the writ indicates at least a strong sense that incarcerated persons should have access to the judicial process.

The requirement of the Constitution is only that some court, Federal or State, be available to hear constitutional claims; yet it is that requirement with which article VI of the treaty collides.

WAIVER AS PRECONDITION TO TRANSFER

The constitutional infirmity thereby created in the treaty can, however, be cured if prior to transfer each prisoner waives any future right to attack in an American court the validity of his Mexican trial.

The constitutionality of the treaty therefore depends on the effective implementation of article IV, paragraph 2, and article V, paragraph 1 of the treaty, which provide for the prisoners' express consent to be given voluntarily and with full knowledge of the consequences thereof as a precondition to their transfer.

In some circumstances, however, conditioning transfer upon a waiver of American collateral attack rights might violate the unconstitutional conditions doctrine, which limits the power of the Government to condition the conferral of a benefit upon the surrender of a citizen's constitutional rights.

While the doctrinal test has not been precisely defined, the courts seem to require that the relinquishment of rights be directly related to the public interest; that the citizen not be required to surrender any more rights than are absolutely necessary to serve the public interest; and that the citizen willingly accept the condition upon which the benefit is predicated.

Thus, a court is likely to strike down any condition that unnecessarily or gratuitously forces the sacrifice of rights.

A waiver by each transferee of his right to attack the Mexican conviction in an American court should satisfy each element of the unconstitutional conditions test. In particular, the public's strong interest in the condition arises from the fact that extensive inquiries by American courts into the conduct of Mexican law enforcement and judicial officers could embarrass the Mexican Government, possibly jeopardizing the continued operation of the transfer program and deterring other nations from entering into similar pacts with the United States.

More generally, the Government might understandably regret the involvement of American courts in inquiries that would implicate sensitive foreign policy issues. In the name of the separation of powers and in the interest of a coherent and effective foreign policy, courts have traditionally shown great deference to the Executive in all matters touching upon foreign affairs.

As a final consideration, it may also be doubted whether extensive examination of foreign proceedings is in any case practicable, in view of the language barrier and the difficulty of obtaining both tangible and testimonial evidence from abroad.

Pretransfer waiver of American judicial review of the foreign conviction will cure the constitutional infirmity of article VI of the treaty, provided that the waiver is intelligent and voluntary. It may be expected, however, that before an American court will give effect to such a waiver, it will closely scrutinize the circumstances surrounding the procurement of that waiver to be sure that those conditions have been met.

IMPLEMENTING LEGISLATION CONCERNING WAIVERS

Legislation implementing the provisions of this treaty is pending in the House of Representatives and it requires that prisoners exercising their option to return under the treaty be provided with counsel and that they be explicitly informed that their transfer will not occasion collateral review of their Mexican sentences in American courts. These elements of the accompanying legislation are critical to the constitutionality of the treaty.

It would be advisable, however, to include in this accompanying legislation a clause authorizing the Attorney General to send a Federal magistrate to Mexico to be present when consents are rendered. While the enabling legislation in its present form provides that a U.S. magistrate or some other American citizen be designated by the Attorney General to verify prior to transfer that waivers are voluntary and fully informed, it is not clear whether this verification is to take place at the time the prisoner gives his consent or at some later time prior to transfer.

The more prudent course would be to validate waivers when they occur. Hopefully, the cooperation of Mexican officials can be secured for this purpose.

For the same reasons that it would be wise to require consents actually to be given before the magistrate, rather than be verified at some later time by the magistrate, it is essential to the validity of the waiver that the prisoner have the benefit of counsel at the time he gives his consent, and not merely, as the present legislation would seem to allow, at a subsequent verification proceeding.

It may also be useful to have the magistrate's proceedings noted in an official transcript or record, which will be available to an American judge seeking later to review the validity of the waiver.

COMMITTEE RECOMMENDATIONS

We believe that if care is taken to satisfy these procedural requirements of a valid waiver of constitutional rights, the committee may recommend the Senate's consent to the prisoner transfer treaty without fear that the treaty runs afoul of the constitutional command that some court be open to hear the constitutional claims of American citizens. Yet, the committee may also wish to recommend that the Senate pass a resolution, or in some other way expressly indicate that the giving of its approval to this treaty is predicated upon the treaty's consent provisions and in no way sanctions what would otherwise be an unconstitutional deprivation of access to judical review.

Such an expression would negate the possibility that article VI of the treaty might later be cited in some other situation as legislative precedent for the denial of judicial review to colorable constitutional claims.

It has been an honor to appear before the committee this morning. We thank the committee for hearing us. We would welcome the opportunity to answer any questions which the committee may have.

[The note reprinted from the Harvard Law Review submitted by Messrs. Petree and Chertoff, follows:]

The following pages (139-167) contain material protected by the Copyright Act of 1976 (17 U.S.C.): "CONSTITUTIONAL PROBLEMS IN THE EXECUTION OF FOREIGN PENAL SENTENCES: THE MEXICAN-AMERICAN PRISONER TRANSFER TREATY", article from the HARVARD LAW REVIEW, Vol. 90 no. 7, May 1977

NCJ# 43117

The CHAIRMAN. Thank you, gentlemen. We are very glad to have your testimony.

QUESTIONS FOR THE RECORD

Senator Case had to leave. Will you gentlemen be willing to answer any questions which we may put to you in writing for the record?

Mr. PETREE. Surely, Mr. Chairman.

The CHAIRMAN. I don't know whether Senator Case has any questions or not, but there may be some.

Let me ask you two or three questions.

PRESERVATION OF WAIVER'S VALIDITY

Do you think any questions on the constitutionality of the waiver of the writ of habeas corpus can be resolved through careful drafting of the implementing legislation?

Mr. PETREE. Mr. Chairman, the thrust of the concluding sections of my remarks were intended to outline exactly what kinds of steps ought to be taken in the interest of preserving the validity of that waiver.

To summarize those recommendations, we would suggest that the committee make clear, in the first place, that its approval of the treaty depends entirely upon the treaty's consent provisions; in the second place, that the committee urge upon the House the wisdom of three things: One, having the magistrate preside at a formal hearing within which the consent is actually given, rather than have the magistrate in some way later seek to verify that the consent, when it was earlier given, was valid; second, the wisdom of having the right to counsel attached at that consent proceeding, rather than at the later verification proceeding, as it is presently styled in the enabling legislation; third, the wisdom of having the consent proceeding officially recorded.

Those three things, taken together, we believe would beyond a doubt secure the validity of the consent as a waiver of any future collateral attack right in this country.

The CHAIRMAN. Would you please repeat the last several words of what you said.

Mr. PETREE. We believe that these three procedural steps with regard to the giving of the consent would constitute that consent as a valid waiver of any constitutional right that the prisoner otherwise we believe would have had to challenge in this country the validity of his Mexican sentence, provided that the challenge would run to the reliability of the conviction, rather than the integrity of the violation, which he may also wish to allege.

WAIVER OF WRIT OF HABEAS CORPUS

The CHAIRMAN. I don't know whether I understand all the implications of this or not, but I was of the opinion that a writ of habeas corpus could not be waived by the person against whom it is being used.

Mr. PETREE. If I read the case correctly, I believe the case of *Faye* v. *Noya* was a case of actually a waiver of collateral attack rights in the form of habeas corpus. At least, that was the question involved in the case.

Mr. WECHSLER. That's not quite right, is it? Wasn't the waiver question in *Faye* v. *Noya*, whether by failing to take his appeal in the State criminal proceeding he had waived the constitutional claim that the confession on which he was convicted was involuntary? I don't believe that the court ever spoke about waiving the right to habeas corpus.

I think the chairman is in his instincts about this right, that we ought not ask for a waiver, and I don't understand the statute, as proposed, to ask for a waiver of the right to make an application for a writ of habeas corpus.

The CHAIRMAN. That was tested at one time, wasn't it? Who was the President involved?

Mr. WECHSLER. Of course, during the Civil War, President Lincoln——

The CHAIRMAN. During the War Between the States perhaps we should say.

[General laughter.]

Mr. WECHLSER. That is a much better way to refer to the same unfortunate conflict.

The CHAIRMAN. I believe that the Supreme Court held that he could not do it, didn't it?

Mr. WECHSLER. Well, first of all, Chief Justice Taney held that in a famous case and directed the marshall of the court to serve the writ on the commanding general and to report the matter to the Commander in Chief adding in the hope that that gentleman will see to it that the laws of the United States are faithfully executed, which they were not.

But, later on, the Supreme Court got the question in a more complicated setting, but held, in any event, in ex parte Milligan that Milligan was entitled to release on the writ and that military trial under those circumstances was unconstitutional.

We had the same problem, you may remember, during the Second World War in the Hawaiian mess, where we had a commanding general who undertook to not only declare marshall law, which the President approved, but also to declare it to be a military offense for anybody to petition for a writ of habeas corpus. A quite courageous judge down there, named Metzger, said that so long as he was sitting, anybody could come into his court and petition for a writ of habeas corpus. The Attorney General, I remember, sent Eddie Ennis out to Hawai to try to talk some sense to General Greene, and in the end, they worked that out; at least the military didn't then seek to punish people for petitioning for the writ. In the end, of course, the Supreme Court, when it got this, held that marshall law in Hawaii was no longer valid, though of course, in view of the invasion the suspension of the privilege was initially valid.

I think the way to see this thing, Mr. Chairman, if I may say so, is that these prisoners may petition for the writ under the statute. When they do, if they are held in American prisons, the Department of Justice or the U.S. Attorney will file a return to the application, which will recite that the prisoner is held pursuant to the treaty and the treaty procedure and his consent to the transfer, and perhaps attach the documents establishing the consent. Unless there is an issue as to

the voluntariness of the consent or the veracity of the return, I think the court will then held that this is a good return and the prisoner is not being detained in violation of the constitutional laws or treaties of the United States, and the application must be denied, or the writ discharged.

For example, during the Second World War, an alien enemy detained as an alien enemy would seek discharge. He could petition for a writ of habeas corpus. We had hundreds of them. But the only issue on the return was whether he was a native of an enemy nation, and if he was, then the courts did not enquire into the grounds on which the executive undertook to detain him in the interests of war.

I think it is exactly the same problem.

DISTINCTION BETWEEN WAIVER AND SUSPENSION OF PRIVILEGE

Mr. CHERTOFF. Mr. Chairman, I hesitate to take issue with any statement that Professor Wechsler makes, because he has literally written the book on Federal courts. But I think that it is important to make a distinction between a waiver of habeas corpus by a prisoner who would otherwise have the right, and a suspension of the privilege of the writ by the Government.

We are not suggesting here that the Government has the authority to suspend the privilege of the writ. In fact, we agree with Professor Wechsler that this does not really pose a habeas corpus problem.

What we do find as a problem is the fact that we believe that certain constitutional claims will be able to be stated against the U.S. Government for retaining in its prisons individuals who were convicted on the basis of trials that seem very unreliable. The fact that the treaty, as it now stands, appears to close the door of American courts to any of those claims would seem to run afoul of the very basic mandate laid down by the Supreme Court in *Marbury* v. *Madison*, which is that some court in the United States must be available to review all claims that the Federal Government is acting unconstitutionally.

Now that is a separate and distinct issue from the habeas corpus issue and a very serious issue.

Our way out of that dilemma is to ask that those prisoners who wish to be transferred back to this country waive their personal rights of habeas corpus. This would not, in and of itself, entail a suspension of the writ of habeas corpus by the Government, as President Lincoln attempted to do during the War Between the States. Rather, it would be simply a surrender of the personal rights of the prisoner.

Now, while offhand I cannot think of a particular case in which habeas corpus has been suspended, there are a great number of cases in plea bargaining situations in which individuals, under their own voluntary will and with knowledge of the consequences of their choice, have surrendered their rights to trial by jury and to a proceeding which will determine their guilt or innocence.

It seems to me that if the Constitution permits upon the proper circumstances an individual to waive his right to trial, it should certainly permit him under those same proper circumstances to waive the right to examining the trial post hoc in a habeas corpus proceeding.

NECESSITY OF PROPER CONSENT PROCEDURE

Where we differ with Professor Wechsler—and I think therefore that it perhaps is not totally accurate to characterize us as being substantially in agreement with both of the professors who spoke before us—is that we feel that without a proper consent procedure which would stand up under court scrutiny in this country when the prisoners were to appear on a habeas corpus writ, there would be serious problems under the principles of Marbury against Madison and under the Constitution taken as a whole with the notion that due process claims, or claims under other procedural rights of the Constitution, could be foreclosed in any American court by an act of this Congress.

So, we would lay a great deal of stress both on the need to secure a consent by the prisoners to waiving their habeas corpus and on the need to make sure that the consent is given in a manner that will subsequently stand up in a court proceeding.

I can only concur most heartily with a suggestion that has been made previously, that this is a situation in which it serves everybody's best interests to allow the transfer treaty to stand as it is and to allow prisoners to come from Mexico, rather than to remit them to a Mexican prison and therefore essentially not award them their constitutional rights. Therefore, I think that a court that takes a practical view of the situation will be inclined, if the procedures that govern the actual giving of the consent seem to meet constitutional standards, to permit the treaty to stand as it is and not to inquire into the substance of the sentences and the convictions in Mexico, as the treaty article VI mandates.

The CHAIRMAN. Thank you very much.

It has been a long time since I was in law school and a long time since I ceased the practice of law—about 41 years. But I have always had a very high regard for the principle of the right of American citizens to take advantage of the constitutional guarantee under the writ of habeas corpus proceedings. I realize there are other implications involved. That probably will be one of the points discussed in the committee when we meet to pass on this treaty.

I won't pursue it further at this time.

Senator Pell, do you have any questions?

Senator PELL. No questions, Mr. Chairman, thank you.

The CHAIRMAN. Very well, gentlemen. Thank you all very much.

Mr. PETREE. Thank you, Mr. Chairman.

Mr. CHERTOFF. It's been a pleasure, sir.

The CHAIRMAN. This has been a very interesting panel and we appreciate your efforts today.

WITNESSES

Now we are to have a panel of families and former prisoners. We will have Mrs. Mary Coulter, of Torrance, Calif., Mr. and Mrs. Oscar Carter, of Hawthorne, Calif., Mr. Patrick Balvin, of Corona, Calif., Miss Deborah Friedman, of Healdsburg, Calif., Mr. Paul DiCaro, of Healdsburg, Calif., and Mr. Glen Jones, of Kansas City, Mo.

Ladies and gentlemen, if you would please take a seat at the table, we would be very glad to hear from you.

Mrs. Coulter, we would be glad to hear from you first.

STATEMENT OF MS. MARY COULTER, TORRANCE, CALIF.

Ms. COULTER. Thank you, Mr. Chairman.

I consider it a privilege to speak before the Senate Foreign Relations Committee today. I would like to personally thank Congressman Fortney (Pete) Stark for his efforts on behalf of Americans in Mexican prisons.

I believe that the main text of my comments today will be concerned with the controversy of the role of the U.S. State Department officials assigned to U.S. Embassies in foreign countries concerning the rights of American citizens.

President Nixon, in 1971, established the Cabinet Control Committee on International Narcotics matters, the CCINC. Housed in the Department of State was an Office of the Senior Adviser to the Secretary of International Narcotics Matters, whose primary responsibility with the State Department was "mobilizing and coordinating foreign and U.S. efforts to control the international narcotics traffic."

Also, there is a program in the State Department called AID, and this is to provide economic assistance to foreign nations who wish to develop narcotics control programs. AID also trained foreign officials in drug law enforcement and provided these officials with technical assistance and equipment.

Then, in a reorganization plan of President Nixon, of 1973, the DEA was to conduct all relations with drug law enforcement officials of foreign governments under the policy guidance of CCINC. This agency works closely with the Cabinet Committee under the active leadership of U.S. Ambassadors in each country where antidrug programs are underway.

STATE DEPARTMENT'S CONFLICT OF INTEREST

We contend that the power to arrest Americans stems from the State Department.

According to these documents, which I have named here, the State Department is involved on the one hand in arresting Americans, or in assisting in the arresting of Americans, through setting policy guidance for the DEA. On the other hand, they are supposed to protect the rights of American citizens abroad.

How can this be? There is a conflict of interest. We have given this conflict of interest much attention. We have had a lot of trouble with State Department officials in U.S. Embassies. Because of this conflict of interest, we have suggested that another agency be established by our U.S. Government, as in the Norwegian countries, where it is called an Ombudsman. This is a Government official who investigates citizens' complaints against the Government or its functionaries.

MEXICAN VIOLATION OF CIVIL AND HUMAN RIGHTS

While we do not deny that many of these Americans might be guilty, this has to be proved in a court of law. Many of them have suffered the degradation of convicted criminals, and yet much later,

they were released as innocent of all charges. We have such a person on our panel today.

It is circumstances such as these which bespeak of injustices to Americans at the hands of Mexican officials. While we do not condone Americans breaking the laws of any country, we cannot condone Mexico violating the civil and human rights of Americans who travel in that country.

The United States is entirely a creature of the Constitution. We further believe that a U.S. citizen does not set aside his constitutional rights when he leaves the boundary of the United States no more than a DEA agent does who is acting in his capacity abroad. Are we to believe that the U.S. Constitution applies any differently to DEA agents than to U.S. citizens traveling in Mexico?

We, 1732, Inc., maintain that as long as one American is denied his legal, human, and constitutional rights in a foreign country, it is the responsibility of the President of the United States to intervene on his behalf.

PRESENT APPROACH TO CURTAILING DRUG TRAFFIC QUESTIONED

We believe that the DEA's efforts in Mexico have not set out to destroy heroin, which is the No. 1 killer, which is ruining our society, and one for which Americans in Mexican prisons are not arrested. These people have been arrested for small amounts of marihuana or cocaine, and they have not accomplished the purpose of stopping the introduction of heroin into the United States.

It is very clear that American aid to Mexico has placed a great amount of pressure on Mexican officials to produce drug "traffickers." Until the U.S. Government undermines the roots of organized crime, controlled by "big money," dangerous drugs, such as heroin, will continue to be a contributing factor in destroying our society.

We believe the present approach to curtail drug trafficking is, in fact, permitting organized crime to operate successfully to smuggle heroin across the Mexican border into the United States beneath a cloak of protection, using these "little" Americans with miniscule quantities of marihuana and cocaine as scapegoats. The arrests of these Americans has not served as a deterrent for the drugs coming into the United States from Mexico.

The most important question we must consider is whether or not the protection of basic human rights is more important to us than the protection of economic interest or the coverup of bureaucratic failure.

1732, Inc., supports the efforts of the United States and Mexico to destroy heroin labs and poppy fields in Mexico if the United States could be assured this was being accomplished. However, we cannot support an effort that has proved an ultimate failure or that is so corrupt in its execution that it leads to the persecution of innocent and helpless Americans.

Young Americans, trapped by their own ignorance of penalties for crimes committed in Mexico, are arrested by overzealous officers whose language they do not understand nor speak. They seldom know their rights under foreign Mexican law. They beg for the presence of a U.S. Embassy official upon arrest. However, this is denied during the

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7-hour interrogation period. Many Americans are beaten, tortured with electric cattle prods, and forced to sign trumped up confessions.

We have documented many cases of inhumane treatment, torture upon arrest, extortion of U.S. prisoners and their families and complete lack of concern on the part of U.S. Embassy officials.

The parents of these Americans in Mexican prisons have suffered just as much as the prisoners. We are innocent victims of extortion. We believe our country should look into the way the parents have been used when their children have been arrested in Mexico. American parents should not be punished by having to pay for prisoner's food, clothing, beds, medical and dental care, which, by the way, is not received.

EARLY RATIFICATION URGED

Disregarding all personal reservations which I may have about the U.S.-Mexican treaty proposal, I have come here as a spokesman for human beings who have suffered degradation, torture by medieval methods, been given less than minimal subsistence in Mexican prisons, to beg for early ratification of this treaty. These prisoners plead for U.S. legislators to hear their desperate cries and take immediate action to bring them back to the United States.

With the exception of a dedicated few, little action has been taken to alleviate these Americans' daily anguish.

Many seeds have been planted as distraught parents have written to their Senators, Congressmen, State Department officials, and even their own President. These letters tell of the burden on their hearts and lives concerning the mistreatment of their children, the extortion of shylock lawyers and greedy prison officials, the brutality of sadistic guards and the unconcern of U.S. Embassy officials.

Most of these seeds have been neglected due to the bureaucratic red-tape of U.S. officials. These officials are far removed from the source of trouble. They are faced with urgent problems at home that require immediate attention, thereby allowing these seeds to rot away and die on some desk or in a file drawer.

We parents have grown weary of working this garden, repetitiously planting and hoping the gardener will feed and water it so that it will grow.

It is with this thought in mind that we plant the seed of a treaty between the United States and Mexico with the hope that it will receive constant, immediate attention which would result in the return of these Americans to the country that they love so much.

Please, legislators, don't procrastinate. Make this treaty a viable instrument of justice which will bring these Americans back to their families and loved ones.

OTHER ACTION SHOULD TREATY BE DELAYED

Should this treaty be delayed due to implementing legislation, we plead for other action such as: One, President Carter instructed to invoke U.S. Civil Act, title 22, section 1732; two, persuade Mexican President Lopez Portillo to reinstate preparatoria, or parole, for drug offenders so that Americans who have been in Mexico for the prescribed length of time can be released.

When President Lopex Portillo was in the United States on February 16, 1977, he said that Mexico was ready to release the Americans in Mexican prisons whenever the United States wanted them. Mexico has expressed willingness to cooperate with the United States on this issue. Now it is up to us to take the initiative.

Today I have brought to your attention the conflict of interest in the State Department, the DEA's unconstitutional activities in Mexico, the failure to stop the influx of drugs despite the costly programs created for that purpose, and the mistreatment and extortion of prisoners and their parents.

IMMEDIATE APPROVAL RECOMMENDED

The problems surrounding the approval of this treaty and its implementing legislation need to be resolved as expeditiously as possible.

I recommend your immediate approval. Don't let another 3 years pass before action is taken and justice is realized.

[Mary Coulter's prepared statement and addenda follow:]

PREPARED STATEMENT OF MARY COULTER, PRESIDENT OF 1732, INC.

Mr. Chairman, Honorable Senators and distinguished guests, it is indeed a great privilege and honor to address this body of Government officials. I speak on behalf of Americans incarcerated in Mexican prisons as well as their parents, in the hope that a solution to the dilemma which prisoners and parents find themselves will be forthcoming in the immediate future.

I represent an organization called 1732, Inc., which is composed of prisoners, parents, and concerned Americans working for justice for Americans in Mexican prisons.

I would like to convey the personal thanks of the prisoners as well as their parents to Congressman Fortney H. (Pete) Stark. His personal contribution to a very controversial issue has been outstanding. Despite this controversy, Congressman Stark has pursued the plight of Americans in Mexican prisons with diligence.

I will be concerned with the following:

1. The conflict of interest in State Department: (*a*) Establish an Ombudsman.
2. DEA operation in Mexico is unconstitutional.
3. Failure of DEA to realize its objective to stop drug smuggling.
4. Mistreatment of prisoners.
5. Approval of Treaty: (*a*) Alternatives.

There has been much controversy as to the role of the U.S. State Department officials assigned to U.S. embassies in foreign countries concerning the protection of American citizens' rights.

For the record, I submit Doc. F, page 25 of the Interim Report of the Committee on Government Operations, United States Senate, made by its Permanent Subcommittee on Investigations:

1. President Nixon established the Cabinet Committee on International Narcotics Control (CCINC) on September 7, 1971. CCINC was chaired by the Secretary of State.

2. Housed in the Department of State was an Office of the Senior Adviser to the Secretary of International Narcotics Matters, whose primary responsibility with the State Department was "mobilizing and co-ordinating foreign and United States efforts to control the international narcotics traffic."

3. The Agency for International Development (AID), provided economic assistance to foreign nations who wished to develop narcotics control programs. AID also trained foreign officials in drug law enforcement and provided these officials with technical assistance and equipment.

Document D is submitted for the record. It is Reorganization Plan No. 2, 1973, by the President of the United States.

1. D–1 shows the DEA was to conduct all relations with drug law enforcement officials of foreign governments, under the policy guidance of CCINC.

2. D–4 states the new agency DEA, would work closely with the Cabinet Committee under the active leadership of the U.S. Ambassador in each country where anti-drug programs are underway.

According to these supportive documents, the Secretary of State was chairman of CCINC who sets policy for the DEA. In other words, the State Department is working in drug enforcement in foreign countries. How can U.S. embassy officials with the State Department uphold U.S. citizens civil and human rights in foreign countries where there is a definite conflict of interest within the U.S. State Department? This is like the fox watching the chicken house.

a. Because of this conflict of interest within the U.S. State Department, we suggest that another agency be established outside the embassies in foreign countries to house an ombudsman. This is a government official who investigates citizens' complaints against the government or its functionaries.

It is not our intention to deny the guilt of some of these Americans in Mexican prisons, however, we must admit that Americans arrested in Mexico for an alleged crime have been beaten, tortured, and confined in prisons for long periods. They have suffered the degradation of a convicted criminal, yet much later were released, innocent of all charges. It is with circumstances such as these which bespeak of injustices to Americans at the hands of Mexican officials. While we do not condone Americans breaking the laws of any country, we cannot condone Mexico violating the civil and human rights of Americans who travel in that country.

If we as a nation, hope to re-establish respect for the law in our society, we will have to begin cleaning house at the very top of our government. The seriously misguided brutal program of the Drug Enforcement Agency (DEA), operating as a cooperative arm of foreign drug enforcement to arrest Americans in Mexico rather than in the United States, is unconstitutional. The DEA has assisted in the arrest and torture of Americans in Mexico with full constitutional authority while at the same time exclaims, "Americans have no rights in Mexico."

We think the law must work for the good of society, if it is not to jeopardize the lives and liberties of its citizens. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

We further believe that a U.S. Citizen does not "set aside" his constitutional rights when he leaves the boundary of the United States no more than a DEA agent does who is acting in his capacity abroad. Are we to believe that the U.S. Constitution applies any differently to DEA agents than to U.S. Citizens traveling in Mexico?

The President of the United States *may not* nullify the guarantees of the Bill of Rights by authorizing DEA agents to operate in Mexico as free agents, never to come under judicial scrutiny because of their circumventing the Constitution for all practical purposes. There must be guidelines and restraints to prevent the DEA from impinging upon the rights of U.S. citizens in Mexico. Right now, the only discipline that exists for DEA agents abroad, originates within itself.

While we believe a U.S. citizen must submit temporary allegiance to laws while visiting in Mexico there is no way that this should alter his allegiance to his own sovereign. The United States must retain jurisdiction over its citizens wherever they travel. Protection must not be extended or withheld at the discretion of the Secretary of State, nor should there be boundaries set for an individual to be guaranteed his rights to life, liberty and freedom under the Bill of Rights.

1732, Inc., requests that appropriate action be taken by the United States Government to protect citizens' human and legal rights as guaranteed under the U.S. Constitution. We maintain that as long as one American is denied his legal, human and constitutional rights in a foreign country, it is the responsibility of the President of the United States to intervene on his behalf.

Drug enforcement efforts to control the importation of Mexican heroin, the 'highest priority' of our Government's drug abuse prevention is failing. Do the governments of the United States and Mexico actually believe that a few young Americans alleged to be carrying small amounts of drugs—if, in fact, they were carrying any drugs at all—are responsible for the outrageous amount of drug

trafficking going on between heroin processors in Mexico and addicts in the United States? The U.S. State Department has stated that between three and five percent of all Americans arrested in Mexico were arrested for heroin. 1732, Inc., has not one documented case of an American being arrested on a heroin charge. The majority of Americans arrested in Mexico is on marijuana charges.

To be very candid, we need only to look at our own Government's statistics. Heroin smuggling from Mexico has been on the increase. The fact that Mexico now represents the major source of heroin in the United States indicates that the drug-smuggling operations are vast, sophisticated, and in the hands of well-financed, highly organized crime syndicates.

It is clear that American aid to Mexico has placed a great amount of pressure on Mexican officials to produce drug "traffickers." Until the U.S. Government undermines the roots of organized crime, controlled by "big money," dangerous drugs such as heroin will continue to be a contributing factor in destroying our society.

We believe the present approach to curtail drug trafficking is, in fact, permitting organized crime to operate successfully to smuggle heroin across the Mexican border into the United States beneath a cloak of protection, using these "little" Americans with miniscule quantities of marijuana and cocaine as scapegoats. The arrests of these Americans in Mexico has not served as a deterrent for drugs coming into the U.S. from Mexico.

The most important question we must consider is whether or not the protection of basic human rights is more important to us than the protection of economic interest or the cover-up of bureaucratic failure. 1732, Inc., supports the efforts of the United States and Mexico to destroy heroin labs and poppy fields in Mexico if the U.S. could be assured this was being accomplished. However, we cannot support an effort that proves an ultimate failure or is so corrupt in its execution, that it leads to the persecution of innocent and helpless Americans.

Young Americans, trapped by their own ignorance of penalties for crimes committed in Mexico, are arrested by overzealous officers whose language they do not understand or speak. They seldom know their rights under foreign Mexican law; they beg for the presence of a U.S. embassy official upon arrest, however, this is denied during the 72 hour interrogation period. Many Americans are beaten, tortured with the electric cattle prod, and forced to sign trumped-up confessions. We have documented numerous cases of inhumane treatment, torture upon arrest, extortion of U.S. prisoners and their families and complete lack of concern on the part of U.S. embassy officials.

It would not be practicable to relate on a case by case basis of the torture and mistreatment of Americans in Mexican prisons. This has been proven to be true as evidenced in the Hearings before the Subcommittee on International Political and Military Affairs of the Committee on International Relations, House of Representatives.

The parents of these Americans in Mexican prisons have suffered just as much as the prisoners. We have been innocent victims of extortion. We have been bilked out of our life savings by Mexican lawyers who promised release, yet took our money and did nothing. We believe Americans in Mexican prisons should have treatment equal to that of Mexicans in American prisons. American parents should not be punished by having to pay for prisoner's food. clothing, beds, medical and dental care.

Disregarding all personal reservations which I may have about the U.S./Mexican Treaty proposal, I have come here as a spokesman of human beings who have suffered degredation, torture by medieval methods, been given less than minimal subsistence in Mexican prison, to beg for early ratification of this Treaty. These prisoners plead for U.S. legislators to hear their desperate cries and take immediate action to bring them back to the United States. With the exception of a dedicated few, little action has been taken to alleviate their daily anguish.

Many seeds have been planted as distraught parents have written to their Senators, Congressmen, State Department officials and even their own President. These letters tell of the burden on their hearts and lives concerning the mistreatment of their children, the extortion of shylock lawyers and greedy prison officials, the brutality of sadistic guards and the unconcern of U.S. embassy officials.

Most of these seeds have been neglected due to the bureaucratic "Red Tape" of U.S. officials. These officials are far removed from the source of trouble.

They are faced with urgent problems at home that require immediate attention, thereby allowing these seeds to rot away and die on some desk or in a file drawer. We parents have grown weary of working this garden, repetitiously planting and hoping the gardener will feed and water it so that it will grow.

It is with this thought in mind that we plant the seed of a Treaty between the U.S. and Mexico with the hope that it will receive constant, immediate attention which would result in the return of these Americans to the country they love so much. Please, Legislators, don't procrastinate, make this Treaty a viable instrument of Justice which will bring these Americans back to their families and loved ones.

a. Should this Treaty be delayed due to implementing legislation, we plead for other action such as:

(1) President Carter instructed to Invoke U.S. Civil Act, Title 22, Section 1732.

2. Persuade Mexican President Lopez Portillo to re-instate preparatoria (parole) for drug offenders so that Americans who have been in Mexico the prescribed length of time can be released. When President Lopez Portillo was in the U.S. on February 16, 1977, he said Mexico was ready to release the Americans in Mexican prisons whenever the U.S. wanted them. Mexico has expressed willingness to cooperate with the United States on this issue. Now it is up to us to take the initiative.

Today, I have brought to your attention the conflict of interest in the State Department, the DEA's unconstitutional activities in Mexico, the failure to stop the influx of drugs despite the costly programs created for that purpose and the mistreatment and extortion of prisoners and their parents.

The problems surrounding the approval of this treaty and its implementing legislation need to be resolved as expeditiously as possible. I recommend your immediate approval. Don't let another three years pass before justice is realized.

U.S. CITIZENS IMPRISONED IN MEXICO

Tuesday, April 29, 1975

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
SUBCOMMITTEE ON INTERNATIONAL
POLITICAL AND MILITARY AFFAIRS,
Washington, D.C.

The subcommittee met at 10:12 a.m. in room 2255, Rayburn House Office Building, Hon. Dante B. Fascell (chairman of the subcommittee) presiding.

Mr. FASCELL. The subcommittee will come to order.

On March 14, 1975, Congressman Fortney H, Stark of California for himself and 16 cosponsors introduced House Resolution 313 directing the President to provide to the House of Representatives information pertaining to certain U.S. citizens imprisoned in Mexico. A similar resolution, House Resolution 391, with four additional cosponsors was introduced on April 10, 1975.

Following referral of House Resolution 313 to the Committee on International Relations, Chairman Thomas E. Morgan wrote to me on March 24 requesting the subcommittee to review the subject matter of the resolution and to report to the full committee recommendations with respect to any further action that may be necessary on House Resolution 313.[1] I responded to Chairman Morgan on March 27 in behalf of the subcommittee an agreed to the chairman's request that we conduct a review of the subject matter of House Resolution 313. Today's hearing is being held in response to Chairman Morgan's request.

Without objection the full text of the resolution and the letters referred to will be included at this point in the record.

[The information follows:]

[H. Res. 313, 94th Cong., 1st sess.]

Resolved, That the President is directed to provide to the House of Representatives, not later than ten days after the adoption of this resolution, any information which the executive branch (including the Department of State, the Embassy of the United States of America to the Republic of Mexico, the Drug Enforcement Administration) has with respect to correspondence, investigative reports or other documents relating to any instance where any citizen of the United States has made an allegation of, or has corroborating evidence of, any instance or instances since December 31, 1970, of—

(1) the incarceration of any citizen of the United States of America in the Republic of Mexico contrary to the laws or Constitution of the Republic of Mexico;

[1] House Resolution 313 was formally referred to the subcommittee on July 11, 1975.

to any assistance DEA may provide to the MFJP which results in their arrest. Usually these arrests are made by the Mexican authorities on their own on the basis of standard customs and police controls, particularly at airports. However, should DEA 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 MFJP. Standard procedure in developing international narcotic cases involving one or more countries is to effect the arrest and seizure at the first point in the chain where a successful conclusion would appear most certain. The primary objective is the elimination of the narcotic drugs and the immobilization of the violator. To permit a violator to exit a point in Mexico where he can be intercepted by the Mexican authorities and hope he can be trailed to a point on the U.S. border or interior of the United States in the hope of permitting his arrest by American authorities would be sheer folly. This is done occasionally when the best interests of a particular case can better be served by this tactic. However, on a routine basis, this could only result in the loss of many arrests and seizures and increased quantities of drugs entering the United States.

As stated, of the 116 indixviduals making complaints to Congressman Stark, 43 are listed in the files of DEA. Of that number, our files reflect that DEA special agents were invited to participate in the questioning of 11. Three of these have made allegations of mistreatment in the course of their interrogation.

One such allegation made to Congressman Stark involved Tyrone Wayne Coulter. This individual was arrested at 10:30 p.m. on September 26, 1973 at the Mexico City International Airport in possession of six ounces of cocaine and six ounces of marihuana concealed inside two aerosol spray cans. He had arrived on an Avianca Airlines flight from Cali, Columbia. Coulter refused to give any information to the MFJP, stating that he did not know the contraband was in the spray cans carried in his shaving kit. Coulter alleges that he was tortured with electronic cattle prods. His mother claims this reduced him to a living vegetable. Coulter alleges that DEA was present during his interrogation. Coulter did not identify any specific DEA agent as involved in the alleged torture.

An investigation of this allegation determined that at the time of Coulter's arrest, a DEA agent assigned to the Embassy at Mexico City was called and invited to participate in the questioning of Coulter. He questioned Coulter on September 26 and the latter continued to disavow any knowledge of the drugs seized.

Coulter told the DEA agent that he had traveled from Los Angeles, California on September 20, 1973 to Cali, Colombia by air via Bogota. He said his travel was strictly touristic. About one month before Coulter made a similar trip to Colombia visiting there for four to six days. His return trip was by air through Mexico City to Tijuana, from where he crossed the border by foot.

The DEA agent interviewing Coulter did not report any indication that Coulter had been mistreated and Coulter did not make any statement that he had. Prior to his arrest on September 26, 1973, DEA had no record of Tyrone W. Coulter.

One, Karen Elaine Harrison, was arrested on March 25, 1974 at the Mexico City Airport in company of James Philip Norton, a major drug trafficker when they were found in possession of two kilos of cocaine. DEA had provided the Mexican Federal Judicial Police with the information leading to this arrest. A DEA special agent did assist the Mexican Police in the questioning of Norton and Harrison. Norton offered to cooperate with the Mexican Police and the DEA special agent if they would release Harrison. Under Mexican law this was not possible.

Subsequently, Harrison informed Congressman Stark that a DEA agent was present at an interrogation on March 25, 1974 when police officials allegedly ripped off her pierced earrings, tearing her ear lobes. In subsequent conversa-

tions by Consular officers with the young lady, her parents and her attorney, none of them mentioned anything about mistreatment. Following publication of the allegation in a Los Angeles Times article dated July 11, almost four months after the alleged incident, did the young lady tell Consular officers that she was mistreated. However, an examination of her ears has shown no sign of torn ear lobes.

Another American, Charles Gillen, was arrested at the Mexico City Airport in possession of 470 grams of cocaine. Prior to his arrest, he was unknown to DEA. His arrest came about entirely through the airport controls of the Mexican Police authorities. DEA was not requested to assist in questioning Gillen and did not participate in any interrogation of this defendant. Gillen has informed Congressman Stark that "DEA Agent Steve Green interrogated him at the time of his arrest and that he was beaten." No one by the name of Steve Green was assigned to DEA in Mexico or to the U.S. Embassy at that time. When interviewed by a Consular officer, Gillen did not complain of being beaten at time of arrest.

Another American citizen, Kenneth R. Barton, was arrested at the Mexico City Airport on October 23, 1973 in possession of 840 grams of cocaine. DEA had no prior knowledge of Barton nor did DEA provide the information leading to his arrest. Barton has alleged to Congressman Stark that DEA was present at his arrest and interrogation and that he was hit and roughed up. Investigation has indicated that when Barton was interviewed by a Consular officer on October 26, 1973, he made no complaint of mistreatment and was reported in good shape. No DEA agent was present at his arrest or interrogation.

American citizen Alison Baughman was arrested on June 25, 1973 at the Mexico City Airport in possession of one kilo of cocaine she was smuggling in a body carry. DEA had no prior record or knowledge of this woman who at the time of her arrest was accompanied by a one-year old baby, a son. Later, the baby fell from the bunk at the Mexican Federal Detention Center. Fortunately, no serious injury was sustained, Baughman complained to Congressman Stark of mistreatment involving the treatment of her son by the Mexican authorities. DEA did not participate in the arrest or questioning of Baughman.

In conclusion, and for the record, let me state that there is not a single instance recorded of an agent of DEA or its predecessor agencies abusing prisoners abroad in over 40 years of operations. Should allegations of any such misconduct occur in the future, we trust they will promptly be brought to our attention for appropriate investigation and any corrective action warranted.

Of the 116 U.S. citizens listed in H. Resolution 313 as incarcerated as of March 14, 1975, six were arrested as a result of assistance provided the Mexican Federal Judicial Police by DEA or its predecessor BNDD. We have already discussed the case of Norton and Harrison. Of the six, their case is the only one where mistreatment was alleged. The other cases are as follows.

On November 23, 1972 Bonnie Cockrell Zake and Angella Haapala, females from Aspen, Colorado were arrested at the Mexico City International Airport in possession or 1.5 kilos of cocaine. They were traveling together and each carried a portion of the contraband in a body belt. These arrests came as a result of information provided the MFJP by BNDD, the predecessor agency to DEA. So far as we can determine, they had not complained of any mistreatment.

On April 20, 1973 Alfred Melvin Feldstein and Patricia Saez were arrested at the residence they were sharing in Mexico City by the MFJB, BNDD had informed the MFJP that Feldstein was a fugitive wanted by the U.S. Customs Service. When taken into custody by the MFJB, Feldstein presented false identity documents. This caused the police to search his vehicle and discover 4.5 kilos of cocaine. Feldstein is listed in H. Resolution 313. Saez is also listed but improperly, as she is a Mexican and not a United States citizen. As far as we can determine, Feldstein has not alleged mistreatment.

On March 26, 1974 Maria Elaine Wiezbowski and Mary Elaine Yowell were arrested at the Mexico City International Airport in possession of 1.5 kilos of cocaine. This arrest was effected as the direct result of information provided the MFJP by DEA at Mexico City. While Weizbowski is listed in H. Resolution 313, Yowell is not. So far as we can determine, Weizbowski has not alleged any mistreatment.

DEPARTMENT OF STATE,
Washington, D.C., January 28, 1975.

Hon. ALAN CRANSTON,
U.S. Senate, Washington, D.C.

DEAR SENATOR CRANSTON: Thank you for your recent inquiry on behalf of Mrs. Mary Coulter concerning the arrest and detention in Mexico of her son, Tyrone Wayne Coulter. Congressman Glenn M. Anderson has also expressed an interest in this case and is being similarly advised.

According to our records, Tyron was arrested on September 27, 1973 at the Mexico City International Airport, and charged with the illegal possession of dangerous drugs. At the time of his arrest, Tyrone reportedly had in his possession approximately one kilogram (2.2 pounds) of cocaine. (We understand the street value of this narcotic in the U.S. is now $30,000 per pound.) Tyrone was subsequently remanded to the custody of Lecumberri Prison at Mexico City where he is currently awaiting trial.

In all cases of Americans arrested in a foreign country, there is generally no basis for official U.S. Government intervention as long as the arrestees are being given treatment at least equal to that given a native of the country in which the arrest took place. In these circumstances, United States consular officers in Mexico cannot seek to intercede in Mr. Coulter's case beyond ensuring that he is receiving humane treatment and due process as called for under Mexican law.

As background, one should be aware that, of the 514 Americans currently in jail in Mexico, 390 are being detained on drug charges. The Mexican Government is serious in its enforcement of narcotic control laws and the penalties there for drug possession and trafficking are severe. During the first ten months of 1974, almost 3,000 persons were arrested in Mexico for narcotics offenses. Of these, 340 foreign nationals including 279 Americans. Many of these drug arrests occurred at airports, indicating, in part, the attempt to use Mexico as a transit route for shipment of cocaine and other hard drugs to the United States. Many other arrests were made on the highways and at resort areas. Trafficking in hard drugs can bring a sentence of from six to thirteen years. Smuggling and possession of large quantities of marijuana have also brought severe penalties of from four to eight years.

We fully share your concern for the welfare of Americans arrested in Mexico, but, unfortunately, the growing number of Americans arrested and the complexity of the problems involved have made it most difficult to assure that all receive the adequate protection and attention they deserve. Our Embassy in Mexico City and our consulates throughout the country, although heavily overburdened, have worked hard to meet this demand, to see that every American in Mexico enjoys every right to which he is entitled.

I believe no one is satisfied that the situation is being dealt with as effectively as one would like, but I do feel that we are making progress. Certainly, the problem is not one of attitude, nor of unwillingness to act. It is rather one of limited resources and manpower, and perhaps in individual cases, judgment and personality. Part of it also is the frustration of trying to overcome the difficulties encountered in dealing with a legal system different than our own.

Let me be more specific. A primary complaint has been the long delay between the arrest of an American citizen and the time he is first contacted by a consular officer. We certainly deplore this as much as do the individuals concerned. However, our Embassy in Mexico has been unsuccessful in securing immediate consular access to arrested Americans. Although we have asked and continue to ask the Mexican authorities for this, there is usually a delay of 72 hours before consular access is permitted.

A second complaint which is often heard is that we do not extend adequate assistance to arrested Americans in sending word to parents, friends and others who should be notified of their arrest. Some prisoners may have a valid complaint in this regard. However, there are many prisoners who specifically request that parents and relatives should not be notified and our consular officers, of course, must abide by such requests. Subsequent parental distress at lack of notification may then, quite unfairly, be directed at our consular officers.

We, of course, view with utmost gravity the charges that torture is used during interrogation sessions, and that there are repeated violations of Mexican legal procedures in cases involving Americans. There have been a number of reports of mistreatment of Americans jailed in Mexico in the past year and

whenever they have been substantiated, as a result of subsequent investigation, the matter has been taken up with the Mexican Government. You will recall that we delivered a note on July 2, 1974, to the Mexican Ministry of Foreign Affairs concerning reports of torture, extortion and mistreatment of American prisoners and that this was followed by a discussion of this matter between Ambassador Jova and Foreign Minister Rabasa. Still later on October 21 the Embassy made two representations to the Ministry outlining in detail the circumstances of several arrest cases in which the arrested American had reported to the Embassy various forms of mistreatment, including beatings, theft of personal effects and forced signing of self-incriminating statements in Spanish, a language with which they are not familiar.

Although these representations may not totally prevent the mistreatment of arrested Americans, it appears they have had the positive effect of greatly reducing the reported incidence of such abuse. The Embassy, of course, continues to document these reports and to bring them to the attention of the appropriate Mexican authorities.

There have also been complaints about the reported presence of U.S. Drug Enforcement Agents during interrogations of American prisoners. It is, of course, true that the DEA is cooperating closely with the Mexican authorities in our joint effort to deal with the increasingly serious drug trafficking problem. As a general rule, however, the DEA agents are not present during the arrest of Americans or their interrogation by the Mexicanas and the DEA would certainly not participate in an interrogation if it involved physical abuse.

We have no evidence that DEA agents have ever been present under such circumstances. Separate interviews with Americans by DEA authorities do take place when required to resolve criminal charges subject, of course, to Mexican permission.

Indifference of American officials is also alleged by prisoners who say that they reecive visits from such officials only at widely-spaced intervals if at all This is indeed a problem, but it does not stem from indifference. There are approximately 514 Americans currently serving sentences in Mexico (approximately 390 of these on drug-related charges) in a number of prisons throughout that country. The problem of assuring frequent visits to all of these prisoners is almost insuperable given the small number of consular officials serving in Mexico. As it is, our officers are working long hours of overtime and on weekends in an effort to maintain as much contact as possible on a regular basis. The concern of the prisoners is understandable, but in the absence of additional staff, I am afraid this problem will remain.

In addition, there have been instances where unethical attorneys have been guilty of conduct which amounts to virtual extortion and blackmail. The Embassy is deeply troubled about this and has sought ways to protect Americans from such predators. It is not easy. The Embassy does make available to any Americans who desire, a list of Mexican attorneys who are to the best of the Embassy's knowledge, reputable, ethical, and professionally competent.

The Embassy is also seeking, where possible, to take direct action in instances where unscrupulous attorneys have abused the rights of an American arrestee. For example, the Embassy has recently interceded with the Mexican Government on behalf of one American prisoner and, as a result of such intercession, criminal fraud charges have been brought against a well-known and successful extortionist/attorney. A warrant has been sworn out for the arrest of this attorney.

We recognize that malpractice by Mexican attorneys against Americans is probably impossible to eliminate. We do hope, however, that with the assistance of the Mexican Government and the Mexican Bar Association and through measures such as those I have outlined above we will be able greatly to reduce the prevalence of malpractice, at least in cases where unscrupulous attorneys take advantage of the ignorance of their victims. Those cases in which the victims or their families engage in collusion with the attorney in the hopes of buying off the Mexican authorities are almost impossible to control.

The whole question of our prisoners in Mexico is currently receiving high-level attention in the Department and I have asked the offices directly responsible for this program to keep you regularly informed of any developments or of any action taken as a result of this review. Further, in order that our Embassy at Mexico City may be aware of your interest, I have forwarded copies of your correspondence with the request that it keep you informed of any significant developments in the case of Mr. Coulter.

I hope you will continue to call on me whenever you believe we can be of assistance.

Cordially,

LINWOOD HOLTON,
Assistant Secretary
for Congressional Relations.

Enclosure.

TYRONE WAYNE COULTER.

As soon as I arrived in Mexico City I was escorted to a room where 6 men slapped me around and forced me to pose for pictures. Pictures with drugs I had supposedly smuggled. I then was taken to the jail and for the next two days was tortured by 5–6 agents. The beatings I went through were not so incredible but the electric shockings will scar my personality forever. The first day I was beaten in the back for about 2 hours and then stripped of my clothes and made to stand in water. Next an agent begin shocking me all over my body with a cattle probe. This lasted for about 3 hrs. I was replaced in my cell and told to think it over. The next day I was given the electric shock treatment for 6½ hrs., mostly concentrated on my genital and anal region. The pain was so intense I past out continually only to be revived by more & more & more jolts running through my body.

I told the agents I would sign any thing they wish anything! But they wanted names, names of contacts I had none to give, but would of given any information even if it meant incrimination, but I was too exhausted to think any up so they continued. The agents really "got off" at my spastic muscle jerks. I was then threaten to be held down while another man screwed me in the ass. I could not even muster up enough energy to say no. But I guess it was better that I didn't cause they only wanted to torture me if they knew it would "blow me away" I had a ticket to L. A. Calif yet somehow I've been charged with importation of drugs into Mexico it carries a 6–15 yr sentence. I've been waiting 9 months to go to trial and was denyed my rights to legal aid upon my arrest till 5 days later when all that was needed to convict me was had by the agents.

I informed the U.S. Embassy of the torture I went through and they informed me I got what I diserved and from now on I would have no more rights. My rights have not been given to me under the Mexican Constitution and looks like I will be here for 6–7 years if I'm lucky. I am an ex-Vietnam veteran I fought 12 months months for my human rights. It really seems a joke now I have no rights, no I'm just a statistic now, just a # to be filed.

TYRONE WAYNE COULTER.

I give permission to have any of these statements to be published,

TYRONE WAYNE COULTER.

EMBASSY OF THE UNITED STATES OF AMERICA,
OFFICE OF CITIZENS CONSULAR SERVICES,
Mexico City, Mexico, November 13, 1973.

MRS. MIA S. RICHARDSON,
Los Angeles, Calif.

DEAR MRS. RICHARDSON: I refer to your letter of October 27, 1973, and to my interim reply of November 8, 1973, concerning the case of Mr. Tyrone Coulter.

The Embassy first learned of this alleged brutality when a Consular Officer visited Tyrone at Lecumberri prison on October 2, 1973. At that time, it was also determined that such treatment was perpetrated in most part by overzealous arresting officers at the time of apprehension. These abuses do not normally occur within the prison itself and after the prisoner has obtained permanent quarters.

While under the circumstances it is difficult for the Embassy to prevent such acts, the matter will be discussed by appropriate Embassy officials with Mexican authorities in the hope that action to avoid future similar occurrences might be taken.

Sincerely yours,

ROBERT S. ASHFORD,
Consul.

EMBASSY OF THE UNITED STATES OF AMERICA,
OFFICE OF CITIZENS CONSULAR SERVICES,
Mexico City, Mexico, November 8, 1973.

MRS. MIA S. RICHARDSON,
Los Angeles, Calif.

DEAR MRS. RICHARDSON: I refer to your letter of October 27, 1973, concerning the case of Mr. Tyrone Coulter, an American who is presently incarcerated in a Mexico City jail. The matter will be investigated, and I will inform you of any significant developments which may result from our inquiries.

Meanwhile, Tyrone's father visited the Embassy on October 29, 1973, and reported that his son's physical condition and general well-being had improved markedly since his initial arrest several weeks before.

I appreciate your bringing this matter to my attention.

Sincerely yours,

ROBERT S. ASHFORD,
Consul.

The CHAIRMAN. Thank you very much, Mrs. Coulter.

Now I will ask Mr. and Mrs. Carter of Hawthorne, Calif., to present their statements to the committee.

[Mrs. Carter's biography follows:]

BIOGRAPHY OF OSCAR M. CARTER

As Oscar M. Carter relates to this committee and to these hearings, he is the step-father of Don Virgil Bowen, who was arrested at the Mexico City airport, October 12, 1973.

Oscar M. Carter is the husband of Juanita Carter, President of Freedom Perseverance, Inc. Oscar Carter, himself, is a graduate of the University of Southern California, class of 1957, and like most men in his age group, his education was delayed because of World War II.

For the past several years, Oscar Carter has been engaged in Real Estate Business in Hawthorne, California, associated with Active Realty.

In the past nearly four years, Mr. Carter has made some dozen trips to Mexico City, several of them in an effort to accede to local custom, ergo to bribe someone for the release of his step son.

Mr. Carter has made at least one trip to Washington, D.C. in October, 1975. In May of 1977, during President Carter's visit to Los Angeles, Oscar Carter was fortunate enough to place this Mexican prisoner problem before the President, via television hook up, and he was assured by the President that this was one of the higher priorities of this administration.

Mr. and Mrs. Carter reside at 12612 Inglewood Avenue, Hawthorne, California 90250.

STATEMENT OF OSCAR M. CARTER, HAWTHORNE, CALIF.

Mr. CARTER. Thank you, Mr. Chairman. I am Mr. Oscar Carter, and if I may, I will read my statement.

Since it is not my natural wont to debate issues of the day, either great or small, on the floor of the U.S. Senate, and since it is not customary for people to seek my opinion on even the most mundane of matters, I must beg your forgiveness for seeming a little overawed by this occasion.

I am overawed by this occasion.

Seriously, though, I am aware of my surroundings and I am aware of the august body you represent, and I share your veneration for your institution. I wish to add, Mr. Chairman, that I did what I could some 25 years ago to help you and the great Mr. Adlai Stevenson carry California.

Gentlemen, I thank you for the honor you have extended to me to speak here today.

Last December my wife was invited by the American Broadcasting Co. to come to New York City to appear on their early-morning show, "Good Morning America", and to discuss this treaty with a Professor Vaghts of Harvard University. He, apparently, was the principal architect of the document.

As is my wont, as versus the one referred to in my opening sentence, I accompanied my wife to this engagement. We rode through Central Park with Professor Vaghts on our way to the studios of the broadcasting company.

MERITS OF TREATY IN LIGHT OF U.S. CONSTITUTIONAL GUARANTEES

At that time, I seriously debated with the professor the merits of this treaty in light of the constitutional guarantees enjoyed by all of us, including several hundred people accused of having violated the laws of Mexico. I say accused, because that essentially is the basis for Mexican jurisprudence; the person can be accused and sentenced to prison while he is attempting to prepare his case and establish his innocence.

The burden of proof always rests with the accused. No right-thinking citizen should ever let go unchallenged any attempt to subvert or alter our system of making the State prove its case against the accused.

Gentlemen, I have no quarrel with police forces, whether local, State, national, or international. But I am apt to quarrel with using police tactics in lieu of political or social tactics when political and social tactics are called for. Police may stop crime, if you want to use "stop" for a synonym for "deter." But if crime is to be stopped in the more complete sense, we have to look to the social causes that gave it birth. This is not and should not be the job of a policeman.

TREATY'S ACCENT ON PUNISHMENT

One of the other aspects of this treaty with which I totally disagree is the accent upon punishment. Now I am bound to ask if these 600 poor souls are to be exhibited in public stocks as a stern warning to other would-be offenders, or are we to seriously consider methods of dealing with an international traffic in dangerous narcotics.

This, I believe, is the basis upon which most of these Mexican arrests were made.

Now, gentlemen, we have long ago grown out of our Judge Roy Beans, nor do we really need an over-eager vigilante group protecting our homes. What we do need are men, such as yourselves, to examine these issues without anger and without a sense of personal rancor.

I do not know the nature of the crimes that have been committed by the Mexican nationals now languishing in our prison system. These be the prisoners eligible for the treaty provisions as they would would apply going in the other direction. But if they are of the same or similar caliber as the ones of ours that I have met in Mexico's prisons, they are not criminals in the traditional sense. They are social misfits, maybe, but not criminals.

So, if these people have any redemptive features, or if any of them

are true social misfits, why can't we leave off some of our punitive feelings and give them some human understanding? I simply cannot equate human beings with cordwood, and I don't think you wish to do so either.

POOR FARMERS GROWING NARCOTICS

Gentlemen, narcotics are peculiar matters. We have long imagined that their only slave was their user. But this is not true. The user is directly dependent; but what of the poor farmer who grows it. Is he not a slave, too?

Narcotics are grown in three parts of the world: Asia, the Mideast, and Latin America. Coincidentally, in these three parts of the world you will find the most avid practitioners of three of the world's great religions. And in the forefront of these avid practitioners, you will find the small farmer. This is true in our own Bible Belt.

Now, if the majority of these small farmers are of this persuasion, does it not follow that the growers of the plants that ultimately produce narcotics would not have members in this group. So, we have a God-fearing man, almost fanatic, producing a substance that he knows will harm mankind.

These people may be illiterate in many ways, but their spiritual and moral sense is heightened to an abnormal degree, and their normal compassion is truly God's gifts to humanity. So we have a man and his wife who must wrestle continually with an outraged conscience. They have to know what they are doing, so why do they do it? They do it, gentlemen, for economic survivial. This little dab of illicit farming may represent his money crop in any given year, and he and his family need that money.

Is this not pitiful and is he not enslaved, just as much as the user?

He has an added worry, too. Our Government has sent in helicopters and armed men to hunt him down and burn his fields.

So, gentlemen, I feel the heavy boots of policemen dealing with what is essentially a social problem.

I put this to you, gentleman: Isn't it better that we cease destroying mankind and his fruits while we attempt to divert this energy from the production of an evil to the production of food, which the world needs, and at the same time help the grower regain his own self respect?

Let us examine the hunger pangs and the economic privation that overwhelmed his good judgment, rather than the criminal acts that these hunger pangs and this economic privation caused.

Gentlemen, he is a human being and we are human beings. Let us not put ourselves so far above his lowly station so that we might sit in moral judgment upon him. He needs our help.

If I remember 1952, as I told Chairman Sparkman, I most certainly remember 1960 and the alliance for progress and the Peace Corps. These are the sort of solutions that this sort of situation demands.

An alliance for progress program would and could help the small farmer obtain a tractor; it could help him to obtain fertilizer and some hybrid seeds that would increase the yield of his poor land.

Why not do something of this sort? We and the whole world would be blessed beyond measure, and it seems such an easy blessing to obtain.

PURVEYOR OR PUSHER

We have established that the grower is a slave to narcotics. What of the purveyor or the pusher? This fellow has really built himself a reputation in our midst. He is, in some quarters, evil incarnate, and to distraught mothers, abused policemen, and overworked probation workers, he is probably the most loathesome creature around. In the minds of most he should be hunted down like a dog and shot.

Now why not strip away the mask of this neighborhood myth and look upon this fellow without fear. He is not organized crime. Oh, I have no doubt that organized crime knows about him, not in the immediate sense, but in the abstract sense. In the annals of the trade, he could be called legion. He is at once the pusher, the purveyor, and his own best customer.

Gentlemen, of all the slaves, he is the saddest. He has placed himself beyond the pale of society. He usually does not know of God. The parents who spawned him oftentimes hardly knew each other, much less things like religion and ethics. He does not have the spiritual sanctuary of the small farmer, and he is continually hunted down by the police. His ultimate end is always almost without exception a skid row kind of death or some equivalent, and his only mark in the world can only be described as ignoble.

So, gentlemen, as you see, we have another social problem, where police tactics and prison tactics will not suffice.

How many of these poor devils can we lock up, or worse yet, how many can we shoot? We need programs that will involve these people in some constructive endeavor from the time when they are small. I am sure that some questions could be added to our census questionnaires or even a special census could be authorized to ferret out these children that are doomed to such a fate.

IDENTIFICATION OF AND SOLUTION TO PROBLEM

Gentlemen, before we can hope to solve such a problem, we must be able to identify the problem.

Here, I think, we are going to find the overriding issue to be economic. But let us not overlook the need for objective sciological examination and find some willing and able psychologists as well.

I suppose, in this vein, that the legalization of all drugs might be advocated as a necessary step toward their containment. This I will leave for someone else to debate, as I am sure it might be done solely for economic reasons, either to produce revenue that is now being diverted to illicit channels, or to save money that is now being paid to enlarged police forces.

I do not take issue with either thought, nor do I espouse either thought. My efforts today are exactly as they seem. I wish to call you to a higher level in your examination of this problem and I wish to exhort you to save some precious human beings that are slated for death, either at the hands of angry policemen or from being punctured with a rusty hypodermic needle.

We of the Democratic persuasion have always prided ourselves on taking an action, rather than being forced to react, and I am no different.

I, therefore, plead with you to do three things. First, bring these prisoners home from Mexico with as much dispatch as is possible. Devil's Island, France's famed penal colony, would be an apt comparison with the uncertainty that exists in the prisons of Mexico. Every day there must seem like an eternity. These people are not street waifs; if they were, they would be more able to survive. They are middle class, and many of them are having a rough time coping with the harshness and brutality of it all.

Second, reintroduce something like the Alliance for Progress that would let us export some marketable skills and advance farming methods to the underdeveloped parts of the world. I am sure that Mr. Young would aid and abet our efforts in the U.N.

Third, reintroduce something like the Peace Corps for our youth. In 1960, John Kennedy asked the youth of America to respond, and they did. I have a feeling that should they be asked again, the response again would be overwhelming. We are a good people and a kind people. We do not need to have our representation to other nations left entirely in the hands of the CIA or the DEA. May God grant us the ability to cease with these silly fears.

Thank you.

The CHAIRMAN. Thank you.

Mrs. Carter, do you have a separate statement?

Ms. CARTER. Yes, Mr. Chairman, I do.

The CHAIRMAN. Very well. We would be pleased to accept it at this time.

[Ms. Carter's biography follows:]

BIOGRAPHY OF JUANITA CARTER

Juanita Carter is a resident of California, and has spent most of her life there. She grew up in a family of General Building Contractors, and designed her own career in Real Estate.

She is now Secretary-Treasurer of Carter Enterprises, Real Estate Development Co. Juanita's educational background was in Accounting. Juanita's social credits begin at an early age, when she wrote poetry for the local newspaper to help elect her favorite candidate sherrif.

Continuing on with such organizations such as PTA, American Red Cross, Muscular Dystrophy, Boy Scouts of America, Rental Chairman, Vice President, and President of the Federated Woman's Club of Hawthorne, California. She was also President of the Past Presidents of the Woman's Club of Hawthorne, Vice President and President of the Hawthorne Art and Cultural Society and one of the original Board of Directors.

Out of estensive hard work by many, numerous trips to Mexico, thousands of dollars on phone calls, mailings of written material, television programs, the first one in early 1974 by Canadian television in Mexico done by Juanita and her grandson, also meetings arranged in Mexico City for our Vice Counsul, Peter Wood to come up and address the families and friends of the prisoners.

October of 1975, Mr. and Mrs. Carter, Mrs. Mary Harrison, and the late Mrs. Isabell Millard attended a subcommittee hearing in Washington, D.C., on Americans in Mexican Jails. While there Juanita and Oscar Carter met with Loren E. Lawrence, Jim Hughes, and their staff. At this meeting, they discussed a future trip to California. Arrangements were made and Mr. Lawrence and Mr. Hughes came to California in December of 1975.

In September of 1974. Congressman Fortney Stark asked Juanita to help his staff obtain the necessary material to place this question before an appropriate committee of the Congress of the United States. Juanita responded by going to Mexico City and obtaining statements of any prisoners that would give her one.

STATEMENT OF MS. JUANITA CARTER, HAWTHORNE, CALIF.

Ms. CARTER. Mr. Chairman, Honorable Senators, and distinguished citizens, I am honored by the invitation you have extended to me to address you today. We, at FPI, are not unaware of the many calls that are made upon your time and energies. I would like to take this time to thank Congressman Fortney Stark and his staff for all of their help.

This is the fulfillment of an almost 4-year dream for us and we know you will accept our thanks in the spirit in which they are extended. We are grateful.

I am the mother of one of the young men confined in a Mexican prison. He has been so confined since October 12, 1973. I am a parent with all of the attendant feelings of a parent, but because of my many trips to Mexico City and my involvement in many cases other than that of my son, I have become a counselor and friend of almost all of the other prisoners and their families. We call ourselves Freedom Perseverance, Inc., simply because perseverance has been the only way open to us in our battle against great odds.

EMBASSY AND DEA ACTIVITIES

On my early visits to the American Embassy in Mexico City, I met with Donald Tremblay, Bob Ashford, and Daniel Root. I was met with indifference, aloofness, and they were contemptuous of our plight. I found this to be the experience of all of the families. This attitude determined our course of action.

Our first priority was for the well-being and protection of the prisoners. Having established that the material responsibility was ours, we set about assuming the spiritual and mental responsibility as well. This, we knew, would involve the uniting of the parents, relatives, and friends, as well as the prisoners. This was started in the fall of 1973.

We found the prisoners were dealing with unscrupulous attorneys who were extorting moneys for promises of freedom. Some of these attorneys were recommended by the Embassy officials.

In early 1974, I was appalled to find that the American Embassy in Mexico City was being operated mainly as an office of the Drug Enforcement Administration. The purpose of this action on the part of the DEA and the U.S. State Department was primarily for the purpose of entrapping U.S. citizens en route to the United States and Canada.

I myself had a conversation with the DEA on May 1, 1974. I was directed to their office in the American Embassy in Mexico City and was made an offer by Ed Heath, Art Medena, and a third agent. But they agreed that if my son or I would turn in drug smugglers, they would see that my son was released. However, they did state that the final say would come from our vice consul, Daniel Root.

I was shocked when a newspaper reporter sought me out and questioned me about the DEA having an office in the Mexico City Embassy. This evidently was a little known fact in early 1974.

Our organization has over 200 documented cases of brutality, torture, and extorted confessions visited upon American citizens by the

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Mexican authorities under the auspices and apparent approval of the DEA.

Gentlemen, I ask you now, is this not a constitutional question or an infringement upon the constitutional rights of American citizens by American officials?

I have documented proof of DEA agents being present during the arrest, interrogation, and brutal beatings of American prisoners. I will refer you to one case of a young California woman, Karen Harrison, who had her pierced earring torn from her, and her jaw was sore for 2 months after her beating. This torture and beating was done in the presence of DEA agent Arthur Sedillo, badge No. 1944, at approximately 5 p.m. on March 24, 1974.

WHY NOT AN EXECUTIVE ORDER?

You will have to excuse me, but there is one very large unanswered question which I have been instructed to ask of you. Why could not these people have been brought home by Executive order? We just fail to see the necessity for this elaborate manner for bringing these people home.

Mexico has offered to release these people at least three times. In June of 1976, the former President, Luis Echevarria, offered to release them to Dr. Henry Kissinger while Dr. Kissinger was visiting Mexico. After the inauguration of President Carter, the first official visitor was President Portillo, and he offered to release them to us while he was here.

Just recently, Mr. Oscar Flores, the attorney general of Mexico, offered to release them to our consul general, Mr. Macinish. He said he would take them. But they are still there.

Now, this certainly seems to indicate a willingness on the part of the sovereign state of Mexico to release these people.

Gentlemen, I have a question which I feel is somewhat rhetorical. Now, without further ado, I would like to take up the matter at hand, the treaty.

QUESTIONS CONCERNING TREATY

We at FPI most certainly support the treaty and hope for its speedy adoption. Our questions concerning it are not to be interpreted as opposition, but there are some things that we feel need further clarification.

The points which I will cite in a moment, having to do with work time and transport, have given us a great deal of concern.

Our first concern is section 4100, paragraph (e). It states, in fact, that should the United States choose not to receive a prisoner or to receive one, the decision would not be able to be reviewed and would be final. Gentlemen, abstractions do not make decisions. Men make decisions, and officers may change from time to time. Would not such a statement, if let stand, prove to be unworkable? We would appreciate some latitude in that last sentence, such as, let a normal reviewing body determine the merits of the case, if and when a review might be sought.

Now we come to 4102 of paragraph 11. This is concerned with the

power or authority vested to the escort of a prisoner while that prisoner is in territory other than the United States of America. We are aware of there always being a large measure of authority, but in our experience, we are understandably concerned with some measure of protection that might be afforded to the prisoner. We would appreciate some accountability on the part of the foreign authorities and/or some method of monitoring this movement.

On May 13, 1977, an American prisoner, John Kenneth Korn, was being transported from one prison to another when halfway to the prison, Mr. Korn was let out of the vehicle and was beaten severely, kicked in the groin, and at least 10 knots put on his head. I offer these pants [indicating] in evidence. These were Mr. Korn's pants. His jacket was too gory to bring. It was terrible and Mr. Korn has still not recovered.

Now let us consider section 4105, having to do with work commissions. This is a method of allowing a prisoner to work off a certain portion of his sentence. Many work commissions have been purchased in good faith, and later, upon the transfer of the official who sold them to the prisoners, they have been found to have been spurious. We would hope that some procedure might be set up to make sure that each day earned in this manner might be credited to the prisoner whether the commission is spurious or not.

The man may not be able to get his money back, but his days off should not be taken as well.

CONCLUSION

In conclusion, I would like to make one last request of you. I would like to ask that some effort be made to try to get an accounting of our citizens who have just disappeared in this Mexican venture. I have seen no reference of it here. But there have been inquiries made of me, and just days ago, a father from Washington State came to my home in California to enlist our efforts in trying to trace the whereabouts of his son and three more people who had disappeared in Mexico. The plane and jeep were found, but the people have been missing since November 11, 1975. I believe that we have quite a number unaccounted for.

These 600 Americans are now experiencing an additional dimension in their detainment, knowing they face a potential double jeopardy. One of their greatest fears is of retaliation from either Mexican or DEA agents, upon the release of their detailed depositions to this committee through my testimony today. I have not been released from my pledged silence given in return for their confidence for this reason alone.

Admittedly, some of this is skepticism or downright paranoia. But all too much of this has enough truth in it to make anyone wishing to continue believing in our system and in ultimate justice very uncomfortable.

Thank you, gentlemen.

The Chairman. Thank you very much.

[Mr. Carter's prepared statement and supporting documents follow:]

Prepared Statement of Juanita Carter, President, Freedom Perseverance, Inc.

Mr. Chairman, Honorable Senators, Distinguished Citizens:

I am honored by the invitation you have extended to me to address you today. I feel a genuine humility that you would deem the cause of our group to be worthy of your consideration. We, at FPI, are not unaware of the many calls that are made upon your time and energies. This is the fulfillment of an almost four year dream for us and we know you will accept our thanks in the spirit in which they are extended. We are grateful.

Gentlemen I amthe mother of one of the young men confined in a Mexican prison. He has been so confined since October 12, 1973. I am a parent with all of the attendant feelings of a parent, but because of my many trips to Mexico City and my involvement in many cases other than that of my son, I have become a counselor and friend of almost all of the other prisoners and their families. We call ourselves Freedom Perseverance, Inc., simply because perseverance has been the only way open to us in our battle against great odds.

At this point, I would like to insert for the record, our thanks to several people, whose efforts in our behalf is truly appreciated. Former Senator John Tunny, Congressman Fortney Stark of California, and his staff, The Commission of The Calfornias and the many selfless and dedicated people who circulated petitions on behalf of people they had never seen.

On my first visit to Mexico City and I found this to be pretty much the experience of all of the parents, I was received by our consular officials with anything but wild enthusiasm. In fact, I must report they were aloof, indifferent, and somewhat contemptuous of our plight. This attitude determined my course of action.

The well being of the prisoners became of the first importance. Having established that the material responsibility was ours, we set about assuming the spiritual and mental responsibility, as well. This, we knew, would involve the uniting of the parents and relatives as well as the prisoners. This was started in the Fall of 1973.

At first the prisoners were reluctant to reveal the names and addresses of their parents and relatives. They still believed the unscrupulous attorneys and tried to protect their family's reputation and money. However necessity finally overcame pride and they authorized us to get in touch with their homes. This was in the Winter of 1973.

As my biographical data will tell you, I have long earned my living as a self employed business woman and I do take and have always taken an active interest in my community. In light of this, I was not completely unequipped for the task I set for myself in the Fall and Winter of 1973.

Gentlemen I cite these things as evidence of my own legitimacy to enter into your deliberations here today. I will be most happy to submit myself to your questions if you feel that any part of my statement needs further elaboration.

Both my husband and myself have had many talks with our Embassy personnel in Mexico City. On our last trip to Washington, D. C., we arranged with Mr. Loren Lawrence and Mr. James Hughes to come to California to speak to the concerned families. In August of 1975, we talked to Mr. Peter Wood the then vice consul in Mexico City and arranged for him to come to California to meet with these families. I, myself, even had a conversation with the Mexico City contingent of the DEA. I was somewhat shocked, later on, when a newspapaper reporter sought me out and asked if, indeed, the DEA did maintain an office in Mexico City.

Gentlemen you will have to excuseme, but there is one very large unanswered question which I have been instructed to ask of you. Why could not these people have been brought home by Executive Order? My husband asked this of President Carter recently in Los Angeles. We just fail to see the necessity for this elaborate manner for bringing these people home.

Since June of 1976, Mexico has offered to release these people at least three times. In June of 1976, the former President, Luis Echeverria offered to release them to Dr. Henry Kissinger, while Dr. Kissinger was in Mexico City. The first visitor to Washington after the inaugeration of President Carter was President Jose Lopez Portillo, and he offered to release them to us while he was here. Just recently, Mr. Oscar Flores, the present Attorney General of Mexico offered to release them to our present Consul General. This certainly seems to indicate a willingness on the part of the Soverign State of Mexico to release t hese people.

Gentlemen, I have asked a question which I feel is somewhat rhetorical and now without further a do, I would like to take up the matter at hand, the Treaty. We at FPI most certainly support the treaty and hope for its speedy adoption. Our questions concerning it are not to be interpreted as opposition, but ther are some things that we feel need further amplification and some things need further clarification.

The points, which I will cite in a moment, having to do with work time and transport have given us a great deal of concern. Now, if I may, I will turn to my copy of the implementing legislation.

Gentlemen there is, apparantly, a document that precedes this one that we have and one that follows it. We have not seen such documents, but they are feferred to in this document. Where is a reason for referral, we hope the clerk might be instructed to read to us the feferenced material.

Our first concern is Section 4100, paragraph E. It states in gist, that should the United States choose not to receive a prisoner or to receive one, the decision would not be able to be reviewed and would be final. Gentlemen, abstractions do not make decisions; men make decisions and officers may change from time to time. Would not such a statement, if let stand, prove to be unworkable? We would appreciate some latitude in that last sentence, such as, let a normal reviewing body determine the merits of the case, if and when a review might be sought.

We come now to 4102, paragraph X1. This is concerned with the power or authority vested to the escort of a prisoner while that prisoner is in territory other than the United States of America. We are aware of there always being a large measure of authority, but in our experience, we are understandably concerned with some measure of protection that might be afforded to the prisoner. We would appreciate some accountability on the part of the foreign authorities and/or some method of monitoring this movement.

Now let us consider Secion 4105, having to do with work commissions. This is a method of allowing a prisoner to work off a certain portion of his sentence. Many work commissions have been purchased in good faith, and later, upon the transfer of the official who sold themto the prisoners, they have been found to have been spurious. We would hope that some procedure might be set up to make sure that each day earned in this manner might be credited to the prisoner, whether the Commission is spurious or not. The man may not be able to get his money back, but his days off sould not be taken as well.

Gentlemen, in conclusion, I would like to make one last request of you. I would like to ask that some effort be made to try to get an accounting of our citizens that have just disappeared in this Mexican venture. I have seen no reference of it here, but there have been inquiries made of me and just days ago, a gentleman from Seattle came to my home in California to enlist my efforts in trying to trace the wherabouts of his son and several more people who had flown into Mexico in a private plane. The plane, apparantly, is being used openly, but no one seems to have heard from the people.

One other thing I would appreciate doing is to read into the record a portion of a letter I received from John Wesley Calhoun. John Wesley Calhoun died in the Santa Marta Federal Penitentiary on Friday, May 13, 1977. He was, so far, the only tragedy and we pray to God, he will be the only one.

Gentlemen, I thank you.

AN AFFIDAVIT

22 May, 1977
Santa Marta Acatitla Penitentiary
Mexico City, Mexico

My name is JOHN KENNETH KORN, 29 years of age, from Long Beach, California. I was arrested at the Benito Juarez International Airport in Mexico City on August 3, 1975, on a drug-related charge. My experience in the hands of the Federal Judicial Police was similar to that of the majority of Americans apprehended since 1972. I was subjected to physical abuse including the use of an electric cattle prod on my body for over six hours. The United States Embassy here read of my arrest in a local newspaper and, six days later, came to Lecumberri to pay their respects. Again, my experience follows closely that of the many Americans arrested here in the Federal District. I was forced to pay a good deal of money for avoiding the work gang, for a cell, for every basic necessity in addition to the ultimately futile fees paid to Mexican attorneys.

The Black Palace of Lecumberri was closed in August of 1976 and the more than 3,000 inmates transferred to other facilities including two new institutions within the Federal District. I was transferred to the Reclusorio Oriente on August 22, 1976. This was one of the two new establishments and, in their efforts to reform their penal format, the police were dressed in suits and ties and trained to conduct themselves in an ostensibly decent fashion. I was a teacher in the gymnasium from September until my transfer to Santa Marta Acatitla. My conduct since Lecumberri has been verifiably impeccable.

I had received word several weeks prior to the incident I am about to describe that my parents would be coming for a visit from California. I was pleased that at least they would see that the conditions I was living in were reasonably humane. I was particularly concerned in that my Mother is suffering from a weak heart and I wanted to make her as comfortable as possible. She did not want to see me in Santa Marta as the rumors of brutality and danger had frightened her. I was notified that I was to be transferred to Santa Marta Acatitla on May 13, 1977, just prior to my parents visit. I was upset at the news not only in light of the coming visit but also because I am still in the courts fighting my case and have the right under Mexican law to remain in a Reclusorio until all avenues of legal recourse have been exhausted. I explained the circumstance to the officials at Reclusorio Oriente when I was notified of my transfer. The police apparently felt I was being too aggressive in my objection and resorted to physical tactics that were definitely wholly unnecessary. I responded by pushing the police away. The chief of the prison police intervened and, after calming the circumstance, promised that he would do everything possible to have me returned to the Reclusorio Oriente. He bought refreshments and cigarettes and informed me that I was not to worry. I was placed with my belongings on a truck with about six other inmates for the twenty minute journey to Santa Marta. Approximately half-way the truck stopped and backed-up to what appeared to be a loading dock. Because I had been placed in the truck last, I was the first to exit. The moment I stepped from the vehicle I received two blows to the head from clubs held by the police whom, only minutes before, had shaken my hand and wished me the best of luck. More blows were thrown and I knew that I was in for the beating of my life. I was able to see that there were at least 10 and maybe 15 police officials surrounding me. A number of them were in possession of automatic weapons and presumably were prepared to shoot me in the back should I have made any effort to escape. The clubs and kicks to my body were staggering. I felt a tremendous amount of pain rendering me useless in terms of fighting back. Finally, after attempting to slam the truck door on my legs, I was shoved back into the truck. The vehicle then proceeded to Santa Marta. I was immediately placed in a holding cell while awaiting the return to the premises of the Director. The following morning I was given medical attention and re-

moved from the cell and placed in a normal cell. The Director at Santa Marta ordered the District Attorney's office to dispatch an investigator. I made a full statement of the events including names of witnesses. The following day six of the police officials from the Reclusorio Oriente were placed under arrest. There is now a doubt in my mind that those police officials will actually be tried for their crimes. I am still suffering from the acute blows to my head and to my ribs and will undoubtedly require hospitalization soon.

I believe it is important to note that the system of justice in this country remains as brutal and inhumane as always. Even after the enormous amount of adverse publicity given this country regarding their traditional brutality and overt Constitutional violations, they continue unabated.

The above described event is true and wholly without exaggeration or prejudice.

John Kenneth Korn

JOHN KENNETH KORN

June 12, 1977
6831 E. 10th St. Long Beach, CA. 90815

Gentlemen of the United States Senate,

We have just returned from Mex. City & visiting our son, whose affidavit is Enclosed concerning the torture & inhumane beating he was subjected to in the hands of the Mexican police. We arrived 9 days after the terrible torturous treatment & he was still in extreme pain & open wounds to his head & body. Nothing had been done or was being done for him other than pain shots, which he was allergic to. As far as we know he has not had a brain X-ray or rec'd proper medical care.

My husband and 3 of my brothers have served our country these two wars & We have always been proud of our heritage & this is very disturbing to us to see how our country is allowing our American boys & girls be so inhumanely treated by the Mexican government. Like Americans incarcerated in Mex. prisons had such hopes last year, when the Mex. govt signed the Treaty. It is hard to understand the U.S. govt taking so much time to bring our American Boys & girls home, it is shameful, to say the least. Needless to say - We as parents - have suffered untold agony &

-2-

American's nightmarish ordeal these past two years. Hopefully, our govt will stand up in the head in bring our boys & girls home, soon. They were all so hopeful & proud to be Americans & I saw the (enclose) Cartoons & write-ups in Mex. Newspapers saying, quote "The Mexican govt doesn't want the Americans but either do the Americans." Unquote. We have seen & visited with the Americans imprisoned in Mex. City at 3 Prisons The Mexicans feel they can mistreat — brutalize - torture the Americans as they please — Knowing the U.S. govt does nothing about it — other than talk & more talk.

President Carter has said on T.V. that all human rights there and the world should be vindicated - He also said - Concerning our Americans in Mex. prison would be acted upon quickly to: & all are brought home.

They do wanted & loved by alive parents that have fought so hard to get them back - So please help.

Sincerely Mr. & Mrs. [illegible] Bittenbach

March 20, 1977
Reclusorio Oriente
Mexico D.F. Mexico

President Carter and Honorable Members of the Senate:

For some years now injustices have been perpetrated on United States citizens in Mexico by members of the Mexican legal system, members of the U.S. D.E.A. and Department of State. Torture, extortion, unjust confinement and all sorts of sordid deeds have been unleashed on U.S. citizens detained in Mexico. The matter has been studied enough, facts found, to support this claim.* How can you, Honorable Sirs, sit back and do nothing?

By your vacillation on passing the proposed prisoner exchange treaty you are all jeopardizing yourselves by continuing these injustices here in Mexico. You all have knowledge of the atrocities committed against U.S. citizens down here. I swear to you I was beaten and forced on pain of death to sign a confession in Spanish which I didn't understand. I swear to you people have been kidnapped, entrapped and always beaten, tortured, shocked, kicked, drowned, burned, forced into signing confessions. With knowledge that these things have been done, are being done, to U.S. citizens if you do nothing you yourselves become guilty. Guilty of not doing your jobs, guilty of furthering, continuing these violations, just as guilty as if you were holding the cattle prods, holding the heads in the filthy water, kicking, breaking the bodies and spirits of U.S. citizens. By your inaction you become co-conspirators to all these and more violations against people, your people.

* For a well written factual account of one mans' experiences as well as a good overall view of the situation I suggest reading "Nightmare in Mexico" from the January 1977 issue of Penthouse Magazine. For more facts consult Congressman Fortney Stark or see State Department files for hundreds of substantiated cases of torture and other abuses.

In the past whenever I, we, brought up the violations, this insanity, to representatives of the U.S. government they always lied "there's nothing we can do, you're in Mexico and its up to Mexico". That lie is no longer serviceable. Mexico has finished its side of the proposed prisoner exchange. President Lopez Portillo, during his recent (Feb. 77) trip to Washington, Said "you can have them when you want them." I find it hard to believe I'm still here in this nightmare.

Recently President Carter and the U.S. government have been speaking out for human rights all over the world, especially in Russia. Yet you have done nothing about us, United States Citizens whose human and legal rights have been violated and continue to be here in Mexico. You cannot point to the proposed prisoner exchange and say "We're going to do it". It is time for action. Do it now.

Mr. President if for some reason the Senate will not pass the prisoner exchange in April as promised us by a representative of the U.S. government, Mr. John Holstein - House International Relations Committee, then it is your job to invoke Title 22 Section 1732 of the U.S. code which reads in part "If a citizen is unjustly or wrongfully imprisoned in a foreign country the President shall use all means short of war to gain relief for the citizen." (The quote might not be exact.) It has been proven that our confinement here is unjust, illegal. It is your duty to act.

Or is the world so turned around these days that we, U.S. citizens must ask Russia to protect our human rights for us because our own country, government refuses to. Mexico has said we can come home whenever you want us. Are you so concerned with Russian affairs

that you don't have time for your own children?

Please sirs remember the words of our President at a recent U.N. address. He said about the human rights issue "ours is a committment not just a political posture." And recognizing that the U.S. has not always lived up to its ideals in the field of human rights he said the nation would "deal with our deficiencies quickly and openly." Please start here and now. Bring us home.

Thank you,

Sincerely

[illegible]
Ramon Antonio Rodriguez
[illegible]
Richard Stevens
J. Norton
Ronald D'Agostino
[illegible]

[illegible] D Clark
[illegible] T Allen
Gustavo Ruiz Rodriguez
[illegible]
John [illegible]
[illegible]
[illegible]
[illegible]
David [illegible]
James Joseph Mitchell
[illegible]
Andrew Robert [illegible]

SAN Francisco chronicle
cc: President Carter
Members of the Senate
Vocero de SAN Juan
Other Publications

The CHAIRMAN. The next witness is Patrick Balvin of Corona, Calif. We are very glad to hear from you, sir.

STATEMENT OF PATRICK BALVIN, CORONA, CALIF.

Mr. BALVIN. Mr. Chairman and Senators, my name is Pat Balvin. I am employed as a claims representative for the Department of HEW's Social Security Administration. I am here representing my brother.

I wish that the entire testimony which I have submitted be entered into the record. However, in order to save time, I will summarize my statements in some sections and delete other sections. I will also talk fast.

STORY OF VINCENT PAUL BALVIN

In Mexico City Airport, on June 18, 1974, Mexican customs officials found a minute amount of cocaine buried in the bottom of one of two sleeping bags that were in the possession of my brother, Vincent Paul Balvin. The following is the story of what led up to—and the tragic aftermath—of this find. Our family has saved most of the correspondence and documents, if any verification of what I relate is requested by the committee.

No case of an American prisoner in Mexico is the same as any other case. If there is a norm, Vince's norm is a long way from resembling that norm. There is a generality that can be seen from Mexican justice, and that is that there is none. In Mexico, they still use a system of Napoleonic Law: one is guilty until proven innocent, and to prove that is impossible when there is forced confessions and suppression of evidence. It is an example of the confusion experienced when working with Mexican law that the actual amount of cocaine found was not determined for months. First we heard 900 grams, then we heard 900 milligrams, then 2 grams; and then when we read the expediente, the court record, we found out the actual amount found was 90 milligrams—less than one-tenth of a gram.

VINCE'S ARREST AND INCARCERATION

Vince was on a surfing trip. He flew into Mexico City from Colombia to meet an old friend who was traveling in a jeep with five surfboards. When Vince left Colombia, where he was staying briefly with our brother Mark, Mark asked Vince to take his sleeping bag with him so that he could take it to El Salvador, where they had both left belongings to facilitate their trips. The small amount of cocaine was found in that sleeping bag. Vince should not be made to pay for the mistakes of his brother.

Behind the scenes, greater forces were coming together and provided another cause of our predicament. In that fiscal year, 1974–75, the U.S. Government poured $8 million into Operation Cooperation. It was U.S. involvement that led Mexico to build up the number of drug arrests.

Humberto E. Moreno, of the U.S. Drug Enforcement Administration, who coordinated efforts between the DEA and Mexico, stated: "We motivated it."

Vince's arrest and incarceration in Mexico was used to help the Mexicans justify the amount of U.S. money they spent to eradicate drugs. It is ironic that during Operation Cooperation, Mexican heroin increased from 15 percent to 60 percent of the U.S. supply. It seems that U.S. money was misspent and did not fulfill its purpose, but instead led to the arrest of small-time dealers and, in Vince's case, innocent victims.

Vince's original description of his arrest and interrogation are submitted in this testimony. During this time we did not know where he was. Six days after his disappearance, we were notified by a lawyer of his whereabouts in Lecumberri Penitentiary.

EXCESSIVE WORK AND BEATINGS

My father, James Balvin, long ago had suffered four nervous breakdowns and is now psychologically disabled because of his 14-month stay at Stalag 17b during World War II. I saw this type of pressure getting to Vince when I visited him during the first month of his stay in Lecumberri. So, I wrote the Ambassador on July 8, 1974. In part that letter reads:

> We have hired an attorney and have been following legal processes in trying to free him. However, we are thinking in participating in illegal extortion in order to improve Vincent's condition.
>
> We have heard that what I am about to relate happens all the time but deals are made, and no one talks about them. Giving no weight to hearsay or conjecture, though, we know that in dormitorio F the guards and trustees are attempting to extort $1,000 American currency from Vincent for him to be exuced from working 20 hours a day, 7 days a week, as is presently the case.
>
> For a more complete description of the type of work, a signed letter from Vincent will be forthcoming. His letter will also contain a description of the beatings he undergoes, which incidentally, are growing more severe.
>
> For the past 18 days he has sustained the work detail and the beatings without making a deal. However, his physical and psychological well-being is at stake. I suggested to him to offer them $200 American currency. I take full responsibility for this action if it becomes necessary. I feel it will become necessary if other action is not taken this week to put an end to the excessive work and the beatings.

The U.S. Embassy in Mexico City has Vince's report in his own words of his mistreatment at the military-run prison. A copy is also submitted in this testimony.

The Embassy also should have records of our search for Vince, the date of his arrest, and the date I notified them of his arrest and incarceration. The U.N. Convention on Consular Relations, held at Vienna in 1963, specifies that a foreign national, if arrested, has a right to notify his Embassy within 3 days. Vince was never given that right. He was also beaten at the airport jail and at Lecumberri. At Lecumberri, in dormitorio F, the guards and trustees attempted extortion.

REFUSAL OF DEMANDS FOR EXTORTION

After my letter of July 8, 1974, and after speaking personally to Mr. Peterson, the Consul General, and with the colonel of the prison, Vince was transferred to dormitorio O, where the majority of the Americans were and where the mejor, the head trustee, usually demanded $2,500 from Americans. Mexican prisoners give about $200 for their so-called "fahina."

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Vince has refused all demands for extortion, except once for 80 cents, and has suffered the consequences.

A hunger strike by Americans at Lecumberri was being conducted at the time of the transfer from dorm F to dorm O. The mejor of dorm O had approved the strike on condition that the prisoners only mention the role of the United States in their arrests and not talk about mistreatment in prison or in interrogation. The mejor called the strike off when word leaked to the press about extortion, beatings, and torture.

They found out that some would talk, including Vince, so Vince was not pressed for the $2,500 when he refused to give it and told them that he simply did not have it. He was one of the only American prisoners who was allowed to sleep in a bed and did not have to undergo excessive work detail in dorm O within a month without paying. Of course, essentials such as blankets and food were supplied by visitors. His fiance still visits him every day, now at Santa Marta penitentiary, and provides necessities.

PROFITS OF MEXICAN ATTORNEYS

Mexican attorneys also profited from desperate American prisoners and their families. A lawyer acquaintance of Vince's fiance believes in Vince and is now handling the case as a favor, with no fee. This is quite commendable because drug cases are avoided unless a huge fee is involved. Our family, though, has had its share of rip-offs from unethical lawyers. We only lost a couple of thousand dollars, as compared to tens of thousands of dollars others have lost because we tried to be very careful and quite skeptical. We knew that he had to have an attorney in order for him to receive a sentence within a year. But we decided not to pay exorbitant fees and to keep a check on what they were doing.

Vince's conviction and 6-year sentence was upheld on appeal. Under Mexican law, a drug addict may possess small amounts of drugs. Vince could have been declared an addict by three doctors for a sizeable fee for lying, and quite possibly released. But he opted to tell the truth, that the evidence found was not his. A letter from our brother Mark was analyzed, notarized, translated, and legalized by the Mexican Consulate in Los Angeles. In it he expressed his culpability. Mark was arrested in August of 1974 and died in a prison in Bogotá.

MAIN POINT OF TESTIMONY

The main point of this testimony is that Vince should not have languished in a Mexican jail for 3 years. I feel it is the responsibility of the U.S. Government to see that he is released as soon as possible. Even with the reduction in his sentence for working these 3 years, he still has over a year left to serve. His family and friends cannot see any sense to this story. He was a good citizen who did not break the law. He voted. He was even a registrar of voters. He served in this country's military and fought in one of its police actions, Vietnam.

We ask first that you bring this treaty to exchange prisoners to a vote on the floor of the Senate as soon as possible. We hope you also

see to it that the implementing legislation is passed quickly, otherwise Vince will not even be affected by this treaty. If Vince is not able to petition for an exchange under the proposed treaty by December of this year, then he will not fall under the treaty's guidelines.

A situation analogous to this occurred about a month ago. About 70 prisoners were released who had been arrested with small amounts of drugs. The amount that Vince was arrested for was probably the smallest amount ever found. But the prisoners released were those who had not been to trial yet. Thus, Vince was not included.

We believe that the case of my brother deserves special consideration. Our family requests that this committee consider transmitting a joint letter to President Portillo of Mexico asking that he pardon Vince and send him home immediately. I wish to be notified of the outcome of this consideration.

I thank you for allowing me to tell his story and I wish to end with a note of thanks and appreciation to Vince's fiance, Theresa Briones. For 3 long years she has stayed by his side visiting him nearly every day, bringing him food and other necessities. She has kept his spirit up all this time. She is another one who can tell you how innocent Vince is. That's why she is there.

The CHAIRMAN. Thank you very much.

[Mr. Balvin's prepared statement and supporting documents follow:]

PREPARED STATEMENT OF PATRICK L. BALVIN

3978 Moody
Corona, Ca. 91720
June 16, 1977

United States Senate
Committee on Foreign Relations
Washington, D.C. 20510

At Mexico City Airport, on June 18, 1974, Mexican customs officials found a minute amount of cocaine buried in the bottom of one of two sleeping bags that were in the possession of my brother, Vincent Paul Balvin. The following is the story of what led up to, and the tragic aftermath of this find. Our family has saved most of the correspondence, if any verification of what I relate is requested by the Committee.

No case of an American prisoner in Mexico is the same as any other case. If there is a norm, Vince's case is a long way from resembling that norm. There is a generality that can be seen from Mexican justice, and that is, that there isn't any. In Mexico they still use a system of Napoleonic law: One is guilty until proven innocent.

It is an example of the confusion experienced when working with Mexican law that the actual amount of cocaine found was not determined for months. First we heard 900 gr., then 900 mg., then 2 gr., and then when we read the expediente (court record) we found out the actual amount found was 90 mg.--less than one-tenth of a gram.

Vince's penchant for surfing put him in this dreadful wrong-place-wrong-time position. Vince had surfed for over ten years and was never away from the beach for long, except for a tour of duty with the U.S. Army, which included Viet Nam. In the winter of 1974, he realized a desire to experience the type of waves he had experienced in Hawaii. (He had attended Chaminade College in Hawaii, in 1967.) In 1974 he had worked two years and saved enough money to surf in Central America. La Libertad, El Salvador, featured in Surfer Magazine and recommended for its big, uncrowded waves, was his first stop. Then, on his way to surf in Ecuador, he stopped at Bogota, Colombia, to visit our brother, Mark. Vince had already stayed with Mark at a family residence in El Salvador.

But in Columbia, our brother Mark was dabbling into cocaine and Vince wanted to get away. It was at this time that he was offered a trip in a jeep, with five surfboards for different types of waves, by a friend with whom he had surfed in Hawaii. His friend was to meet him in Mexico City. This friend paid for Vince's flight to

Mexico City and was to drive him back to El Salvador and eventually to Ecuador where they were to meet Vince's fiance who was going straight from Colombia to Equador.

Vince's friend, Michael Whitsell, had surfed with Vince in Hawaii. He told me Vince had saved his life at Sunset Beach. My wife and I had planned to attend U.N.A.M., Mexico's National University, in Mexico City. We were going with another student, in his car, and Mike Whitsell decided to go with us so that four people could share the driving of two cars. Picking up Vince in Mexico City meant that he did not have to drive the rest of the way to El Salvador alone.

When Vince left Columbia, Mark asked Vince to take his sleeping bag with him to El Salvador where they had both left belongings to facilitate their trips. The small amount of cocaine was found in that sleeping bag. Vince should not be made to pay for the mistakes of his brother.

Behind the scenes greater forces were coming together and provided another cause of our predicament. In that fiscal year, 1974/1975, the U. S. Government poured 8 million dollars into "Operation Cooperation". According to the Los Angeles Times, December 9, 1974, "The vast majority of Mexican federal and customs agents had been trained by the U.S. . . ."

One major plan was to halt drug traffic in Mexico City on commercial flights from South America. Most flights from South America to the United States stopped at Mexico City Airport. The reason for making arrests in Mexico was expressed by Humberto E. Moreno of the U.S. Drug Enforcement Administration. He coordinated efforts between the D.E.A. and Mexico. He stated, Mexico is ". . . much better than our courts on convictions and penalties." He added, "The Mexicans are giving defendants six years in cases that we are losing in American courts." Vince's is one of those cases. Actually in the United States, charges probably would not have even been pressed.

It was United States involvement that led Mexico to build up the number of arrests. In Mr. Moreno's words, "We motivated it." Vince's arrest and incarceration in Mexico was used to help the Mexicans justify the amount of U.S. money they spent to eradicate drugs. It is ironic that during "Operation Cooperation" Mexican heroin increased from 15% to 60% of the U.S. supply. It seems that U.S. money was misspent and did not fulfill its purpose, but instead led to the arrest of small-time dealers and in Vince's case, innocent victims.

Vince's original description of his arrest and interrogation are submitted in this testimony. During this time we did not know where he was.

Six (6) days after his disappearance we were notified by a lawyer of his whereabouts. All this time the U.S. Embassy said they could not locate him. Kathy Mullen, a Vice Consul, said that the Embassy even had tried at the airport jail, where authorities had lied to them. After Vince was transferred to Carcel Preventiva de Ciudad de Mexico, otherwise known as Lecumberri, he told a visiting lawyer to contact me. We are now working with our fourth lawyer.

My father, James Balvin, long ago had suffered four nervous breakdowns and is now psychologically disabled because of his fourteen month stay at Stalag 17b during WW II. My father, after working during the day, would do much of the work on the famed tunnel at night because of his small size. I saw this type of pressure getting to Vince when I visited him during the first month of his stay in Lecumberi, so I wrote the Ambassador on July 8, 1974. This letter is submitted in this testimony. In part it reads:

> "We have hired an attorney and have been following legal processes in trying to free him. However, we are thinking of participating in illegal extortion in order to improve Vincent's condition. We have heard that what I am about to relate happens all the time; but deals are made, and noone talks about them. Giving no weight to hearsay or conjecture though, we know that in dormitorio F the guards and trustees are attempting to extort $1,000 American currency from Vincent for him to be excused from working twenty (20) hours a day, seven (7) days a week as is presently the case. He sleeps less than four (4) hours a day and works the rest of the time except when visitors are present.
>
> For a more complete description of the type of work, a signed letter from Vincent will be forthcoming. His letter will also contain a description of the beatings he undergoes, which incidentally, are growing more severe. He will also try to name as many of the transgressors as possible.
>
> For the past 18 days he has sustained the work detail and the beatings without making a deal. However, his physical and psychological well-being at stake, I suggested to him to offer them $200 Am. Cy. I take full responsibility for this action if it becomes necessary. I feel it will become necessary if other action is not taken this week to put an end to the excessive work and the beatings. This means that normal channels of issuing complaints should be circumvented. (Another reason is that a normal complaint might result in even worse conditions, a chance we are not going to take.) For these reasons I respectfully request your most prompt intervention in these affairs."

The U.S. Embassy in Mexico City has Vince's report in his own words of his mistreatment at the military-run prison. A copy is also submitted in this testimony.

The Embassy also should have records of our search for Vince, the date of his arrest and the date I notified them of his arrest and incarceration. The U.N. Convention on Consular Relations, held at Vienna in 1963 specifies that a foreign national, if arrested, has the right to notify his Embassy within three (3) days. Vince was never given that right. He was also beaten at the airport jail and at Lecumberri. At Lecumberri, in dormitorio 'F' the guards and commandos (trustees under the domination of the mejor, the head trustee in each dormitorio) attempted extortion. After my letter of July 8, 1974, and after speaking personally to Mr. Peterson, the Consul-General, and the Colonel of the prison, Vince was transferred to dormitorio 'O' where the majority of the Americans were and where the mejor usually demands $2500 from Americans. Mexican prisoners give about $200 for their so-called "fahina". Vince has refused all demands for extortion (except once for 80¢) and has suffered the consequences.

A hunger strike by Americans at Lecumberri was being conducted at the time of the transfer from dorm 'F' to dorm 'O'. The mejor of dorm 'O' had approved the strike on condition that the prisoners only mention the role of the U.S. in their arrests and not talk about mistreatment in prison or in interrogation. The mejor called the strike off when word leaked to the press about extortion, beatings, and torture.

They found out that some would talk, including Vince, so Vince was not pressed by the mejor of Dorm 'O' for the $2500 when he refused to give it and told them that he simply did not have it. He was one of the only American prisoners who was allowed to sleep in a bed and did not have to undergo excessive work detail in dorm 'O' within a month without paying. Of course, essentials such as blankets and food were supplied by visitors. His fiance still visits him every day and provides necessities.

Vince is now at Santa Marta Penitentiary. Lecumberri was shut down in August, 1976. In May of 1976 it was rumored the General and Colonel of Lecumberri had been removed from their positions and had themselves been jailed. I have heard that a U.S. Embassy investigation found bank accounts containing hundreds of thousands of dollars in their names. Apparently this money came from Americans imprisoned there.

Mexican attorneys also profited from desperate American prisoners and their families. A lawyer acquaintance of Vince's fiance believes in Vince, and is now handling the case as a favor (no fee). This is quite commendable because drug cases are avoided unless a huge fee is involved. Our family, though, has had its share of rip-offs from unethical lawyers. We only lost a couple thousand dollars

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because we tried to be very careful and quite skeptical. The Mexican lawyer who notified us of Vince's arrest, and who escorted Mike and I into Lecumberri to see Vince for the first time after his arrest, proposed an initial fee of $2,500. He said he would have Vince out in three months. We thanked him for getting us in to see Vince, but did not take him up on his offer. It causes me distress to look back on these events and ask myself what might have been. Would that attorney have been able to free Vince? I can empathize with the many families who have spent tens of thousands of dollars to Mexican lawyers to free a loved one but received no results. We knew he had to have an attorney for him to receive his sentence within a year, but we decided not to pay exhorbitant fees.

Vince's conviction and six (6) year sentence was upheld on appeal. Under Mexican law a drug addict may possess small amounts of drugs. Vince could have been declared an addict by three doctors for a sizeable fee (for lying) and quite possibly released. But he opted to tell the truth: that the evidence found was not his. A letter from our brother Mark was analyzed, notarized, translated, and legalized by the Mexican Consulate in Los Angeles. In it he expressed his culpability. Mark was arrested in August of 1974 and died in a prison in Bogota.

The main point of this testimony is that Vince should not have languished in a Mexican jail for three years. I feel it is the responsibility of the United States government to see that he is released as soon as possible. Even with the reduction in his sentence for working these three years, he has over a year left to serve. His family and friends cannot see any sense to this story. He was a good citizen and did not break the law. He voted. He was even a registrar of voters. He served in this country's military and fought in one of its police actions, Viet Nam.

We ask first that you bring this treaty to exchange prisoners to a vote on the floor of the Senate as soon as possible. We hope you also see to it that the implementing legislation is passed quickly, otherwise Vince will not be affected by this treaty. If Vince is not able to petition for an exchange under the proposed treaty by December of this year, then he will not fall under the treaty's guidelines.

A situation analogous to this occurred about a month ago: about 70 prisoners were released who had been arrested with small amounts of drugs. The amount that Vince was arrested for was probably the smallest amount ever found. The prisoners released were those who had not been to trial yet. Thus, Vince was not included.

We believe that the case of my brother deserves special consideration. Our family requests that this committee consider transmitting a joint letter to President Luis Portillo of Mexico asking that he pardon Vince and send him home immediately. I wish to be notified of the outcome of this consideration.

I thank you for allowing me to tell his story and I wish to end with a note of thanks and appreciation to Vince's fiance, Theresa Briones. For three long years she has stayed by his side visiting him nearly every day, bringing him food and other necessities. She has kept his spirit up all this time. She is another one who can tell you how innocent Vince is. That's why she is there.

Sincerely,

Patrick L. Balvin

Patrick L. Balvin

I WAS ARRESTED AT BENITO JUAREZ INT'L AIRPORT AT ABOUT 8:30 6-17-74. FOR ALLEGEDLY IMPORTATING TWO GRAMS OF COCAINE. THE COCAINE WAS FOUND IN A BLUE SLEEPING BAG THAT WAS IN MY POSSESSION IN THE AIRPORT CUSTOMS STATIONS. THERE WERE THREE MAIN OFFICERS INVOLVED IN THE ARREST AND INTERROGATIONS ONE WAS AN OFFICER VALDEZ, THE OFFICER IN CHARGE, AND TWO OTHER OFFICERS. OFFICER VALDEZ SPOKE IN ENGLISH AND THE OTHERS DID NOT.

AFTER THE INITIAL ARREST I WAS TAKEN TO A SIDE ROOM IN THE AIRPORT FOR FURTHER FRISKING AND STRIPING. THIS COMPLETED I WAS ASKED BY VALDEZ "WHO IS YOUR BIG CONNECTION IN MEXICO CITY" AND "WHERE WERE YOU TAKING THIS STUFF," I ANSWERED "IT'S NOT MINE" AND "I DON'T KNOW WHERE IT CAME FROM." WHEN THE OFFICERS FOUND NO OTHER DRUGS THEY TOOK ME TO ANOTHER ROOM ON THE OTHER SIDE OF THE AIRPORT AND UPSTAIRS FROM THE STRIPPING ROOM, WHERE I WAS TO BE INTERROGATED.

THE INTERROGATION WENT THUSLY:

OFFICER VALDEZ ASKED. "WHERE WERE YOU TAKING THIS STUFF" AND FURTHER "WHO IS YOUR BIG CONNECTION" BEFORE I COULD ANSWER ONE OF THE TWO OTHER OFFICERS HIT MY FOREARM WITH HIS KNUCKLES. THEN I ANSWERED "ITS NOT MINE", VALDEZ ASKED "THEN WHO'S IS IT" I EXPLAINED "THE SLEEPING BAG IS MY BROTHERS" AND THAT "HE WAS LIVING WITH A MAN NAMED GREGORIO IN BOGOTA WHO THE COCAINE PROBABLY BELONGED TO."

THEY ASKED ME ABOUT MY PASSPORT. "WHERE DID YOU GO AND WHAT ARE THE REASONS FOR YOUR TRAVEL." I ANSWERED THAT "I WAS TRAVELING AND VACATIONING FOR ~~REASON~~ IN AND SURFING THROUGHOUT CENTRAL AND SOUTH

AMERICA FROM EL SALVADOR AS MY FIRST STOP." AND EXPLAINED IN DETAIL THE PLACES AND TIMES OF ARRIVAL AND DEPARTURES VALDEZ ASKED "WHERE DID YOU GET THE MONEY" I SAID I WORKED FOR TWO YEARS AND SAVED MONEY" THEN THE OTHER MAN BEGAN HITTING ME IN THE RIBS AND CHEST WITH THE ENDS OF HIS FINGERS, THEN IN THE HEAD WITH HIS KNUCKLES AND THEN VALDEZ JOINED HIM.

I WAS TAKEN FROM THE ROOM LONG ENOUGH TO HAVE MY PICTURE TAKEN WITH THE COCAINE IN MY HANDS. AND THEN WAS TAKEN BACK INTO THE INTEROGATION ROOM. EVEN DURING THE PICTURE TAKING I WAS SLAPPED BY THE OFFICERS WHILE I WAS SAYING ALL THE TIME "NO ES MIO"

WHEN I WAS TAKEN BACK INTO THE INTEROGATION ROOM I WAITED A FEW MINUTES AND VALDEZ CAME BACK IN AND STOOD IN FRONT OF ME WHILE ANOTHER OFFICER SAT NEXT TO ME ON THE BENCH. THEN THE QUESTIONING BEGAN WITH "WE HAVE WAYS OF MAKING YOU PEOPLE TALK." AND "YOU WANNA GO FOR A RIDE" FROM VALDEZ. ANOTHER OFFICER TOOK MY ARM IN HAND AGAIN AND HIT MY FOREARM WITH HIS KNUCKLES. THIS WENT ON WHILE I TOLD THEM I WAS TELLING THEM THE TRUTH AND THE TWO OFFICERS BEGAN HITTING AND KICKING ME ~~AGAIN~~ MORE VICIOUSLY THAN BEFORE.

I TOLD ~~THEM~~ HIM THAT "IT ~~WAS~~ MY BROTHERS SLEEPING BAG WHO IS IN BOGOTA" AND "HE HAS A FRIEND NAMED GREGORIO WHO IT PROBABLY BELONGED TO." HE ASKED "WHERE DOES YOUR BROTHER LIVE IN BOGOTA AND I SAID "I CAN'T REMEMBER THE ADDRESS BECAUSE I WAS IN BED SICK, MOST OF THE 3 WEEKS I WAS IN

BOGOTA. HE THEN ASKED FOR GREGORIO'S ADDRESS in the States AND I GAVE it TO HIM. IS WRITTEN it DOWN.

THEN VALDEZ ASKED "WHERE WERE YOU TAKING the SLEEPING BAG." I ANSWERED. "TO El SALVADOR" AND FURTHER EXPLAINED "I WAS to MEET A FRIEND, MIKE WHITSELL HERE IN MEXICO CITY AND TRAVEL BY CAR to El SALVADOR WHERE WE'D STAY A WHILE AND I WOULD LEAVE MARK'S BELONGINGS IN LA LIBERTAD, WHERE he AND I HAD LEFT SOME OTHER OF OUR BELONGINGS A MONTH BEFORE, WITH A SALVADORANIAN FAMILY FOR the PURPOSE OF EASIER TRAVELING, WITH less LUGGAGE. WE'D both SPENT ~~#~~ 2-3 MONTHS IN LA LIBERTAD AND HAD LEFT MUCH OF OUR OTHER PROPERTY THERE in this SMALL TOWN WITH HIS FAMILY."

THEN I WAS TAKEN to ANOTHER PART OF the PHOTOGRAPHY ROOM AND the INTERROGATION WAS ENDED.

WHILE WAITING IN this OTHER ROOM I WAS RETURNED MY PURSE AND $2.00 WAS MISSING IN SILVER DOLLARS. I ASKED the GUARD WHERE the REST OF the MONEY WAS AND he REFERED ME to OFFICER VALDEZ. OFFICER VALDEZ PULLED FROM his POCKET A WAD OF BILLS & SHOWED them to ME AND SAID "I HAVE LOTS OF MONEY, WHY I GOING to STEAL YOUR TWO DOLLARS." THEN he BEAT ME to the FLOOR WHERE he AND the OTHER PRINCIPAL INTERROGATION OFFICER KICKED ME FOR APPROXIMATELY 30 SECS.)

to A MINUTE. THEY both KICKED ME UNTIL I FINALLY SCREAMED "I MUST'VE MISCOUNTED" SEVERAL TIMES. I WAS THEN TAKEN AND ORDERED to SIGN A DECLARATION.

I WAS THEN HANDCUFFED AND LATER TAKEN to the PENITENCIARIA WHERE I WAS ~~LOCK~~ INCARCERATED.

Vincent O'Gallen

7-20-74

In the "F"

taken by car to the Procuradoria.

The day I entered "F" Section I was told by a man named Hector that I must either pay $100 or work the Cabeina. I told him I didn't have that much money and they put me to work immediately, alone, even though I was one of four new inmates. Some who had paid, some who hadn't left all were mestizo. While working I had one American silver Dollar that I saved as a memento - It was taken from me by Hector.

As I did not pay the fabiano and chose to work I was isolated and harassed continually by the man in charge By the Jefe of the work Crew, a man named Maya who at Several times kicked me while working and one day the 4th of 3rd of July while Jefe Maya was kicking me while I was working I saw the Mayor, the man in charge of the Dormitorio and looked up at him standing on the heads with a grimace on my face and my shoulders shrugged and he kicked me in the chest twice as he with pointed shoes this kicking welt was occasionally visible I left "F".

A few days later I was approached by a man named I believe Don Tino who wanted money, 14 fourteen dollars to not work what was called Chochee I ventured the Question "If I cannot pay then when will I work the chochee" He replied "when you can/or slept" I believe him and paid a downpayment of ten pesos. The rest was to be paid later on Visiting day. We were only allowed four hours sleep and it had become practically Working hours were from two in the morning until ten o'clock at night.

Then on my last day in "F" I was approached by a new man Jefe named who demanded I pay the rest of the Cho chu. I told him I hadn't the money and while we were actually standing in the cuartel I was called to be transfered. The cuartel perhaps one quarter again the size of a regular cell held accomodated anywhere from 15-19 people and possibly more. Blankets were scarce and one morning when the Jefe Mayor deemed it necessary my blanket was to be up and used as rags. I slept two nights without a blanket while it rained outside This blanket business is the only qestion I have mentioned that was not discriminate for everyone was treated the same in

The CHAIRMAN. Next we will hear from Ms. Deborah Friedman. I understand that Ms. Friedman and Mr. Paul DiCaro are together. We will be very glad to hear from you both.

Mr. DICARO. Yes, sir.

Ms. FRIEDMAN. Mr. Chairman, we have separate testimonies.

The CHAIRMAN. Very well, if you have separate statements, we will hear from you first, Ms. Friedman.

[Ms. Friedman's biography follows:]

BIOGRAPHY OF DEBORAH LEE FRIEDMAN

Address: 16484 Healdsburg Avenue, Healdsburg, Calif. 95448.
Date of Birth: August 20, 1950.
Place of Birth: New Haven, Conn.
Parents: Dr. and Mrs. Murray Friedman, 400 Tiffany Dr., Waukegan, Ill. 60085.
Education: June 1968—Graduation from: Waukegan Township Highschool, Waukegan, Ill. 60085; June 1970—A.A. Degree: Kendall College, Evanston, Ill. 60204; June 1972—B.A. Degree: Sociology and anthropology, Lake Forest College, Lake Forest, Ill. 60035.
Work experience:
June 1972–January 1973: Kelly Services, Oakland, Calif., legal and secretarial temporary employment.
June 1973–December 1973: Friend Ranch, Healdsburg, Calif. 95448, agricultural and viticultural worker.
January 1974–August 1974: Coordinated Home Care, Inc., Santa Rosa, Calif., county worker to aid the aged and disabled in their homes.
August 1974–December 1974: Friend Ranch, Healdsburg, Calif. 95448, agricultural and viticultural worker.
June 1975–October 1976: Boise Cascade Corp., Healdsburg, Calif. 95448, apprentice carpenter.
October 1976–present: Friend—Independence Cooperative Ranch, 16484 Healdsburg Avenue, Healdsburg, Calif. 95448, self-employed agricultural and viticultural worker and land owner.
Arrested in Mexico: January 22, 1976.
Date of freedom: February 28, 1976.

STATEMENT OF MS. DEBORAH FRIEDMAN, HEALDSBURG, CALIF.

Ms. FRIEDMAN. Gentlemen of the Senate, distinguished guests, and beloved family, it is a miracle that I am here today to testify before this most important committee after being arrested and imprisoned in Mexico. Not many of those American citizens arrested in Mexico have been as lucky as I to be free today after spending a relatively short time within one of the grossest corruptions of any judicial system.

I come to you today as a representative of my fellow Americans arrested and imprisoned in Mexico. I feel a moral obligation to speak to them, as they are not fortunate enough to be free with us today at this hearing.

VIOLATIONS OF MS. FRIEDMAN'S RIGHTS

I, Deborah Friedman, arrested in Mexico, January 22, 1976, do hereby testify to the following violations of my rights as an American citizen and as a human being.

I witnessed the brutal beating of my companion, Paul DiCaro, upon arrest. I was held in the city lockup in Guadalajara for a total of 6 days without food or adequate drinking water, sleeping on a cement floor in 30-degree temperatures at night with nothing but the clothes on my back. I was forced into signing a confession without legal

counsel. I was officially charged with buying, possessing, transportation, and tentative exportation of 50 grams of marihuana, when in reality I possessed a mere 13½ grams for my own personal consumption. Each charge warranted a possible sentence of 5 years, 3 months, thus giving me a mere minimum sentence of 21 years for possession of one-half an ounce of marihuana, which might give me a fine of $100 in the State of California.

I was held for up to 30 days in the women's department of the state penitentiary of Jalisco with a total of 120 women in a prison the size of half a football field, whose only sleeping quarters were 4 large rooms with 30 women and/or children in each half, who slept on a cement floor, as beds were at a high premium.

The prison's only bathroom facilities are 2 toilets, neither of which flush, and 2 showers, with a small 25-gallon hot-water heater to supply showers to over 100 women and children. Needless to say, showers are available very rarely and hot water available even less of the time.

The only food served is beans, rice, and coffee twice a day. All of the food has to be purchased and brought in from the outside.

Medical care is at a bare minimum with no infirmary on the premises. A doctor is available only in the most dire emergency and hospital care is available only in a life or death situation.

After a few weeks or a few months, not to mention a few years in this type of daily environment, one begins to experience the physical and emotional deterioration of the human body, mind, soul, and spirit.

I experienced the Mexican system of bribery when I contacted an infamous prison lawyer, Guttierez Martin, referred to me by the directress of the women's prison. On the day of our second appeal, Martin was there at the court waiting. Although he had not been hired by anyone, he offered the secretary of our case a substantial bribe to write a negative report so that he could take the case. Our original lawyer, Ramirez, heard of this bribe and told my mother, who in turn told Ramirez to double Martin's bribe. Of course, the higher bribe was accepted. Had my mother not been there ready to pay this bribe, I have the deepest of feelings that I would still be in prison today.

We were kidnaped upon our release secured by the court. We were apprehended at the prison gates with passport and visa in hand by immigration authorities, and were taken to the same jail we were originally put in where yet another bribe was to be extorted.

But let me stop here and attest to the fact that our case is mild. It is hardly an example of the severity of the majority of cases of Americans imprisoned in Mexico today.

TESTIMONY BY MR. ROBERT SMITH REQUESTED

At this time I would like permission to present Mr. Robert Smith to testify. His knowledge and experience in relation to the D.E.A. involvement with Americans is very important to this testimony.

Am I granted this permission, Senator?

The CHAIRMAN. Mr. Smith, are you ready to report to this committee.

Mr. SMITH. Yes, Mr. Chairman.

92-305 O - 77 - 15

STATEMENT OF ROBERT JONES SMITH, RELEASED PRISONER

Mr. SMITH. I am Robert Smith, a released prisoner. I spent 20 months in an Acapulco jail.

On July 14, 1975, I was arrested in Mexico for allegedly having seven seeds of marihuana in my airplane. I was held for seven days in a camp in the hills where I was submitted to torture. Electric shock was applied by a D.E.A. agent that I later identified, and we are in the process now of finding out who this man is. The name that I got from his credentials was Jay Medina, D.E.A. Badge number 1944.

For 5 days I went through beatings, stompings, and electrical tortures, in addition to being denied food, sleep, and water. All of this was done because they wanted to obtain a confession so Lieut. Gen. Ruiz Jimenez of the 27th military zone could have a basis for confiscating my aircraft. I did not confess. I hurt so badly that I begged them to go ahead and kill me, but I did not confess.

On March 23, 1977, I was declared innocent of all charges, acquitted and released by the Federal Court of Appeals in Toluca.

INJUSTICES ENCOUNTERED IN MEXICAN JAILS

Following are some of the injustices that I encountered in the 20 months that I was held prisoner in Acapulco, Mexico. This also goes for a lot of other Americans who are in the jails down there now and are innocent.

Mexican law states that detention must not exceed 72 hours without a decree being issued by the penal judge upon being arrested. I was held 19 days.

The Mexican Constitution declares that after an arrest is made, the prisoner shall not be held in detention incommunicado where he is unable to contact outside help or lawyers. I was held incommunicado 7 days.

There are a lot of others that I could mention, but there are more important things that I would like to bring out against the State Department.

DISINTEREST OF STATE DEPARTMENT

On December 19, 1975, I was shot in the back of the head and beaten in the streets of Acapulco by the commander of the guard. Three ribs were broken and one punctured a kidney, and a skull fracture caused paralysis of my left arm and leg. The American Embassy was notified on the same day, but did not make a move to assist for almost 2 weeks, at which time Congressman Barry Goldwater, Jr., intervened on my behalf.

On January 3, 1976, Peter Woods of the State Department appeared with Dr. Edwardo Varela to examine me. The doctor told me that the only thing they would allow him to do was to examine me. He could not treat me or prescribe medication. The American Embassy advised my wife that I was receiving "adequate medical care."

This is not only just for my part, Senators, this is for a lot of Americans held in jails in Mexico. There are a lot of people there who are innocent. In my 20 months there, I witnessed approximately 38 Americans passing through that jail, and some of them are still there now. They were brutally beaten, and I could give you references to several of them. I saw two young girls tortured, burnt by electricity, raped by the commander of the federal judicial police. His agents took their turns after him. These girls looked like hamburger meat and I had to administer medication to them because they would not allow a Mexican to touch them.

Let me continue with this.

I have with me a letter from Dr. Varela dated July 14, 1976. He listed my condition as grave. The letter stated that he advised the Embassy and anyone concerned that I needed hospitalization under a qualified urologist until I was cured.

For 15 months I suffered the agonies of pain, lack of medical treatment, lack of sufficient food, and more of the Mexican's physical and mental tortures. I spent approximately 4 months of the 20 months in the "hole" because I demanded the rights for the other prisoners and for medication and doctors.

When Ward Morrow of the U.S. Embassy in Mexico City came to see me, there was blood and pus running down my legs. They had just let me out of the bartolina, which is a punishment cage. Ward stated that I should have behaved myself and they would not have punished me. Then he laughed. The offense for which I was being punished was my inability to pay 3,000 pesos rent in the infirmary to be able to stay in bed.

Ward seemed disinterested as he had a young woman with him who he was constantly fondling. He stated that if we had no more complaints, he had a golfing appointment with the public defender and he wanted to show his lady friend the sights of Acapulco. This shows you the disinterest that the State Department has for American prisoners. The minute that they know that you are in there on a drug charge, regardless of your guilt or your innocence, they wash their hands of you.

The man was obviously unconcerned with our problems and the conditions in the jail.

Since my return to the United States 2 months ago, I have spent over $1,000 in phone calls to the State Department and U.S. Embassy in Mexico City, attempting to obtain the release of my aircraft. I have been referred from the Secretary of State all the way down to the janitorial service, with people passing the buck.

I requested assistance from the Director of Aircraft Recovery at the U.S. Embassy in Mexico City and was informed by him that they do not recover aircraft for anyone and he was not going to make an exception for me. If these people will not assist in recovering an aircraft, which is their main function, why are we paying thousands of dollars per month to keep them there?

I have a taped conversation with him and in the taping, he states that he does not care who I talk to, he is not going to help me.

Why?

I have had and will continue to have hundreds of dollars in medical treatment for injuries and problems sustained in Mexico. Who is going to pay this? I went through living hell for 20 months only to be declared innocent of all charges and acquitted with orders from the Ap-

peals Court to be immediately released along with my airplane. Yet, my airplane still sits rotting in Mexico.

Who is going to reimburse me for all the hell, the suffering, the loss of my health, and my airplane and for 20 months of my life?

During my time in the Acapulco prison, I learned to speak fluent Spanish. This enabled me to translate for the other prisoners. I became their spokesman and was called upon to assist them when they needed my help.

There are approximately 600 Americans in Mexican jails, and their future and their health and well-being are in your hands. So are their rights as American citizens. I beg you to bring them home while they are still alive and still able to be helped.

On May 13 of this year, one man died. The State Department listed it as "natural causes." The man was 29 years old. We don't know if he was guilty or innocent, and I guess no one will ever know now.

NEED FOR TREATY

When an American citizen does not have the right to contest his conviction in our courts without a chance of proving his innocence, our country must be going to the dogs. Regardless of the guilt—and I am sure there are some guilty people there—30 days of the torture and the hell put on these people by our agents working in conjunction with the Mexican system is punishment enough. Is America going to allow a foreign government to take away an American citizen's basic rights? Let them come home under a constitutional treaty.

Thank you.

[Mr. Smith's prepared statement follows:]

PREPARED STATEMENT OF ROBERT JOSEPH SMITH, RELEASED PRISONER

Mr. Chairman, Honorable Senators and distinguished guests: On July 14, 1975, I was arrested in Mexico for allegedly having seven (7) seeds of marijuana in my airplane. I was held for seven days in a camp in the hills where I was submitted to torture. Electric shock was personally applied by Jay Medina, DEA Badge No. 144. For five days I went through beatings, stompings, electrical tortures, in addition to being denied food, sleep, and water. All of this was done because they wanted to obtain a confession so Lt. Gen. Ruiz Jimenez could have a basis for confiscating my airplane. I did not confess. I hurt so badly that I begged them to go ahead and kill me but did not "confess." On March 23, 1977, I was declared innocent of all charges, acquitted and released by the Federal Court of Appeals in Toluca.

Following are some of the injustices that I encountered in the 20 months that I was held prisoner in Acapulco, Mexico.

1. Mexican law states that detention must not exceed 72 hours without a decree being issued by the penal judge upon being arrested. (I was held 19 days.)
2. Mexican Constitution declares that after an arrest is made, the prisoner shall not be held in detention incommunicado where he is unable to contact outside help or lawyers. (I was held incommunicado 7 days.)
3. Mistreatment at the time of arrest or during imprisonment is forbidden. (I was brutally beaten and tortured both at the time of my arrest and while imprisoned.)
4. Torture, whipping, or the confiscation of personal property is prohibited by the Mexican government. (Even though the judge ordered my airplane to be released, it is still not in my possession. Two attempts to retrieve it have been unsuccessful. Does it not appear to have been "confiscated?")
5. Final judgement is to be within 1 year if the penalty is such that it exceeds 2 years. (I was imprisoned 15 months before receiving my sentence.)

These things go against the laws and constitution of the Mexican government yet they have and continue to go on every day to hundreds of others. My letter dated January 25, 1977, to the Legal Department, U.S. Embassy, Mexico City, protesting these violations has yet to be answered. Why?

In addition to these things, which you must certainly know are not at all unusual for Americans held in Mexican prisons, the Mexicans have violated their own laws in at least two more instances.

The law states that the trial will be for the crime or crimes as charged. (I was charged with possession and sentenced as a trafficante.) The law also states that it is not an offense to be an addict and have a small amount of drugs in your possession. (My Mexican attorney convinced me that the fastest, surest way for me to be released was for me to pay a Mexican doctor $500.00 for certificate stating that I was a "marijuana addict" even though I was not. The judge used this certificate against me in my sentencing.)

On December 19, 1975, I was shot in the back of the head and beaten in the streets of Acapulco by the commander of the guard. Three ribs were broken (one rib punctured my left kidney), and a skull fracture caused paralysis of my left arm and leg. The American Embassy was notified on the same day but did not make a move to assist for almost 2 weeks, at which time Congressman Barry Goldwater, Jr. intervened on my behalf. On January 3, 1976, Peter Woods appeared with Dr. Edwardo Varela to examine me. The doctor told me that the only thing they would allow him to do was to examine me. He could not treat me or prescribe medication. The American Embassy advised my wife that I was receiving "adequate medical care."

Also submitted with my testimony is a letter from Dr. Varela stating my condition 6 months later and the necessity of putting me in a hospital under the supervision of a qualified urologist until I was totally cured. At that time, he listed my condition as "grave." He stated that he sent a copy of this letter to the U.S. Embassy and it was completely ignored with no response from them whatsoever. My wife was again assured by the U.S. Embassy that I was receiving "adequate medical attention." At this time they had the gall and audacity to inform her that they were more concerned with my mental health than with my physical condition. For the record, my weight had dropped from 197 lbs. down to 123 lbs.

As a result, for 15 months I suffered the agonies and hell of pain, lack of medical treatment, lack of sufficient food, and more of the Mexican's physical and mental torture. Father John Black of the Holy Cross Church in Acapulco paid for Dr. Varela's services.

If it had not been for John and Pat Tully (whose son along with 2 others presently being unjustly held in Acapulco), I certainly would not have made it. These people smuggled medication in to me. On several occasions they also notified the State Department of my weakening condition, but it was all fruitless.

When Ward Morrow of the U.S. Embassy in Mexico City came to see me, there was blood and pus running down my legs. They had just let me out of the barolina which is a punishment cage. Ward stated that I should behave myself and they wouldn't punish me. Then he laughed. (The offense for which I was being punished was my inability to pay 3,000 pesos rent to stay in the infirmary.) Ward seemed disinterested as he had a young woman with him that he was constantly fondling. He stated that if we had no more complaints he had a golfing appointment with the Public Defender and he wanted to show his lady friend the sights of Acapulco. The man was obviously unconcerned with our problems and the conditions in the jail.

Since my return to the United States 2 months ago, I have spent over $1,000 in phone calls to the State Department and the U.S. Embassy in Mexico City, attempting to obtain the release of my aircraft. I have been referred from the Secretary of State all the way down to the janitorial service with people passing the buck. I requested assistance from the Director of Aircraft Recovery at the U.S. Embasy in Mexico City, and was informed by him that they do not recover aircraft for anyone and he wasn't going to make an exception for me. If these people will not assist in recovering aircraft, which is their main function, why are we paying thousands of dollars per month to keep them there? I have a taped conversation with him and in the taping he states he does not care who I have talked to, he is not going to help me. Why?

I have had and will continue to have hundreds of dollars in medical treatment for injuries and problems sustained in Mexico. Who is going to pay for this? I

went through living hell for 20 months only to be declared innocent of all charges and acquitted with order from the Appeals Court to be immediately released along with my airplane. Yet my airplane still sits rotting in Mexico. Who is going to reimburse me for all the hell, the sufferings, the loss of my health, and my airplane and for 20 months of my life?

During my time in the Acapulco prison, I learned to speak fluent Spanish. This enabled me to translate for the other prisoners. I became their spokesman and was called upon to assist them when they needed my help. I treated men and women who had been horribly tortured and burned with cattle prods by the Mexican police and American and Interpol agents.

There are approximately 600 Americans in Mexican jails, and their future, their health and well-being are in your hands. So are the rights as American citizens. I beg you to bring them home while they are still alive and able to be helped.

The treaty before you now is a bunch of buffalo chips. When an American citizen does not have the right to contest his conviction in our courts without a chance of proving his innocence, our country is going to the dogs. Regardless of the guilt, 30 days of the torture and the hell put on these people by our own agents, working in conjunction with the Mexican system, is punishment enough. Is America going to allow a foreign government to take away an American citizen's basic rights? Let them come home now and let them come home free. Parole under a constitutional treaty.

Enclosures: Statement of Dr. Eduardo Varela Hamui dated July 14, 1976.

Robert Smith's letter to Legal Department, U.S. Embassy, Mexico City dated January 25, 1977.

[The enclosures are in the committee files.]

The CHAIRMAN. Thank you very much, Mr. Smith.

Mr. DiCaro, we will next hear from you.

[Mr. DiCaro's biography follows:]

PAUL FRANCIS DICARO

Date of birth: July 23, 1947.

Place of birth: Chicago, Ill.

Parents: Anna Wanda Mazur and Peter Phillip DiCaro, Wheeling, Ill., both retired.

Education: 12 years Chicago Parochial School system.

Work experience—full time employment—Chicago: Chicago Transit Authority, November 1965 to June 1970; Elmwood Park & Fire Dept., June 1970 to July 1971; E. Myers & Son Interstate Movers, January 1971 to November 1972.

Part Time and second employment—Chicago: Elmwood Park Concrete, January 1966 to July 1971; Liggett & Meyers Tobacco Co., January 1971 to July 1971.

Work experience in California: Catholic Worker, Los Angeles, January 1973 to June 1973; Souverain Management Co., Sonoma County, January 1974 to June 1975; Palace Hill Ranch, Santa Rosa, January 1977 to present; Friend—Independence Ranch, Healdsburg, July 1973 to present.

Interests: Baseball, history, out-of-doors.

Arrested in Mexico: January 22, 1976.

Date of freedom: February 28, 1976.

STATEMENT OF PAUL DiCARO, HEALDSBURG, CALIF.

Mr. DICARO. Senators and Mr. Chairman, I am here today to give testimony concerning my arrest in Mexico during the months of January and February 1976. As you gentlemen represent citizens of your individual States, I, too, have been chosen to represent the state of affairs of young Americans incarcerated in Mexican jails. I believe

myself to be an inadequate spokesman. I say this meaningfully and in all candor.

Approximately 600 U.S. citizens are incarcerated in Mexican prisons as we sit here today. Beatings, tortures, and extortions have been documented in the American press over the last few years. These, it may be said, are common experiences for the men and women behind the walls of Santa Marta, Lacumberri, Hermasillo, Mazatlan, and Jalisco State Prison, just to name a few.

I feel fortunate to be here today. I feel somewhat like a veteran of a foreign war, lucky enough to be able to tell his story.

MR. D'CARO'S ARREST AND INCARCERATION

On January 22, 1976, I was arrested, along with Deborah Friedman, at an aduana stop, 1,000 miles south of the American border. In our possession was less than one-half ounce of marihuana—intended for personal use only.

Upon my arrest, I remember being handcuffed, hands behind my back, while a secret service agent beat on me until finally he had had enough of his own revenge and had shown his subordinates how to beat on a gringo, suspected of trafficking, without drawing too much blood.

I remember how I waited in a 12-foot-by-12-foot-by-12-foot solid concrete cell, a floor below the streets of Guadalajara, 30 degree temperatures, with only the tee shirt on my back, no food, no water, only a hole in the floor to bring me yet closer to the bowels of Guadalajara.

I had 7 nights and 6 days of this treatment, until finally the secret service had extracted a signed declaration, at gunpoint, in a language that was not my own, by a hand that no longer seemed to be my own.

This declaration stated that we had brought, transported, possessed, and tentatively intended to export less than one-half ounce of marihuana. Five years, three months, to twenty-one years, was the sentence we were tentatively looking at.

After signing the declaration, upon my transfer to La Penal del Estado de Jalisco, I remember being assigned to Departimento Processaos, where to share a cell with three other prisoners, the cost was only $25. But unfortunately, my last remaining $40 had disappeared somewhere within the secret service department of Jalisco, along with my car and credentials.

So, I found myself on the streets on my newly acquired all-male village, with only myself and a prayer. Survival in my first week at Jalisco State was difficult, to say the least, but one learns the rules of this game rapidly. Aid came partially in the form of fellow-Americans incarcerated in the penal, and from a strong sense of self-preservation. After two attempted muggings and two protection threats against my life, my prayers were temporarily answered in the form of $100 that was sent to me from Chicago by a member of my family. With this, I was able to buy into Departimento H, which housed 8 of the 10 young Americans incarcerated in Jalisco State at that time.

I remember all too well the stories heard and the documents read during that time in prison, the stories of beatings, cattle proddings, water tortures, forced signings of fabricated declarations without

counsel and without interpreters, bribes, money extorted until his story became my story and became the same story all over again.

You sit and you wait and you pray that justice will prevail; but optimism turns quickly to pessimism as the hours turn to days, and with each passing day, you begin to realize that this is reality and not just a nightmare or a scene from the surreal.

Your ears begin to hear the word "gringo" until it reverberates off the walls of the penal as well as the innermost confines of your mind. It caroms from one side of your brain to the other, until the echoes intensify, even in your sleep. Gringo becomes omnipresent, until one finally realizes that this is a hopeless situation.

"Con dinero baile los perros." Loosely translated, this means "with money, even the dogs will dance." This, Senators, is the unwritten law of the land. Morally, ethically, and legally you protest, but there are no listening ears sympathetic to your cause.

Yes, I remember the morning that my freedom papers arrived, once again waiting, hoping, and praying that this is not just another scene from the surreal that has become part of one's everyday life. Suddenly I found myself being let out of the front gate of this inferno and I was hustled into a car by yet two more officials of the State, representing the Department of Immigration, and I was cast once again into the dungeon where I had begun this entire nightmare.

I felt nothing at this time but a hostility and anger, for I had my passport, my visa, and my freedom papers signed by three "jefes" of various police departments, and by the appellate court judge of the State of Jalisco, stating that all charges against me had been dismissed, no deportation necessary. Why, then, was I back here where it all began?

Another day and another $800 was extorted, and we were finally free to flee Guadalajara and all of old Mexico.

SITUATION TODAY AT GUADALAJARA PRISON

Senators, I would like to bring you up-to-date on the situation as it stands today at the prison in Guadalajara in the prisoners' own words, if I may.

Mr. Roger Timothy Richards:

On Monday, April 25, 1977, a riot began at the Guadalajara Penal. For several days the Mexicans burned, looted, robbed, and even murdered. The prison was all but destroyed. Several Americans were threatened at knifepoint. Many large caliber automatic pistols were in evidence, being carried by various Mexican prisoners. The situation grew graver by the day, and on the third day of the rioting, Wednesday, April 27, 1977, the American citizens concerned had barricaded themselves in a cell with only boiling water and clubs for their protection.

Next is a quote by Mr. Dirk Van Der Brink, who, as recently as a week ago today, June 9, was beaten so severely for his escape attempt that his mother is there today and cannot be with us for the simple fact that the man is mentally and physically incapable of doing things for himself. He is, to our knowledge, acting like a 5 year old. This is his quote: So there we stood, our department and conciderados were the only ones left. All the others along with the tienda stores and shops had been looted; many deaths had occurred and we were next. At 10:30 that night, we were informed of our transfer, which we had requested previously. At this point, I would like to commend Mr. Gregory, Vice Counsel and the Counsel General. Because of their efforts and sleepless nights, we were removed from this life and death situation. This and other events to come showed me the power the State Department really has. For 2 years they have been telling me they don't have the power to help us.

Once again, I will quote Mr. Roger Timothy Richards: That evening, April 27, the Americans were transferred to a judicial holding jail in Guadalajara. Many were familiar with this jail as they had spent their first few days of interrogation there. During our stay in this jail, we once again witnessed the same brutality we had suffered being given to arrested Mexican citizens. Human rights violations in Mexico are so common place as to be considered standard operating procedures. Yet nothing is ever said from our government. It's simply appalling.

In the early hours of May 6, 1977, an escape involving nine Americans took place at the judicial jail. The Americans had been informed that there was an extremely good possibility that they would be transferred back to the main prison. After all the abuse that the Americans had already suffered, they were left with little choice but to risk their lives in an escape attempt.

The Americans that were recaptured on the morning of May 6, 1977, were beaten severely. Only after a U.S. State Department official forced his way into the jail and threatened the Mexican agents were the beatings stopped. His name, once again, was Gerald Gregory, and the Americans are all quite thankful for his aid. Escape is legal in Mexico yet it didn't stop them from beating us once again.

HUMAN RIGHTS HIGH ON ADMINISTRATION'S AGENDA

Mr. Chairman and Senators, our President, Mr. Jimmy Carter, has put human rights high on the agenda of his administration's international concerns. President Carter is a man who would dare and tempt the breakdown of a delicate Soviet détente because of human rights denied Soviet citizens, sending a warm letter of support to the foremost Russian dissident and advocate of human rights in Russia today, Andrei Sakharov.

More recently and in addition, Mrs. Carter met with two American churchmen in Recife, Brazil—Lawrence Rosebaugh, a Catholic priest, and Thomas Capuano, a Mennonite missionary—who had been arrested while distributing vegetables to the poor. They said they had been held incommunicado for 3 days, stripped naked, and beaten before being allowed to call the U.S. Consulate.

Clearly, gentlemen, human rights is on the agenda of the present administration, and so I must ask you why has the matter of U.S. citizens undergoing torture in Mexican jails been left to bake in the sun all these long months?

TREATY MUST BE PASSED

This treaty must be passed to reduce ill will between the two countries. Mexico has passed and ratified it. President Carter has endorsed its passage.

The treaty does not call for a release of these prisoners, but only that they be exchanged as prisoners. It is a sensible treaty to help alleviate this most stressful situation for both governments, relatives, and the young Americans involved.

The situation, as it stands today, in Guadalajara la Penal is still a very volatile one. Let us take affirmative action to protect the human rights of Americans in Mexico today.

INTRODUCTION OF GORDON DUNLOP AND DWIGHT WORKER

At this time, gentlemen, if time and this committee permit, and there are no objections, I would like to introduce two former prisoners

who have come here to give brief testimony in opposition and in definite contrast to that testimony which was given here yesterday by the State Department and drug enforcement agencies. Those two people are Gordon Dunlop and Dwight Worker—with your permission.

The CHAIRMAN. Mr. DiCaro, we still have a good bit of testimony to be taken from the panel and I don't think we are prepared to have other witnesses come in at this time. You have made a very forceful statement. It is now almost 1 o'clock and the committee does have other important business scheduled for today.

The staff will be very glad to talk with you and to prepare statements from what you tell them. These will be incorporated in the hearings.

In addition to that, do I understand that you and Ms. Friedman would like to have this New York Times story made a part of the record?

Mr. DICARO. We would like it to be a part of the record, along with the four letters of testimony given by young Americans incarcerated in Guadalajara today, which I believe your office has. Mr. McMurphy has received them.

The CHAIRMAN. Very well. These and any other documents which you have for the committee will be made a part of the record. Of course, we cannot reproduce the pictures for the record.

Mr. DICARO. Thank you, Mr. Chairman.

[The information referred to follows:]

Monday evening, April 25, 1977, I was awoken by the other Americans in cell block "H" to be shown several hundred police moving into positions around the courts adjacent to my cell block and the two other major ones in the prison. They were readying for a search. Within 15–20 min. the entire prison had been alerted and flaming barricades set up in front of the main doors to the cell blocks. Every soda bottle in the prison was thrown out into the courtyard that these 3 cell blocks face. Broken glass was an inch thick everywhere on the courtyard. Several Mexicans were burned, many stabbed, one was shot. The death toll by morning was well over 10, not at least 1.

The police retreated until the early morning of April 26, when several hundred soldiers with automatic weapons were brought in to back up the police. A fire-fighting unit was called in to clear the doors and then the prisoners were filed out in small groups under very heavy guard. The search then began. An assortment of knives, Molatov cocktails, drugs and other weapons were confiscated. In the cell block where the majority of the Americans lived, only personal things were stolen as none of the Americans were armed in any way.

Following the search it was discovered that the majority of the items confiscated were personal. The police used the search only to enrich themselves. Several hundred weapons went unconfiscated, many large caliber pistols.

The soldiers and police left the area and the general prison population was unlocked. This was Tues. morning April 26th.

The night of the riots, all the independent food vendors had been sacked, this left the fruit stand, meat market, and general store as yet untouched. However, following the releasing of the prisoners after the search, the general population continued its rioting, sacked the meat market and fruit stand, and totally looted and burned the general store. By 5 in the afternoon of Tuesday the prison had no more food supplies available to anyone. Sometime around 8 p.m. the guards managed to contain the rioters and place them back into their cells. Several assaults took place during the evening.

The following day, Wed., April 27, was a visit day and the prisoners were told that if they cleaned up the prison the visitor would be allowed to enter. The prison was swept and the visitors began to enter. By this time the Americans had been threatened several times at knifepoint and had barricaded themselves into a cell. Clubs and boiling water were prepared to defend their situation. The Americans were told that if they didn't pay the large groups of rioters, that their cells

would be burned and their lives taken. Several handguns were in evidence for use by the Mexicans and it was at this point that cells were beginning to be taken from the Americans. Guards were absolutely useless.

Wednesday

A representative from the U.S. State Dept. arrived on the scene, and asked the Americans what could be done. Several Americans requested a transfer to another facility to avoid killing or being killed. The consulate left with a signed request. The rioting continued. About 9:00 p.m. the order came through to move the Americans out. The Americans were told that upon their return that their possessions and cells would be secure and returned.

The Americans were incarcerated in the federal judicial jail in Guadalajara. This is a maximum security jail without living facilities available. No showers, no food. Food was donated to the prisoners by church organizations, consulate general and friends.

Daily notices through the Mexican media and American Consular Services were brought in to keep the prisoners informed, the situation looked grave, and it had become a well known fact that if the Americans returned to the prison, that contrary to all the promises, nothing would remain of the existence they had attempted to establish prior to the riot.

As the daily notices began thinning out, and it appeared that once again the Americans would be returned to the prison to face the loss of everything their families had brought them to survive and that indeed survival at all looked bleak, an escape plan was formulated and executed at the judicial jail.

Nine of the Americans made their way through an air shaft to the roof above, then down the face of a 3-story wall to the street below, sheets being used as a rope. Of these 9, 2 were presumed safe, 5 were recaptured outside of Guadalajara, 1 was stopped on the street below, and 1 is in the hospital from injuries he sustained while attempting to jump the 3 stories to the ground and a courtyard below. It is obvious that the situation had become very desperate for all the Americans involved. The escape attempt took place in the early morning hours of May 6th, and by Sat., May 8, the remaining Americans were returned to the main prison under heavy guard.

Upon return to the prison all the fears that the Americans had were true. All the cells that had cost the Americans several thousand pesos, all possessions & clothes had been stolen by the other prisoners. The Americans were warned that any attempt on their part to recover what was rightfully theirs was only asking for the gravest of problems from the Mexican population. The Americans are presently sleeping on the floors of various cell blocks without beds & few blankets. Only one set of clothing per prisoner.

Every American incarcerated in Mexico was at the time of his or her arrest robbed & beaten. Confessions were taken at gunpoint. Human rights were grossly violated. Lawyers stole thousands & thousands of dollars. All the Americans received were long & unjust sentences. There is not 1 American in the Guadalajara jail for anything more than marijuana. The only thing these prisoners had was their cells and cooking facilities by which to survive. For the 2nd time everything they owned has been stolen. The road of survival is nearing its end.

Mexico & the Mexican prisoners do not want them in the country. All that is needed is for the American govt to ratify the exchange treaty. Several hundred young American lives are at stake. The most incredible thing is that this situation could happen at any of Mexico's prison institutions—there is no guarantee of food, clothing & shelter, something must be done & now. The riot was primarily instigated by the police moving into the prison late at night to attempt to trick the prisoners, and led to power-plays & catastrophe. It is obvious that the Americans had no alternative but to attempt escape. All the Americans were beaten because of this attempted escape.

(Signed) ROGER T. RICHARDS
A recaptured American.

As of May 14, the prisoners at the Guadalajara penal are still without basic necessities, and have been denied an audience that the new director had promised, there is so much more involved in this situation, that a reporter should definitely contact the prison personally. Things are getting worse daily, Americans returned possessions have been urinated on et cetera.

Please excuse my sloppiness and misspelling, my hand is bandaged and they stole my dictionary.

Monday

Heavy vibes all day, Gary got robbed for a fairly good amount of money. He got sliced on the arm and hand a few times, he then went to get help from a few other Americans. They went and found the people who robbed Gary. It ended up with Gary getting three broken ribs and more bad vibes for the gringos. Later that day, two other Americans were accused of stealing a small amount of money from Dept. "H," where most of the Americans live. Well the Mexican started out losing a small amount in the after noon, later in the evening the amount increased by 5 times. He also accused 3 or 4 other Mexicans, so the guard was gonna have it settled in the morning, which it wasn't because of other events. There was fights and extra weird things happening all day. That night at about 11:30 Tony and I watched the state and Federal police and army personnel start lining up in a sum what unorganized formation.

Tuesday

About an hour after they arrived, the people in Procesados and sentenciados started throwing bottles of every shape and size out at the police, the police moved back out of range the people then started to take all the stores and restaurants apart for the wood, in which they used for a very large fire at the front doors of the Depts—P. & S. They kept the fire going most of the early morning with any thing that would burn including cats and one dog. Tony and I stayed up most of the morning taking pictures until they started taking out dead and injured victims of the seige. About midmorning the police had done their job of searching the whole penal, but in reality they did nothing but stir up the people. They only took a very small amount of guns, knives, clubs and other types of weapons. At this moment there is at least 10 times more weapons here including machine guns, and malatov coctails. After the police left the people stormed the corral or the hole, they let everyone out including the most heavest killers.

So now the people had their leaders, killers. They just went crazy robbing stores and people, completely destroying stores and people, deforming structures, buildings, people, anything, it was a free for all. The penal was in shambles, the guards were no where to be seen, they were hiding in the front office, and we were making ready for an attack on Dept. "H". We were not attacked as of yet, but we heard the chants and widespread talk of getting the gringos. Everyone thought and still thinks all the Americans are rich, which certainly is not true. The new Director made deals with the people to get em locked up for the evening, it was a night of more violence in Procesados and Sentenciados.

In the morning I was standing in front of the Dept. "H" watching people going back and forth, from place to place robbing, stashing the stuff, go back for more, until there was no where else to rob except individuals and of course Dept. "H", I saw the look in their eyes and stepped inside and told Tony that I thought it was coming. At that moment 6 or 7 of the leaders or killers if you wish, rushed in with about 300 crazy Mexicans chanting to kill us. We were taken back into the Dept. with the flood of people, I had a knife pointed firmly in my back and Tony had his new chucks in his hand facing the main killers with all the other Mexicans behind them. Tony had 'em sorta stood off, but if he would of made a move to attack or fend off an attack I would've been killed immediately and himself shortly after, but with many deaths and injuries to them also. Tony and one of the killers and another American, who lives with and is like the heavier Mexicans, talked the main leaders into waiting and not bother the Americans or the Dept. for the time. They went in and beat up one guy and robbed him of 4000 pesos and personal items, it was to appease them for the moment. The people were offered visits if they cleaned up the mess, which was quite extensive. We had it all cleaned up in a few hours, with everyone working. I thought it was complete madness to have visits come in, it was and still is very explosive. There were at least 2 deaths and many stabbings the entire day, the visits quickly realized they had made a mistake by entering this place.

Some of the men visits were extorted and robbed, 2 women were raped at knife point that I heard of, who knows how many more things happened during those days that no one talks about. We had a threat of paying off the leaders with a first payment of 40 pesos a person or die, it sounded fair enough. But we all knew it would be the first of many such payments, so we stalled 'em until that evening. We, the Americans, had made up a petition stating that it was unsafe to be in this prison and that we wished to be removed to a more comfortable situation. That

night most of the American got together in a sorta war consul, we had prepared many a type a weapon. We even discussed, if it came down to it, to kill the main killers and throw their bodies out to the mobs in hopes that it might discourage and scare 'em into not attacking us. The thought of having to kill a person was a sickening one to me, but it was reality face to face. We had four of the killers in our Dept. to protect the landlord. I was forced to give my room to a guy who chopped a man in half with a machete two years ago in this penal. He had a gun in his belt, so I thought it was a good idea not to argue. He also extorted me and two other people with our lives a year ago, he wasn't too fond of us anyway. It was 10:00 or so and we were on the last details on how we should kill the killers, when a guy from the office told us to get our stuff and get out, We did. We had to wait in the truck near the office for 3 or 4 hrs. until we got final clearance to leave from the Governor. During this time we saw one of the killers being brought in from Sentenciados.

To any listening ear:

I Dirk aVn Den Bunk, presently an inmate in the Guadajara Penal, have a true and personal story of the events here starting May 26th. I am writing this in the hope that Americans will open there eyes to our plight and continuing denial of our human and civil rights. By both this Government and the U.S.

One week prior and up until the 26th I was sick with the flu and living in my brother's room. For this reason I had not been up and around. Other than this life seemed "normal." How fast the chain of events were to happen still frightens and dazes me.

At 11:30 Monday night I was awoken by my brother. Federal & state and police along with soldiers numbering 250 were lining up in front of Procesados for a serch. Then they approched the doors inmates started to throw bottles at them. Within minutes they had torn apart the tiendas Stors and resturants apart inside these they piled against the bars of the gate. Shortly after these were set ablaze making entry for the police impossible. All block sentenciados felt suit just after this. Around three Tuesday morning a fire truck was brought in to put out the blazes. At six o'clock things cooled down enough to start the massive serch.

The Police tore cells apart robbing many personal items but finding relatively a small amount of arms. The people had all night to stash them, where the police would never find. This was to be just the begining of the madness.

I was feeling somewhat better so I decided to get up and move around. Outside was insanity that day and populs robbed and burnt the store, broke into almost all the shops and looted. Don Calistra was driven out of the meat market and chased up front. His store was torn apart when guendas tried to stop it milk bottles were thrown scatering and driving them away. From this day on there has been no control inside these walls. The oficial report was one dead. A more realistic number is seven to ten. They died from burning, stabings and gun shot wounds. Yes there are many high power pistols and secure rumors of machine guns and gernades. I know because I've seen them. Also this day an American was robbed for 500 pesos by knife point. A short while latter he was severely beaten with a two by four. He has a spiral fracture of three ribs and several bruises. Also two Americans in my department were acused of robbing 800 pesos. It was evident the Mexican opinion of Americans was going from bad to worse. Just how much though still gives me sleepless nights.

I awoke to find my Brother and Mickey backed against the wall by six killer junkies. Some already had my brothers metal door bent in half. My Brother Tony was armed with noon chucks and would have taken a few of them with him the odds were just to heavy. Outside the doors were three hundred yelling kill the Gringos. Luckily a heavy weight in the power structure here Robert and another gringo were able to stop the situation. Thank God for there surley would have been blood.

At this time we all made a petition to the U.S. Council of our position and requested immediate removal from this Penal. None of us fully believed anything would be done. We readied ourselves by making clubs with nails sticking out the ends and keeping boiling water ready. Some of the Mexicans from Culeacan were preparing themselves also. Our situation was a desperate one for the crazy leaders of the rioters were in possession of guns. Not much you can do against a bullet. So there we stood our department and concedrados were the

only ones left. All others along with the teendas store and shops had been looted many deaths had occurred and we were next. At 10:30 that night we were informed of our transfer. At this point I would like to commend Mr. Gregory Vice Council and the council General. Because of their efforts and sleeples night we were removed from this life and death situation. This and other events to come showed me the power the state Department *really has*. For two years they have been telling me they don't have the power to help us.

After a short delay, the secretary to the governor said we couldn't be moved. Mr. Gregory sent a personal request to the Governor. We were moved to the Judicial holding jail, maximum security. During the time we were waiting up front to be transfered they brought the body of Juan Saut to the office. He was one of the six who held my brother at knife point early that morning. I never in my wildest dreams thought I'd rejoice to see someone die but I was that night.

To make a long story short nine out of 15 of the Americans held at the judicial lock-up excaped through the air vent in one of the cells. Seven bars were cut and we climbed out on the roof and down a make shift rope of sheets to freedom. Mickey was the last one down he saved my life by putting his body in the line of fire of a policeman carrying an automatic rifle. Mickey was severely beaten, kicked, hit and hit by rifles. Tony and I managed to run away. We were free for a few hours. The police captured us on our way out of town. We were beaten and thrown in the same cell where two years prior we were tortured and starved for sixteen days. De jarr for sure.

Around seven o'clock the sixth, Tony and I were moved to the judicial holding cells the same one we broke out of. All but three of us had been recaptured. As of to date two of us are free. I'm praying for them.

Now we were all in the judicial holding cells. They took me out for more interagation they threw me around pretty good and informed me my brother and I would die if I did not think about my answers. Six of the police who questioned me wanted to kill me then, they made this very evident. They were saying they they were going to kill us all. Several of us were badly beaten. Terry who jumped 35 feet for freedom suffered from a broken foot. The police grabed his foot giving him extreme pain to make him tell who planned the escape.

Thank God Mr. Gregory came in at this time. We informed him that our lives were once again in grave danger this time at the hand of the police. Mr. Gregory once again saved us. Using the state department power he stopped the beatings at this point. I can't even relate what this meant to all of us. The next morning we were transferred back to the penal

All of our poshions and cells have been stolen. Cells that we have lived in for two years where we had built kitchens and at least were clean. Right now seven of us are living in our old department "H" in two cells. We learned today the Director has given an order to put all of us Gringos on the street in Sentenceados. This department is filthy, gangs of killers roam the streets at night our lives are still in danger. The American council has now done a 180° turn on us. I am not blaming Mr. Gregory but his superiors. All our cells are gone all our poshions we have no place to cook and now the Director has given us an order to move us out of the two cells we have all bought. Move us to the streets once again we have been torchered all our poshions stolen no where to eat. The new power group is Communist. They want to see us capulsists eat shit which is leateratly happening. We would like to see our lives put back together and have some human rights reinstated. We are sick of being treated like animals.

The American Council now says we can be moved to a Federal prison in Mexico City. They will not or are unable to give us any information on the living conditions. If we can obtain cells or cook our meals. The council is unwilling to talk to our Director about our present condition. They have in so many words tell us there is nothing more they will do for us after all this trouble we have caused.

DIRK VAN DEN BRINK.

MAY 14, 1977.

TO WHOM IT MAY CONCERN: My name is Terry and I am now a resident of the Jalisco State Penal in Guadalajara and have been for the past sixteen months. The following are my observations of what happened here to the Americans since April 25th, 1977.

On April 25th Monday, an American prisoner at this penal was relieved of 400 pesos at knifepoint after sustaining a few knife wounds in the process. He re-

turned to retrieve his money and ended up with three broken ribs and a trip to the hospital. Another American was extorted of 500 pesos under threats of bodily harm so Monday had all the signs of increased danger to the penal residents.

About 11:30 p.m. on the 25th Guadalajara police and Federal soldiers were in the Penal and ready to search the living quarters for drugs and weapons. Procesiados and Sentenciados, the two main buildings where prisoners live, house approximately 3,000 people and these people were displeased at the prospect of having a search. Sooo glass bottles by the hundreds were thrown through the barred doors of the two buildings.

This caused a delay in the search of about 4–5 hours. In this delay fires were started in both cell blocks and burning debris was placed against the front doors. At about 5:30 a.m. on the 26th, when the search began, 10 injured people were removed from the building, at least 4 were known dead due to burns, knife wounds, and bullet holes. Yes, bullet holes. The prisoners were rioting and don't get in their way was the rule.

After the building I lived in was searched, about 7 a.m., things looked like they might be calming down. Not for long. In the maximum security cell block, the corral, of the penal 10–15 prisoners held there for murders committed in the prison were freed by a roaming mob. This was the spark needed for complete anarchy. Any sembelence of order was no longer present. Everyone for themselves.

Quickly the mob discovered they could do as they wished by utilizing physical force. The penal store was looted and burned. This was followed quickly by the looting and burning of the meat market and the resulting loss of power of Don Colistro, owner of most of the living quarters in the penal, meat market, and slaughterhouse facilities. He was chased up to the front gate and safety by a large group of prisoners.

As this looting was happening, prisoners were being held up and robbed at knifepoint. A few more murders took place while prison officials stood by. The prison guards watched the many occurences of violence without trying to contain order. They were helpless.

The Americans in Dept. 4, where I lived, went to bed Tuesday night wondering what the next day would bring. We all knew that knife-wielding bandits were taking what they wanted when they wanted. As of yet no resident of Dept. 4 was relieved of money or threatened.

Wednesday, April 27th, arrived with the promise of more violence. I was awoke at approximately 8 a.m. and told to arm myself. The rioters were coming. I dressed and left my cell to see a group of people at the front of the building. They wanted to come in but a couple of other rioters discouraged them for the time being. They left and then returned a couple of minutes later to enter a resident's cell. He was beaten, threatened at knifepoint, and robbed of 4,000 pesos and other valuables.

This prompted us to arm ourselves with clubs, nail studded and whatever we could find. It looked like a siege. The front office announced that if the people cleaned up the riot damage, visitors would be allowed in. It was a visitor day but nobody expected visitors. The junk was removed and visitors entered. If they had known of the danger I doubt if they would have come. Two more dead people were carried out the gates while the visitors looked on.

The Americans, realizing the danger in the situation, signed a petition requesting a transfer from the penal. It was a situation of either being killed or killing. The petition was presented to the vice-counsel in Guadalajara with the hopes of protection being the result. The Mexicans were coming down on Americans and letting us know it.

Our building director, a Mexican, was threatened repeatedly so finally hired four bodyguards for his personal protection. These four fellows proceeded to hustle him into his cell where they discussed his safety. The terms were that the four would run the building while he would officially deed them the authority to do so.

These four were dangerous people and soon the Americans knew where they stood. In their building they had four killers to contend with. Outside they had a mob waiting for a chance to loot the building. To forestall the mob, their leader made an offer of not looting "4" if each resident paid 30 or 40 pesos protection money. He wanted it before 5 p.m., lockup time on visit day, but was told there would be a slight delay.

The evening was spent in anticipation of an attack but none came. Around 10:30 p.m. a few men came and told all the Americans to take their bedding and

come with him. We left with the clothes on our backs and not much else. We were leaving the prison and that was good enough for us.

We arrived at the front gate and were herded into a police van backed into the prison gateway. The American Counsel was represented by Gerald Gregory. He said he was in the process of getting permission for us to be transferred. It took four hours to gain that permission.

While they kept us in the van we saw another dead combatant brought through the front gate. The counsel also witnessed the arrival of the body and continued to seek our transfer.

We were moved to the holding cells of the Policia Judicial in downtown Guadalajara. No facilities for feeding us or showers were provided. 17 Americans in five cells equals crowded conditions.

After staying there for 5 or 6 days we began hearing that our transfer back to the penal was due soon. Each day we wondered when the police would come to take us back to our death.

Shortly before 2 a.m. on May 6th I was awakened by a voice asking me if I wanted to leave. I got up to see people hurrying into the last cell. My cell's lock had been picked so I had a short time to decide. 16 months in a Mexican prison was long enough. I decided to go.

As we got on the roof it was a beautiful night. A ¾ moon with clouds scattered lightly. A perfect night to enter freedom. It had been so long since a night breeze had blown on me early in the morning.

Suddenly the rope was over the wall and one, two, three people were down it. Everything was going fast until I heard whistles and a command to stop. I looked over the wall and discovered a guard standing below the rope. The number 7 man had gotten away but number 8 was caught in the act.

That avenue of escape was closed so my chance for freedom was getting smaller. I could either reenter the cells or jump the distance to the ground. I chose to jump and landed hard breaking my right foot, injuring my knees and back also. A 30 foot jump kind of jars a person when he lands.

I found myself in a courtyard in the Policia Judicial complex. No way out except through a door into the office. As I was limping into the office a police officer grabbed me and pushed me down. As soon as he discovered my injured foot he kicked it in order that I might remember where my fellow escapees disappeared to. I didn't know so my answers weren't satisfactory. I was told to stand and then he would step on my foot very slowly. This he did 2 or 3 times but he finally got tired of waiting for me to get back to my feet. He kicked me once in the back, which I had already hurt in the jump, and made me walk back to me cell.

By this time I am in a lot of pain but just lying down was something to look forward to. I got into my cell and waited 12 hours for a doctor. I was taken to a hospital where I waited for 6 hours for X-rays and something for pain.

I was stationed at the hospital for 6 days and returned to the Penal on the 12th of May. The rest of the Americans were already there. Two Americans were and are still free. The other Americans recaptured were beaten for knowledge of where the free people might have went. Now the beatings were over but further disheartening events were ready for the Gringos.

When we left the penal the Americans had cells and belongings amounting to 60,000 pesos. When we returned we had nothing. No clothes, no cells, no nothing.

As of this writing we are staying in Dept. H, but have no cells. We sleep with other people in their cells. We have heard that the Director of the Penal won't authorize the returning of our cells. That is exactly what he is doing and also there is the extreme possibility that we might not even be allowed to live here.

This means that for the 7 remaining Americans in Dept. H they not only don't have their cells in "H", they are being forced into the two big cellblocks without rooms or anything. This is exactly where the most danger is for robbing or murders to take place. Not to mention the loss of kitchen benefits with the cell. Eating in restaurants is expensive.

TERRY JOHN DIXON.

May 15, 10:30 p.m.

At this time the situation is basically the same. We still don't know if we are to be moved out of "H." Yesterday one person was stabbed to death in the "corral" because of a dispute among the prisoners and guards. A feeling of tenseness fills the air.

A case of typhoid has been reported in the women's prison so we are faced with another problem. We have women prisoners for visits so the possibility of infection due to contamination is high at this time. The toilet facilities and drinking water [copy illegible] in all bathrooms in the prison. The rat population is tremendous so with the addition of typhoid we are faced with a very real threat to our health.

Tomorrow we are scheduled to have a meeting with the director to determine if we can remain living in H. We still don't have cells but this is better than living without a cell in the other two cell blocks. We have been trying to see the director since Thursday but this is the first opportunity we have had.

The American Counsel is to be informed tomorrow of the situation here and hopefully the Vice-Counsel will come to the Penal. The American Counsel now says that its power has been greatly reduced due to our desperation escape attempt. We hope the American Counsel extends some of its limited power on our problems of survival in this prison.

Note: I wish to say that what I have put down in words are my own observations only. There have been many more attrocities and violent acts that have been related to me. I no doubt believe they all occured. We are in danger at this moment.

TERRY JOHN DIXON.

[From the New York Times, May 1, 1977]

BUSTED IN MEXICO

(By David Harris—David Harris is a freelance writer based in California.)

Paul DiCaro and Deborah Friedman left Guadalajara on Thursday morning, Jan. 22, 1976. Three weeks of camping on the Pacific beach at Puerto Vallarta and visiting Paul's American friends at Guadalajara University in west-central Mexico had reduced the couple's finances to their last $40. Paul and Debbie were anxious to return to their Sonoma County, Calif., home. DiCaro, 29, installs winery irrigation systems, and Friedman, 26, helps run their 55-acre co-op farm. Paul and Debbie have been living together for three years. The two Americans spent most of Wednesday night packing their 1963 Volkswagen. Debbie carefully hid the remains of an ounce of marijuana she had bought to smoke on the beach inside two cards sealed in envelopes and addressed to their house in Healdsburg, Calif., U.S.A. Debbie threw them in among 15 other letters in her bag, and she expected to mail the whole batch somewhere along the way. By 7:30 Thursday morning, Paul DiCaro and Debbie Friedman were on Highway 15 headed north across the state of Jalisco, 1,000 miles south of the American border.

The first few hours had all the earmarks of another mellow Guadalajara day. It was 80 degrees when they crossed the mountains and dropped down the long run through the cactus to Tepic. The sky was solid blue. Debbie was driving while Paul stretched out in the back seat and relaxed, or got loose, as he put it. Getting loose was something he rarely did in Mexico. This was his third visit in four years, and every time he went south, he tied his over-the-shoulder hair up on top of his head and hid it under a wide-brimmed hat. The Mexican authorities dislike longhairs, and Paul DiCaro wasn't looking for trouble. But that day he didn't expect to get out of the car for another 12 hours. He took off his T-shirt, combed his hair out and fell asleep in the back seat.

When he woke us an hour later, the day had changed, drastically. Debbie was calling him from the front seat:

"What's this? What's happening?"

Paul shook himself to attention. They were north of the town of Magdalena and had been surprised by a roadblock. A stop sign was planted in the middle of the two-lane road, and uniforms were milling around the cars parked on both sides of the blacktop.

"*Aduana*," Paul answered.

Aduanas are a series of checkpoints set up along the Mexican highway system. The police camp there in sporadic 24-hour shifts and check all vehicles for guns or dope. Debbie stopped their VW next to the brown khaki *Federal* straddling the dotted line with an M-2 carbine strung over one shoulder. He bent down and put his face in the window.

"*Por favor*, your papers, *Senorita*."

Debbie didn't have them and had to ask Paul. The *Federal* looked at Paul's hair and stared while Paul handed forward their passports, visas and car-insur-

ance papers. The *Federal* thanked Debbie and looked at Paul again before going over to the group in uniforms on the road's shoulder. When he finally returned, the policeman spoke rapidly in Spanish with an occasional English word thrown in. The couple's papers were in order, but there was still some problem. The *Federal* wanted them to pull over to the side. He said he would have to detain them "for a moment." It was 9 A.M.

That "moment" is the subject of this account. By 11:30 A.M., DiCaro and Friedman would be found to be in possession of an envelope containing marijuana—13½ grams, to be exact. Had they been stopped with the same quantity of contraband in California, they would have been issued a citation and fined $25. By 5 P.M., they would be charged with buying, possessing, trafficking, transporting and intending to export dangerous drugs, and they each would face a possible 57 years in prison. They would join some 600 other Americans in the Mexican prison system, the largest single group of this country's citizens imprisoned in any foreign nation. Most of the arrests have been on drug charges. However, a good number have been for minor violations, and it is the treatment of those arrested or imprisoned that is the focus of attention and concern. This account was drawn from interviews with Paul DiCaro and Deborah Friedman and with dozens of others, as well as from documents and records in the Mexican court system and offices of both American and Mexican immigration and diplomatic authorities.

Paul's and Debbie's nightmare began with a single marijuana seed that Paul says did not belong to them. Debbie had spent an hour the night before on her knees looking for seeds in the car's upholstery. He says the seed belonged to the Mexican Federal Judicial Police.

That Thursday the Magdalena *aduana* was being manned by eight *Federales* armed with automatic weapons and two plainclothes Federal agents. Three *Federales* began combing through the car's carpet, and two others stood beside Paul and Debbie, 50 feet from the car. Finally, Paul said, a young agent, wearing a bright polyester shirt, sunglasses and pointed boots, looked at Paul for a moment, walked to the car, bent over the doorway for 10 seconds and stood up with his hand over his head. "*Mira,*" he shouted, "look at this." He was holding one marijuana seed.

The "discovery" gave the police license to search everything. Paul was handcuffed with his hands behind his back and told to get down on his knees. Paul DiCaro got up off his knees twice in the next two and a half hours. The first time was when the agent came over to ask, in Spanish:

"Do you have any contraband in your car you want to tell me about?"

"No," Paul said, struggling to his feet. Paul DiCaro wanted out of the vise he felt tightening around him. He continued talking in stumbling Spanish. "*No inglés, amigo,*" the agent said. "It makes no difference," Paul said. "You can have it all. *Sabe?* The whole thing. The car. The sleeping bags. Everything." Paul motioned with his head at the VW surrounded with brown uniforms. "It's all yours. Just take us to the bus station and let us buy a ticket north."

The agent laughed and pulled a fat wad of bills out of his pants pocket. "*Muchos pesos,*" he grinned before walking off. Paul took the response as a simple statement that the price was a lot more than an old VW and two sleeping bags. A *Federal* motioned Paul back to his knees with the barrel of his carbine.

DiCaro got on his feet a second time when the agent discovered the hidden weed. The agent was going through the mail in Debbie's bag again and noticed that two of the unopened letters were addressed to herself in her own handwriting—apparently an obvious giveaway. He shouted and ripped them open. The agent was on Paul in a flash. DiCaro had just enough time to stand up before the first blow landed.

"You lied to me, gringo mother——," the agent shouted. "You lied to me twice." Then he swung at Paul's head. DiCaro tried to back up but a *Federal* had moved behind him and there was suddenly nowhere to go. The blow slid off the American's ear.

"Wait a second . . ." As Paul recount's the story, he tried to talk through the pain ringing in his head, and as he did so, the agent swung a foot at the gringo's testicles, threw a series of body blows and then another kick. "You can have it all. You don't want to bust me . . ." The plainclothes agent hit Paul DiCaro in the middle of the face.

Deborah Friedman ran toward them. "*Mi esposo,*" she shouted. "*Mi esposo.* You can't beat him like that."

The agent laughed, took one more kick at DiCaro's crotch and had the *Federales* chain Paul to the Volkswagen until a car could be sent out from Guadalajara to pick the Americans up. A black 1974 Lincoln Continental with a red light on the roof arrived three hours later. Paul was put in the back seat and two agents drove him south. Debbie followed without handcuffs in the VW, driven by a third agent.

The Lincoln carrying DiCaro stopped for a little excitement along the way. The car had been moving through the outskirts of Guadalajara at a fast clip when a Chevrolet passed them going even faster and cut them off. The agents were furious and began chasing the Chevrolet. After weaving through traffic for three blocks, the Lincoln caught the Chevy and forced it to pull over. The two agents drew their .45's and got out of the car. One grabbed the Chevy's driver by the collar and the other put a pistol to the driver's head. They said he ought to learn some respect. The driver protested, pulling the arm of his jacket down and showing them the insignia on his khaki shirt. He was a *Federal*, too. The plainclothesmen said it didn't matter. He still ought to learn respect. They slapped him a few times before returning to Paul. The rest of the trip was uneventful.

At 4:45, the Lincoln Continental pulled into the garage under the *Palacio Federal*, the center of law enforcement in the state of Jalisco, in downtown Guadalajara. As soon as Debbie arrived in the VW, the agents took them both to the sixth floor, where they were told they would be interviewed as soon as Captain Salinas returned from dinner. That took three hours.

In the meantime, Paul and Debbie waited on a bench with no idea of what would happen. Their legal knowledge, restricted to high-school civics and TV cop shows, had hardly prepared them. They would not be allowed a phone call for a week. Their requests for a lawyer were ignored until after they were interrogated twice. They would not be fed for four days, and then only because another prisoner shared some beans her mother brought on visiting day. The interrogation began at 8 P.M., and it set the tone for what was in store. DiCaro and Friedman were not shown any identification by their interrogator but they are certain that he was called Captain Salinas, though Mexican authorities whom I have since queried now insist that there is no such captain.

The captain was sitting behind his desk when DiCaro was brought into his office. He motioned for Paul to sit. Two agents in plainclothes stood at parade rest behind Paul's chair. One held a two-foot-long hard leather baton. Throughout the interview, he twisted the leather in his hands, and it made a high squeaky sound behind the American's left ear. Salinas toyed with the edge of a folded newspaper on his desk. The captain wanted Paul to explain the marijuana.

Paul asked for a lawyer instead. The captain refused. Paul asked for an interpreter from the consulate. The captain said it wasn't necessary. Paul asked for a phone call, and Salinas smiled.

"If you don't mind," Paul explained in a polite voice. "I'd like to have my lawyer read it before I sign."

As soon as the words were out of DiCaro's mouth, the room filled with tension. The agent on DiCaro's right bent over nervously and advised signing right away. The agent on his left increased the volume of his leather squeak. After an appropriate pause to let the enormity of the moment sink in, the captain proceeded to teach Paul DiCaro the rules of the game. He opened the newspaper in front of him and revealed a .45-caliber Colt automatic pistol. The captain placed his palm on the weapon and turned it until the barrel pointed straight at DiCaro. Paul stared. With a slow motion of his thumb, Salinas drew the Colt's hammer back. Paul DiCaro reached forward, took the pen off the desk, and signed his name. The captain smiled and said he had to sign both sides. Paul DiCaro smiled and signed his named a second time on the back.

DiCaro and Debbie Friedman were quickly learning the workings of Mexican law. It and the Yankee variety are built on different principles. The theory behind Mexican justice is the Napoleonic Code, a legacy from the reign of Emperor Maximillian in the 19th century. Under this form of legal organization, the accused are, in effect, assumed guilty until they prove their innocence. There is no effective Bill of Rights, and arrest is the equivalent of indictment. There are no juries, and trials are not usually open to either the general public or the defendants themselves. The judge decides largely on the basis of the case description written by his own secretary. Lawyers rise to be secretaries and secretaries eventually become judges. Legal business is conducted in very small rooms, and there are no verbatim transcripts of the proceedings.

The daily application of the Napoleonic Code is shot full of *mordida*, the home-grown expression signifying the practice of gaining influence or getting results through bribery. Whom your lawyer knows and what his friends will do for you are as important as the law itself. Those who have risen to high position expect their assistance to be rewarded in proportion to their stature. The result is *mordida*. Lawyers who know the judge or his secretary are in great demand and figure the price of bribes into their fees.

There are thousands of tiny passageways through the legal maze built by Napoleon and *mordida*. But these passageways were invisible to Paul and Debbie, whom Salinas ordered off to the city lockup. On the arch over its front door are inscribed the words *Procuraduria de Justicia*, literally translated as "where justice is procured." The sign means exactly what it implies.

It was 30 degrees in Guadalajara that night, and the jail was cold. There was no food. On the women's side, Debbie was able to borrow a blanket. On the men's side, Paul slept in a T-shirt on the floor. Both felt they were being buried alive and prayed that someone would rescue them.

On Friday night, Jan. 23, DiCaro and Friedman had a visitor. They had no idea how he knew they were there. His name was Hale, and he was a representative from the American Consulate. He patiently explained that his job was to help them get a lawyer, contact relatives in the United States and help arrange for them to receive money from home. Nothing more. He had no advice to give and no influence to wield on their behalf. Hale produced a list of Mexican lawyers and asked Paul to choose three of the unknown names. The consulate would contact their choices directly.

Blindly, they selected Gustavo Ramirez Gomez. If they hadn't been such newcomers to Mexican justice they never would have hired him. Gustavo Ramirez' *mordida* was minuscule. He'd begun life as a *campesino*, a peasant; after the family farm was foreclosed, he moved to the city to work as an auto mechanic. Gustavo Ramirez learned the law at night school. He was full of resentment for the system and the way it worked. Ramirez was a very principled man who believed the law was the law and ought to be bigger than anyone who practiced it. He wanted $1,000 to take the case, to be paid when they were released.

Paul and Debbie hired him because he looked straight in their faces and seemed to know his business. Small *mordida* or not, Gustavo Ramirez was a smart attorney. He was the first to tell DiCaro and Friedman about Articles 524 and 525 of the Federal Penal Code. These provisions established a legal classification of marijuana "addicts" who trafficked for use only. According to Articles 524 and 525, possession of up to 40 grams is considered an addict's habit and constitutes grounds for dismissal of criminal charges. Ramirez recommended pleading addiction and would approach the judge with this argument immediately. He was sure the charges would be dropped without a hearing. Gustavo Ramirez assured them, optimistically, that the process would take no more than 72 hours.

Ramirez was wrong. Seventy-two hours later, Paul DiCaro and Deborah Friedman were still in the lockup. Ramirez apologized for their disappointment and explained that the judge was about to be promoted and didn't want to jeopardize his possibilities by seeming to be lenient on gringo marijuana addicts. They would have to wait for a formal hearing in two weeks. Paul and Debbie winced, tried to stifle their panic and buckled down for their wait.

One full week after the arrest, the two Americans were transported to the Jalisco State Penitentiary, outside Guadalajara. The prison was in an uproar when they arrived and soldiers were patrolling the grounds. The army had reinforced the prison guards after a daring breakout the day before. Six political prisoners had killed two guards with pistols and gone over the front wall. A bus with sandbagged windows had been waiting for them and raked the front of the prison with automatic-weapons fire. Two more guards died on the front steps.

The Jalisco State Penitentiary didn't feel much like home, but Paul and Debbie recognized it was going to be just that for another two weeks at least, if Gustavo Ramirez was right. DiCaro and Friedman didn't want to think about how long they'd stay if Gustavo was wrong a second time. The car dropped Paul at the main entrance and Debbie around the corner at the women's gate.

The walls at Jalisco State Penitentiary are 20 feet tall and four-feet thick.

Built in 1926 to hold 1,500 prisoners, it now houses more than 3,500. Twelve blue-shirted guards walk the wall with carbines during the day and the shift doubles at night. The women's section is a small compound, 90 by 150 feet, housing 100 prisoners. With the addition of Deborah Friedman, 3 of them were American citizens. Jane Barstow (like all the names of American prisoners described here, except those of DiCaro and Friedman, this is a pseudonym) had been arrested for possessing 200 seeds in her car. She would end up staying four months and spending $4,000 to get out. The other American citizen, Elaine Gavin Sanchez, was married to a Mexican who'd been arrested on kidnapping charges. Elaine knew nothing about it but was arrested anyway. At the Palace, she said she was strapped to a table while a *Federal* interrogated her with applications of an electric cattle prod to her breasts, vagina and rectum until she passed out. Like everyone else, the American women spent their days wandering around the central compound; at night, they were locked into one of four large sleeping rooms. Only half the women had beds and the rest slept on the floor. Debbie, Jane and Elaine slept on the floor. No one would sell them beds.

The Men's Prison takes up the rest of the penitentiary's 15 acres, except for the administrative offices and the separate political compound. The Men's Prison is more like a village with a population of 3,400. It has a soccer field, rubber factory, basketball court and a dozen assorted shops and cafes. On the night they arrived, Paul DiCaro met the prisoner who owned Javier's Cafe, which is between the mess hall and the front office. Javier befriended the American and told him Jalisco State Penitentiary's first commandment. "*Con dinero baila el perro*"—with money, even the dogs will dance.

Javier knew what he was talking about. Every male prisoner at Jalisco State sleeps in one of six sections according to the state of his finances. A single cell in Department 6 costs a flat fee of $25. Department 5 rises to $45 and Department 3 on up to $75. Department 4 is simply called "H" and, at $100 is the last of the flat-fee cell blocks. Department 1 and 2 have 18-by-19 foot cells with 18-foot ceilings, arranged into suites, and rent by the month. Half of the prisoners can't afford a cell and sleep in the hallways in either Departments 5 or 6, where they pay an appropriate "street fee" to the inmate "street sergeant." The street sergeant takes a small piece of his rents and passes the rest on to the department captain, also an inmate. The six department captains take another small cut and deliver the remainder to what is called the prisoner jefe, or boss. Don Calistro, an old man doing 27 years for cattle rustling. This jefe keeps a herd of cattle inside the walls in a corral he himself rents from the warden.

Paul DiCaro began his stay in prison sleeping on the floor of Department 5. He explained to the sergeant that he had money on its way from the United States and would pay his fee when it arrived. After four days, the money hadn't come and DiCaro was transferred to the floor in No. 6, the second worst. (The worst is the Pit, to which a prisoner is sent as punishment. The Pit's ceiling is 4½ feet high and its residents are chained to a floor that the guards slash with water every two hours.) After one miserable night on the street in No. 6 listening to the sounds of 400 very poor people creeping around in the dark looking for something to own, Paul DiCaro knew he was going to have to get some credit right away. To do that, he would have to talk to Don Calistro, the *jefe*.

Don Calistro wasn't exactly suffering. He kept his cattle down by the soccer field and sold them to the prison butcher shop, which he also ran. The shop in turn supplied the mess hall, the cafes and the restaurants, one of which was Don Calistro's. He had a handsome suite where he lived with his wife and children. Paul DiCaro approached him there on Feb. 3, the 13th day after his arrest. He told the *jefe* that the money was sure to come. Don Calistro relented and DiCaro moved back to No. 5. Two days later, a money order arrived from Paul's brother in Chicago. Paul DiCaro paid his debts and bought a cell in H right away. It had showers and toilets. Six of the 10 other Americans in the Men's Prison lived there.

Like DiCaro and Friedman, the rest of the Americans in the Jalisco State Penitentiary were small fish. Throughout the 1970's, the United States has applied heavy pressure on Mexico to stop drug traffic. Good enforcement statistics have been rewarded with financial aid and gifts of equipment. The result has been thousands of arrests and an increase in traffic. The major dealers who move marijuana by the ton and 90 perient pure heroin in kilo lots are rarely arrested. They have the requisite cash for some very heavy *mordida*. The small fish are used to fill the statistical breach. Once he had met some of these other Americans, Paul realized just how lucky he and Debbie had been.

Mort Brainard was the only one besides Paul who didn't tell stories about having been tortured. Brainard and his wife had been busted at the Magdalena *aduana*. The *Federales* found 4½ kilos of marjuana in the car and, Mort said, stripped his wife naked on the spot. He was told she would be raped if he didn't sign a confession.

Bill Frye and Sam Russell had been arrested in the cab of a truck hauling 300 kilos of marijuana. The two Americans said they were chained to a tree at the scene of their arrest for two days and beaten at regular intervals. When they finally reached the Federal Palace, they were cattle-prodded around their genitals, beaten with clubs and immersed head first in a 50-gallon drum of water. Frye is sure his testicles were permanently damaged. Originally sentenced to two decades apiece, $30,000 in bribes and legal fees had reduced their terms to eight years.

The Patterson brothers, James and Dennis, were awaiting sentencing for marijuana transportation. James had been worked over so viciously at the Palace that he almost died; his interrogator had beaten on his chest with a mallet and split open his rib cage. He was never hospitalized.

Robert Gordan's questioning was conducted by the usual team of four *Federales* in a room right off the Federal Palace parking lot and lasted 30 days. He reported being given the full treatment of water, cattle prods and clubs. Gordan was originally arrested when the police kicked down the door of his Guadalajara apartment. They were looking for cocaine. No cocaine was ever found, he said, but he was charged with selling it nevertheless. His confession was signed after the interrogating officer placed a loaded .45 against his head. Gordan had been in the prison for three years.

No one was worse off than Alan Cummings, who had been caught with LSD. This seemed especially infuriating to the *Federales*. Two months after they were through beating him, a tumor had begun growing on the back of his head. In prison more than two years, he had once been hospitalized for a week but only after he had passed out on the floor of his cell and seemed to be dying and the rest of the Americans pooled their cash and bribed the jailer to take Cummings to the infirmary. Alan was married to a Mexican woman who came to sleep with him every two weeks and she was pregnant. He seemed to be slowly dying in the Mexican prison, yet had never ever been sentenced. The other three Americans there were not well known by the rest.

Frye and Russell had bought a three-room suite for $500 when it had become clear that they were going to be in Jalisco State for some time. It was one of H's nicest. During his first few days in that department, Paul spent a lot of time there, listening to their stories. They explained that there were no guarantees even *mordida* would work. One American arrested for possession of a marijuana cigarette had spent $10,000 over the last year and was still inside Santa Marta prison. All the Americans told stories about their countrymen. One was of an American citizen named Hernandez from Tucson, who had been giving the Guadalajara jailers a hard time, and they were said to have administered a fearsome beating with their leather batons. Two days later, on Christmas Eve 1975, Hernandez was rumored to have died from his injuries. Paul DiCaro soaked up the talk, and felt worse with every story.

He and Friedman next saw each other on the regular day when the women were allowed to visit the men. The couple walked across the plaza outside H, and Debbie shuddered as her eyes fell on the Snail, a Mexican prisoner who had tried to commit suicide by jumping off the two-story administration building. He had failed and only broken a leg. Rather than set the bone, the prison authorities amputated it above the knee. The Snail couldn't afford crutches, and he made his way through the dust by pulling himself along with his arms.

The two Americans' hopes for the judge's hearing on Monday, Feb. 9, fell flat. The judge was unwilling to do anything more than reduce the charges. He said he needed more evidence about their addiction. Ramirez apologized for this further disappointment and delay but reassured his clients that it would be only a short while before they were freed. Paul and Debbie had their doubts.

So did Hannah Friedman and Tod Friend. Tod Friend is a member of DiCaro's and Friedman's Sonoma County co-op and shares their house. Hannah Friedman, Debbie's mother, is a housewife in Waukegan, Ill., with a long history of community service. At this point, they joined forces to try to rescue Paul and Debbie. Before they were done, $10.000 had been spent, in bribes, lawyers' fees and expenses. Relative to the sums paid by other Americans, it was a bargain basement.

As soon as Debbie's mother had heard from the consulate, she had wired money and guaranteed the lawyers' fees. She and her husband, a suburban physician, had flown to Guadalajara and visited the couple on Sunday, Feb. 8. Hannah Friedman had been so sure of [illegible]l and Debbie's imminent release that she left them two plane tickets home, told them to stay out of trouble, and flew back to Chicago that night. When she heard that her daughter was still behind bars, she felt Debbie and Paul were being swallowed in legal quicksand. She wasn't sure what to do.

Tod Friend had heard that it was possible to call the prison directly and talk to an inmate. He did and got Debbie on the phone. She said things did not look good. Friend called Hannah Friedman, told her he was going south and promised to call her from Guadalajara.

He rented a room in the Hotel San Jorge and began visiting Paul and Debbie every day he could. Most of the visits took place in a small room in the front of the prison, but on two days a week he was allowed to be locked in the men's side with Paul all day long. Paul figured they needed a new lawyer. He liked Gustave Ramirez but thought he was too naive and didn't have the necessary connections. Paul had a replacement in mind: Francisco Gutierrez Martin.

Gutierrez Martin was said to be a legend behind the walls of Jalisco State Penitentiary. Martin's extraordinary influence grew out of a long career teaching law at Guadalajara University. Three of his former pupils sat on the Jalisco State bench, and the old professor was said to be making great sums of money. Paul had seen one example of Martin's influence first-hand. Two 17-year-old Mexican kids had been brought to the prison after being arrested while harvesting an entire field of marijuana. They were cocky and bragged that Gutierrez Martin was their lawyer so there was no reason to worry. Two days later, the kids were released. Many people told Paul that he and Debbie would have been home by now if they had hired Gutierrez Martin. Paul was convinced and sent Debbie a message to call Martin, who said he could, indeed, get them out. It would cost $12,000 cash in advance.

Twelve thousand dollars in cash is a lot of money, and it took five days for Tod to persuade Hannah to bring it down. When she finally arrived in Guadalajara, Mrs. Friedman planned to see Martin and make the arrangements as soon as she had registered at the Hotel Fenix. She would have if there hadn't been a sudden change in plans. At the last minute, Paul and Debbie decided to stick with Gustavo Ramirez. The change of heart grew out of a conversation with an imprisoned lawyer in Javier's Café while Tod was spending the day. The lawyer's name was Abraham and he agreed to look Paul and Debbie's papers over. Abraham concluded that it was a waste of money to hire Martin.

"Gustavo has done all the work," Abraham explained, "so why Martin?" The prison lawyer said the charge reduction was a first step to freedom and told them not to worry. Gustavo had all the right law on paper.

Tod reached Hannah with the news after she had contacted Martin and made an appointment. She called Martin back, canceled the appointment and deposited her $12,000 certified draft, on a Waukegan, Ill. bank, in the hotel vault. The decision saved money but would eventually cause Paul and Debbie plenty of trouble. The smell of cash was around their case now and a lot of folks in Guadalajara have a nose for the smell of cash.

In the meantime, Gustavo Ramirez put the final touches on their case. Friends of Paul, Debbie and Hannah in the United States sent letters asserting that the couple were genuine marijuana addicts and had been treated for their addiction for years. The last piece of the puzzle was their official certification. To get this, Paul and Debbie were taken out of the prison to a clinic near the Federal Palace. They both passed the examination with flying colors.

The other Americans had clued Paul in that the tests picked up traces of marijuana resin in the mouth and on the fingertips. Their mouths and hands would be rinsed with a solvent to collect samples. On the recommendation of his countrymen, Paul bought a little weed on the plaza and smoked half a joint on the morning of the tests. He hid the remainder in his pants and passed it to Debbie on their way to the clinic. She asked to relieve herself before she saw the doctor and smoked the rest of the weed in the bathroom. The next day, Dr. Natzahualcoyotl Ruiz Gaitao sent a memorandum to the Third Judge of the *Distrito en el Estado* certifying that the accused Paul Francis DiCaro and Deborah Lee Friedman "are habitual drug addicts in the use of marijuana . . . requiring at least three to six cigarettes a day."

With that document, Gustavo Ramirez was ready to go back in front of the judge.

A few days after Gutierrez Martin's aborted contact with Hannah Friedman, Ramirez began to encounter signs of Gutierrez Martin's continued presence. Martin had evidently not lost interest in the possible $12,000 fee.

Gustavo was worried. He explained that Martin and the judge's secretary had been talking. Ramirez had picked the story up on the courthouse grapevine. Martin was said to have told the secretary that the DiCaro and Friedman case had money attached to it, and that if it could just be held up until the Americans changed lawyers, there could be $400 in it for him. The news of Martin's presence had left Gustavo Ramirez ready to quit. He thought he ought to leave the case. Martin was impossible to fight.

The Americans disagreed. Hannah and Tod wanted to know why Gustavo didn't just take $800 to the same secretary. Gustavo said they shouldn't need a bribe. They were clearly in the right under the law. The Americans agreed but said they'd rather see Paul and Debbie free. Ramirez responded that it was exactly this *mordida* that had made Mexican law a joke, and he wanted no part of it. Gustavo Ramirez was a man of intense belief. He refused to eat meat because it symbolized the fat Mexico of the cattle barrons. He refused to drink soda pop because it symbolized Mexico's addiction to the Yankee Coca-Cola culture. Gustavo kept a photo of Che Guevara over his file cabinet. It took Tod and Hannah half an hour to change Ramirez's mind about bribing the secretary. Finally, the challenge of beating Martin and his desire to get Paul and Debbie released overwhelmed Gustavo's reluctance. The bribe was offered immediately and consummated with cash during the next week. On the morning of Friday, Feb. 26, 1976, the judge signed the documents dropping criminal charges. Gutierrez Martin subsequently denied any involvement in the case.

The news reached DiCaro around 10:30 A.M. He wasn't expecting it. Paul DiCaro had begun assuming that nothing would work out and was preparing to serve five years and three months, the minimum sentence for drug-related convictions. On Friday morning, DiCaro was all set to play third base in a prison baseball game. One of the young boys who hung out on the plaza brought Paul the message. He thought the American's freedom papers had arrived. Paul tipped the kid a peso and hurried to the prison building, where a guard told him to go back to H and get his stuff. Paul DiCaro was being released. Debbie was given the same news on the women's side half an hour later. Then they waited. The guard said it was only a matter of signing some final papers. Paul sat in the visitors' room for three hours. During that time, Tod, Hannah, Gustavo Ramirez and Ramirez' son Carlos arrived to welcome them out. They all waited together. When the guard finally gave Paul his release certificate and official papers, there was great jubilation. The rescue team was laughing when they left to pick up Debbie.

The laughter came to an abrupt halt as soon as they walked out the front door. Two agents from the Department of Population were waiting on the steps. The Department of Population's jurisdiction includes foreigners inside Mexico. The agents approached Paul and explained that before his release was final, there were some more papers to sign downtown. Paul was stunned. The agents handcuffed him and hustled him into their waiting automobile. The rescue team tried to follow the car but lost it shortly after the agents grabbed Debbie at the women's gate. None of the rescuers had any idea where Paul and Debbie were being taken. Once again, Paul DiCaro and Deborah Friedman had disappeared into the morass of Guadalajara law.

Gustavo Ramirez's best guess was that they'd been taken to the city jail, and the rescue party drove straight there. The lawyer went into two different offices to inquire and was told that there were no Paul DiCaro and Deborah Friedman in the city lockup. Gustavo was headed back to the car when he spotted a policeman friend of his in the hall. The friend assured him in confidence that he had seen the Americans in the building not 10 minutes earlier. Gustavo came back to Tod and Hannah looking angrier than they'd ever seen him. He said we was going to find the judge and would drop them back at the Hotel Fenix.

Gustavo's friend had good information. Paul and Debbie were in the basement sharing a cell. For the last 36 days, DiCaro had prided himself on his composure but that was all behind him now. Paul and Debbie had quickly perceived that all the talk about signing papers was a hoax and DiCaro was furious. He spent three hours kicking the door and screaming about all the rotten chicken—*cabrones* who had kidnapped him. He screamed down the hall that he wanted to

talk to someone, goddamn it. No one came until 11 P.M. By that time, DiCaro had calmed down and he and Debbie were in their sleeping bags on the cell floor.

The visit was from Señor Gabriel Romero Barragan, the head of the Department of Population of Jalisco. He identified himself by flipping out a gold badge with papers and a photo. Romero stood on the other side of the bars flanked by two bodyguards. He had evidently just come from dinner. One of his bodyguards reached up and wiped a spot of enchilada sauce from his lapel.

"*Buena noches*," Romero began. He understood the whole case, he explained in English, and he knew that the two Americans had their freedom papers, but that didn't matter. Under the law, the Department of Population had the authority to hold them for 30 days before deportation. If, on the other hand, their friends were to make an arrangement with him, Romero could sign their deportation papers immediately and put Paul and Debbie on a plane. He gave the couple a scrap of paper with his phone number on it. Romero said he would instruct the jailer to give Paul and Debbie two phone calls the next morning. They should call their people and have them contact him directly. He would be in his office between 9 and noon.

"Tell them to bring their best offer," Romero added with a smile.

Paul and Debbie were ready to pay whatever it took. They knew that if they weren't released by Saturday at 6 P.M., all the legal machinery would shut down until Monday. By then every jackal in Jalisco would be onto their case and they'd be buried in payoffs. Feb. 26 was the worst night the couple had spent in jail. Their prospects seemed miserable.

As it turned out, they had seriously underestimated Gustavo Ramirez. Ramirez was not about to be walked on by Señor Romero, head of Population or not. Ramirez found the judge coming out of a movie at close to midnight. He explained what had happened and pointed out that Population had no legal authority over DiCaro and Friedman. The charges had been dropped so no deportation was in order. Population was totally out of bounds. Not only that, the lawyer argued, it was an obvious insult to the judge himself. When a judge ruled, it was final, and Population shouldn't think it could overrule him. The judge agreed, and called his secretary. Instead of meeting Romero the next morning, Ramirez huddled with the judge's secretary. The incentive of another $800 cash for "bail" was enough to persuade the secretary to accompany him to the Palace and file charges against Romero and everyone else involved in the two Americans' illegal detention. They arrived at the Guadalajara lockup's main desk at 11 A.M.

The secretary threw six different files full of charges on the counter and demanded the immediate release of the Americans, Dicaro and Friedman. The act drew a lot of attention. Secretaries to the judge of *Distrito en el Estado* do not visit a prison lockup except on very special occasions. The first clerk took one look at the secretary and the papers and called his superior. The superior approached the papers with a smile but lost it as soon as he began leafing through them. He retreated to the phone and called the Weasel. The Weasel was the lockup's resident legal expert. He had a thin face and a long twisted nose that had a tendency to twitch. It twitched a lot as he read through the files. The Weasel got back on the phone and made calls for the next hour and a half. During the last and longest of them, he did little but listen to a loud Spanish voice and answer "sí" and "no sí". After hanging up, the Weasel called down to the cellblock and told them to send the two Americans up.

Like every other process they'd been through for 37 days, this last one took some time. Paul and Debbie had to wait an hour at the cellblock door. The turnkey explained that he was on his lunch break and couldn't open the door until he was done. They watched him eat *burritos* until Debbie started pulling her hair and screaming. The jailer finally opened up and went back to eat his lunch in peace. Paul and Debbie waited another three and a half hours in the front office while Gustavo, the judge's secretary and the Weasel shuffled papers and signed documents. At 5 P.M., Paul DiCaro and Deborah Friedman walked out the Federal Palace's front door. After 37 days behind bars, the late afternoon Guadalajara streets felt electric.

The party celebrated in the Hotel Fenix dining room. Gustavo was paid his $1,000 plus a $1,000 bonus, and put the dinner celebration on his tab. He wanted Paul and Debbie to stay in town to testify against Romero, but Paul, Debbie, Tod and Hannah were ready to leave. Hannah suggested that they do so before Population had a chance to counterattack, and she devised a plan. The Americans made plane reservations departing the next day from both Guadalajara and

Mexico City—then, in a rented car, they drove to Monterrey, changed cars and continued on to Texas. They crossed the Mexican border at Nuevo Laredo shortly after midnight on Suday, Feb. 29. On their way to the San Antonio airport, the party stopped at the Alamo. It was 5 A.M. Tod, Paul and Debbie kissed the monument's wall.

At the airport, Paul bought a Sunday copy of The San Antonio Light. The front section was dominated by a two-inch banner headline: "U.S. Suicide in Mazatlán Jail." The story, by Larry D. Hatfield, was about a young American jailed in the state of Sinaloa who had "committed suicide . . . rather than face torture for his part in an aborted escape attempt." Paul DiCaro and Deborah Friedman didn't neeed to read further. They closed the paper, boarded the plane to San Francisco, and counted themselves lucky to be north of the Rio Grande.

The Argument Over Mexican Justice

After repeated inquiries made by The New York Times to various Mexican Government and U.S. State Department officials about the imprisonment case of Paul DiCaro and Deborah Friedman, the Mexican Government announced what was described as a change of policy: As of April 16, 1977, possession of small amounts of marijuana, cocaine and heroin for "normal use" would not be subject to criminal charges. However, those people already sentenced would have to continue serving their sentences, ranging from 5 to 14 years, and, in the case of marijuana, the announcement represented no change in the law. That provision already existed in Articles 524 and 525 of the Mexican Federal Penal Code, though, in fact, it was for possession of a small amount of marijuana that DiCaro and Friedman were put in prison. And reports of torture, mistreatment and corruption in Mexican prisons are still being heard from friends and relatives of the approximately 600 Americans in Mexican prisons.

The State Department's statistics on the question are contradictory. At the June 29, 1976, hearings of the House Subcommittee on International Political and Military Affairs, Leonard Walentynowicz, then administrator of the Bureau of Security and Consular Affairs, testified that the State Department had been able to substantiate 40 cases of physical abuse in the first six months of 1975 and 61 cases in the same period of 1976. Secretary of State Cyrus Vance, however, in his quarterly report to Congress about the status of Americans in Mexican prisons on March 4 of this year claimed that only 58 cases had been substantiated in the entire period of July 1975 to Jan. 1977.

At present, the American and Mexican Governments are attempting to reach a treaty agreement on prisoner exchange, but it has stalled in the U.S. Senate on questions of constitutionality.

The Jalisco justice authorities deny DiCaro's and Friedman's allegations, and representatives of the Mexican Government and U.S. State Department contend that conditions have changed dramatically in the past year. Those with friends or relatives still in prison say the situation remains the same. Following are various comments on the matter:

"When someone is arrested, there are always complaints and bitterness. We always follow law and ethics. We live in a glass house and everyone can judge us. We are entirely satisfied and proud of our behavior."

—Gabriel Romero Barragon, Chief of the Department of Population, Guadalajara, Jalisco.

"This is a typical case of Americans in Mexican prisons. If anything, these two were exceptionally lucky relative to the other cases that have come to my attention."

—Representative Fortney Stark, Democrat, California.

"Usually Americans are handled in a way comparable to their handling here in the U.S. We do have a substantial number of abuses, but once the case comes to the attention of the consular officer, nothing untoward happens. There has been significant improvement over the last year and a half and a marked decrease in reports of physical abuse We have had innumerable discussions with senior Mexican officials and had a good response. It takes a while for the word to filter down, but we are beginning to see hopeful results"

—Robert Hennemeyer, deputy administrator, Bureau of Security and Consular Affairs, Department of State.

"The State Department ought to come out of its ivory tower and deal with reality. Torture continues during arrest and interrogation. Things haven't improved. Just this week, an American prisoner was in desperate need of an appendectomy and in great pain. They took her to the hospital in the back of a truck. That's not torture? It used to be that the consulate called collect but now they will return your calls at their own expense. That's the biggest change. In my experience, the consulate officials acted more like undercover C.I.A. and F.B.I. than consuls."

—Juanita Carter, mother of an American prisoner in Norte Prison, Mexico City.

"Things have changed radically on this question. I'm almost in a position to say that you're kicking a dead horse. Since the change of Mexican administrations, we have had almost no complaints of mistreatment. I suspect there is still a certain degree of extortion, but that it, too, has decreased. We have developed a very good relationship with the Attorney General of the Republic on this question. We try to see that American prisoners have all the rights they are entitled to, but they are subject to Mexican law."

—Rolfe Daniels, Chief of Citizen Consular Services, American Embassy, Mexico City.

"The State Department is just a damn bunch of liars. Just last week, the new director of Santa Marta Prison allowed his cronies to extort all the Americans in his prison. They were told that they had to buy insurance to keep themselves from getting hurt. They talk all about human rights in Russia but they don't say a thing about Mexico. When the State Department says torture has stopped, they're just not telling the truth."

—Mildred Cottlow, mother of an American prisoner in Santa Marta Prison, Mexico City.

"Look very carefully into these people's story. People who violate laws always see the story from their point of view, which may not be the whole truth. Sometimes law enforcers go beyond their prescribed limitations, but that often is dependent on the attitude of those arrested. By order of the President, these abuses have come to a standstill. Abusers have been dismissed and abuses are now in the process of being totally eliminated. We have always tried to investigate all allegations. When we have, we have often found the story to be more than the complainers told. Often it is shown that these people are drunk, resisting arrest, under the influence of drugs or have drugs in their possession."

—Enrique Buj, Minister Counselor to the Mexican Embassy, Washington, D.C.

"I personally know of individuals as recently as April 1976 who were tortured upon arrest. The treatment inside the Federal District prisons did improve over the last year. Two new prisons have been built. The arrest procedure, however, remained brutal as far as I could tell. Although the Federal District had improved, the reports I heard from the provinces were still just as bad as ever. The judicial process hasn't changed at all. In that sense, the prison reform is a fraud. With the courts and arrest procedures unchanged, all it means is a nice place to stay after they screw you."

—Bob Goode, American prisoner in Oriente Prison, Mexico City, released March 22, 1977.

—D.H.

15 June 1977.

Prepared Statement of Gordon Dunlop, Jr.

My name is Gordon August Dunlop, Jr. I was living in Seattle, Washington in the year 1972 working for my father as a wholesale furniture representative. On my vacation, I took a trip to South America and on my return to the United States, I was arrested in Mexico City, 21 April 1972. My final charge was importation of Cocaine into Mexico, ½ gram. I was sentenced to seven years and 5,000 peso fine. I spent four years, ten months and twenty-one days in Mexico City in jail. I'm now living at 87 Nelson Mill Vally, California. Phone 383-9419.

Gordon August Dunlop, Jr.

U.S. Senate Committee on Foreign Relations, Washington, D.C.

On April 21, 1972 I was landing in Mexico City, coming from Columbia. I was on my way to Los Angeles, California. However, as I waited for my flight to Los Angeles, I was asked to go with a man who said he was with the police—international, that is. I was taken to a room where Robert Wayne Sexton was seated and on a table in front of him was a bag filled with a white powder. I was then told to take off my clothes. I did this and then to my surprise, I was told that a

pair of pants in Wayne Sexton's bag were mine, and that they contained ½ gram of drug. I was then left in a blank space because the American who arrested me left. I asked to use the telephone to speak with my embassy in Mexico. Well, no one spoke English at all. I was taken to a jail in the main part of town, where I was told in broken English that the man speaking and a friend would be back at 12:00 to beat me up if I did tell the truth. When they came back, I said the same. I know nothing about a green pair of pants. I was then hit and then they left. For two days I sat in my cell waiting, and in those two days I had one coke that a visitor to someone else gave me. I was a complete wreck.

On the 3rd night I was taken out, it was dark out, I was taken to the D.A. office, where I was told to tell my story to a woman who said she understood English, but didn't speak much. Well I told her everything that happened and then I told her about my problems of not eating or being able to contact my family. Well she said something I couldn't understand at all. I was then taken upstairs where to my surprise were some newsmen. I was forced to hold a big bag of white power, and I was forced to by a police officer gun in my back. I then tryed to talk to one of the T.V. men to get help I was knocked to the ground and removed from the room. The next day I was taken to a new jail, Tucumbiari in Mexico City. No one here spoke English either. Well I was there 2 days and then it's been five days now altogether I get my first visit—the American Embassy and a member of my family. Well he told me there was nothing he could do for me himself this being the American counselors, but gave me a list of lawyers to call. Well this is now at the point of entering a Mexican Prison. My first hours were spent fighting with the prisoners themselves. There are no guards inside the prison nothing but prisoner who run the Dorms.

Well all the fighting ended when the Mayor came out offered me a big marihuana smoke and then tells me it will cost me $2000.00 dollars for a cell. He spoke a bit of English I told him I needed to speak on the phone he told me $100.00 dollars. This is just the very beginning of a nightmare that I feel no one can help to prevent this but our own Government. I spent a total of 4 years 10 months and 21 days in Mexican jails my charge importation of Cocane. My time there would be impossible to write down, it would be a book of years of unbelievable things. There is no verbatim in Mexican jails there is no understanding of the English language or of foreigners at all. They believe every American is rich. I myself have several human rights valuations and know that there is nothing being done about this.

Therefore I feel the Mexican American Prisoners Exchange should take place. The people that are still doing time in Mexican jails are many and I know about hundred of them, along with my wife and baby who I met in jail who have years of pain and torture to live through. I watch people get there head cut off and the guards just looked on. Time's were you would see people undressed in a shower for days because they didn't have money. Then there the case where if you are a hard guy you get a new trial because there some drug in your cell. They have all the power and the way to make you pay. Now I ask you isn't 5 years of a prison life enough. I've been out for three months, there are no government against I can go to get help. I apply for a job and because of five years in a Mexican jail I can not get employed. Yet if I were a convict in the United States I could receive help and believe me after trying to stay alive for four years ten months 21 days you owe a lot of money to people and you need a chance to get started.

We could go to the doctor and the doctor couldn't speak English and Krebs just couldn't get anyone to help him. I not sure what cause his death but I know the lack of understanding between the Mexican officials and him was a big part. Please do vote for the exchange it is the only way to bring about justice to all the people who are involved.

Thank you,

GORDON AUGUST DUNLAP, JR.

PREPARED STATEMENT OF DWIGHT WORKER

I was incarcerated in Lecumberri prison from December 8, 1973 ,to December 17, 1975, charged with importation of cocaine. I was guilty as charged, regardless of the fact that this was the first time I had ever attempted smuggling. I am not proud of myself for what I did, and I cannot make any moral justifications for my conduct, since greed was my only motivation.

But unlike me, most of the Americans in Mexican prisons are charged with possession or transportation of marijuana. Even though less than one percent of

them are charged with trafficking heroin, they are all subject to the same inflexible laws.

Upon my arrest I was cattleprodded with electricity on my face and genitals until I signed my confession. After I had signed, the police laughingly told me my trial was over; I would now spend the next 7 to 15 years in "Hotel Lecumberri". For the next two years I never saw a judge, entered a courtroom, or entered a plea of guilt or innocence.

When I arrived at Lecumberri prison, I was told my price was $5,000 to survive. When I told them I could not pay it, I was beaten by a prison gang and hospitalized two weeks. Over the next five months I would be hospitalized three more times from beatings, whippings, and stabbings because I could not pay extortion. I was finally sent to a psychiatric ward for electroshock treatment. During this period I watched leaders of different Mexican prison dormitories literally fight over who would get the next American prisoner for extortion purposes. Guilt or innocence was irrelevant. Americans in Mexican prisons are big business. The treatment I received by the Mexicans, although brutal, was in no way unique to that received by Americans throughout Mexican prisons.

While I was in Lecumberri in the spring of 1974, I met Dan Root, former vice-consul in charge of prisoner affairs at the U.S. Embassy. Dan Root told me there was nothing he or the embassy could do to protect me, although by now I had discovered that the prison guards did not beat up or extort Canadians, Australians, or British subjects. For purposes of protection and survival, I learned to declare myself to be a Canadian to threatening, unfamiliar guards. If they believed me, I would not be beaten. But although Dan Root could not help me, he did suggest that I get the services of Mexican attorney Jorge Avilé-Ortiz, because in Root's words, "If there's a man who can get you out of here, it is Jorge Avilé's-Oritz."

Jorge Avilés-Ortiz was later arrested in Mexico and charged with defrauding U.S. prisoners. On April 2, 1975, he would declare that Dan Root worked with him to defraud these Americans. Although Dan Root's actions were extreme, they exemplify the negligence or inability of the U.S. Embassy and consulates to act when needed.

The prisoner exchange treaty should be passed because the cultural and legal differences are too great to bridge from within a foreign prison. The temptation to rob and extort American prisoners is too great for Mexicans in prison to resist. Just by having these Americans within our borders and free of extortion would relieve much of the burden that the parents and relatives now suffer.

The prisoner exchange treaty should be passed because these Americans in Mexico are not heroin traffickers. Their return to the United States as prisoners would be irrelevant to the serious drug problems within the United States. They have been used as scape-goats and pawns in the game while the dangerous heroin trafficking from Mexico increases. Their continued presence in Mexico only threatens to further exacerbate the relations between the United States and Mexico.

After I crossed the U.S.-Mexico border on Christmas Eve of 1975, I knelt down on the cool Arizona sand and kissed the ground, crying. Unfamiliar with my past circumstances, the two U.S. customs agents watching me from the nearby border station thought this an unusual display of emotions. But while in a Mexican prison, I had learned to respect and value our Constitution and Bill of Rights. So have the other U.S. prisoners in Mexico. I hope that the work of this treaty is completed sooner rather than later so that they will return home.

Everyone who has testified before this committee on the proposed treaty has endorsed its passage; yet I fear that it may take many months, even years, before we see any results from it. Please do not forget the human terms of this treaty: the wasted years, and broken lives and families. Gentlemen, I urge you to proceed with all due haste and pass this treaty and the requisite enabling legislation.

Thank you,

DWIGHT WORKER.

The CHAIRMAN. Our last witness this morning is Mr. Glen Jones, of Kansas City, Mo.

STATEMENT OF GLEN JONES, KANSAS CITY, MO.

Mr. JONES. Thank you, Mr. Chairman.

I wish to thank the committee for allowing me to speak this afternoon. Since it is late, I will try to keep this short.

I am neither an attorney nor a member of a family who has someone incarcerated in Mexico. I am a legal investigator. Over the past 5 years, I have taken extortion money to Mexico for the release of Americans arrested in Mexico, so I do have some knowledge of extortion, ill abuse, and misconduct by Mexican and American officials in the country of Mexico.

I have no prepared statement and will speak off the top of my head. Again, I will try to keep this short.

Mexican Government Mentality

First of all, you have to realize what you are dealing with when you are dealing with Mexico. You are dealing with a corrupt government. The PRI Party is the only party that has been in power since the revolution. It is a totalitarian state in which every president happens to be appointed by the outgoing president. He is always elected. This is the party that counts the votes. This is the party that authorizes what legal action is to be taken anywhere in the country.

However, in small groups in isolated areas, the discretion of law is left up to the individuals who are appointed.

Civil servants and police in Mexico support themselves not from the fees they receive as government employes, but from bribes—"la mordida," the bite, as it is referred to in Mexico. That is the only way they have of supporting themselves and their families.

It has become worse since the devaluation of the peso. For some reason they hold Americans responsible for this. I don't know why, but that is a common statement heard by officials in Mexico and citizens.

Legal fees charged families are outrageous by Mexican lawyers. I know of one such family who has spent over $70,000 in legal fees for absolutely nothing. This is not involved in the money which they have to send their son in Mexico to support himself. It averages, I think, around $100 a month. He is in one of the better prisons in Mexico. He is in Recruloz Oriente in Mexico City.

The constitutional question involved in the treaty is abstract. I am not a constitutional expert and I know nothing about it. But I do know that a great number of these people in Mexico are guilty of only minor infractions, even under Mexican law, and a great number are guilty of absolutely nothing. These were people who were arrested for "the bite," so that the families could be extorted.

I have had offers from Mexican officials in various parts of Mexico—this is not an isolated incident—for me to be part of the deal. When a child or an American citizen was arrested, they would tell the prisoner that the only way he could effect his release was to have his family get in touch with me in this country. This deal was offered to me, which I declined, of course.

DEA MENTALITY

Now just take this mentality that we are talking about and you add the mentality of the DEA, the Drug Enforcement Administration, which came into power in any really effective way during the Watergate period. I think we have the same mentality that started this

agency and ran this agency that was responsible for this event that happened in our country.

Hopefully we have taken care to weed out those people involved and to get ourselves straight again, to get our country on the move.

But this agency, the DEA, which was created by these same people, is still in business. It still effects the same consequences that it did when it was begun. I ask you in the form of a question, how many U.S. prisoners were imprisoned in Mexico on drug charges before 1968? Just compare that figure and the figure for today. You will see that the former is almost nonexistent.

The laws are the same in Mexico. They were not changed. They were implemented at the request of the Drug Enforcement Administration of this country.

We heard Mr. Beringer yesterday tell us—and I can't quote him exactly, he went so fast—that the DEA agents in Mexico absolutely do nothing. They don't do this and they don't do that, so they have no function.

I will ask another question: are DEA agents carrying firearms in Mexico? the answer is yes, on occasion. Are DEA agents issued weapons? The answer is yes, always. Is there an arsenal in the DEA office specifically for DEA agents in Mexico? The answer is yes.

In behalf of a client in Mexico, I sued the Drug Enforcement Adminstration for any information it might have pertaining to his arrest and/or conviction. I was denied this information under the Freedom of Information Act.

I went to Mexico at the behest of the family and acquired that, the Freedom of Information and the Privacy Acts, both, and took my request to the Embassy, and it was denied. I took it back home, sued in Federal Court, and it was denied, the reason being that this particular individual—who I might add had no former arrest record nor any former drug record, indeed had nothing but good grades in school; he was merely a businessman—I was told and the Federal judge was told, was under investigation.

I find that not one DEA file has been released to an American citizen or to his counsel. Gentlemen, not one.

Now with 600 people in Mexican prisons, they are telling you that all are under investigation.

Now that is a simple procedure. You just whip up a quick 10 pages as soon as someone is arrested. I have information regarding this particular individual from informers within the DEA office in Mexico City that they were indeed involved, not with the arrest, but with the prosecution after the arrest.

This particular individual was on an airplane from South America. When he got to the airport in Mexico City, he asked a Colombian national, who happened to be on the same plane, for dinner. The Colombian national was what is termed a "mule." She was carrying drugs for an organization with which this man was not involved. He merely spoke to the girl. He was sentenced to 8½ years imprisonment. His confession was extracted out of him after 3 days of electrical torture, physical abuse and mental abuse. For me to recount those things would be to say again what this panel has already said. Most of those things, if not all of them, happened to this particular individual. We don't

know what happened to the woman involved. He signed a statement that was in Spanish without the aid of a translator.

When the Embassy finally was called, he told the Embassy that it was taken by force. He showed them signs of physical violence which were properly recorded by the Embassy. A formal protest was made to the Government of Mexico—all to no avail. Nothing has happened, not to this date, anyway, except that he has been sentenced to 8½ years prison time, a completely innocent man.

Something has to be done.

TREATY RECOMMENDED

I suggest that there are outlets, even in this treaty, and I recommend the treaty for the simple fact that these people will be home and can be dealt with under the penal system here.

I will tell you why I think so, although I again state that I am not an expert on the law.

Even if these individuals waive their rights, it does not waive my rights, as an American citizen, to ask for habeas corpus or any other judicial process in their behalf, even if it means a class action suit. I don't believe that the Supreme Court of this country will allow the system in Mexico to dominate our judicial system in this country, regardless of the treaty. But I think you should approve the treaty.

The CHAIRMAN. You say you think we should approve the treaty?

Mr. JONES. Yes, sir, I think you should approve it for the simple reason that I think this Government can deal with it once it is done.

The CHAIRMAN. Thank you very much.

Mr. JONES. Thank you for allowing me to speak.

The CHAIRMAN. Senator Glenn and Senator Sarbanes, do you have any questions?

Senator GLENN. I have a few questions, Mr. Chairman, thank you.

PRISONERS' AWARENESS OF TREATY

Are most of the prisoners in jail in Mexico even aware of the treaty and what is being considered, as far as you know?

Ms. COULTER. Yes.

Ms. CARTER. Yes.

Mr. JONES. Senator, most of them are not only aware, but most of them are skeptical. I spoke to the arrest and detention officer in Mexico City, and he asked me to urge you people to expedite this matter because the mental anguish of 3 years of waiting for this thing to happen or not to happen has become intolerable on these people. We are inflicting our own pain upon them.

Senator GLENN. When you say that they are skeptical, are they skeptical of us passing it, or do you mean they are skeptical of the provisions doing any good once it is passed?

Mr. JONES. Both. Some prisoners think that it will never come to pass.

Senator GLENN. I see no reason for skepticism in the first case, about it being passed. I can't guarantee that it will be passed, of course.

PRISONERS SKEPTICISM CONCERNING TREATY'S PROVISIONS

However, the second point, what do they see as the deficiencies in its provisions if it is passed?

Mr. JONES. Yes, sir. Certain individuals, particularly the individuals that are guilty of no crime or of minor infractions, see that they might have to serve up to 20 years in the U.S. prisons for these offenses with which they were charged in a foreign country, and for which confessions were extracted from them by brute torture.

They cannot conceive that they would have to do that. But the way things have gone, they have been stalled for 2 and 3 years and so they don't know what to think.

Senator GLENN. Do you think that with the provisions of this treaty most of the prisoners in Mexican jails now would prefer to serve out their sentences there, or would they prefer to come back under the treaty's provisions?

Mr. JONES. I can't answer that, Senator Glenn. You would have to ask the prisoners.

Senator GLENN. Does anyone else have any ideas on that?

Mr. CARTER. Senator Glenn, I would like to comment on that.

Our son has commented to us. He is like the Balvin boy. He might not fit into the guidelines of this treaty. But, under the circumstances where we have passed the treaty, as has been touched upon here, if a man has been sentenced to 7 years in a Mexican jail and he is on his way home, and there is no hope for him to get out of these 7 years, even on his own soil, he does not look forward to this prospect either.

PAROLE, HABEAS CORPUS AND PAROLE UNDER TREATY

Senator GLENN. Staff, correct me if my interpretation of the treaty is incorrect. It is my interpretation that once they come back under this treaty, they will be eligible under American law, we being the receiving nation, for parole.

Mr. CARTER. But that would have to be a Mexican parole.

Senator GLENN. No, that is not true. Staff, correct me on this. It is my impression that of the prisoners come back from Mexico, they would be handled parolewise by U.S. authorities; but they would have to give up any right of habeas corpus or any right of appeal of their sentence. When they arrived here, however, they could apply for parole.

Is that correct, or not?

Mr. MCMURPHY. They could apply for parole. They could only appeal in the Mexican courts.

Senator GLENN. They could only appeal for relief from the whole sentence, for guilt or innocence, in the Mexican court. They could appeal for parole here under American law, but with no right of habeas corpus.

habeas corpus.

Mr. MCMURPHY. [Nods affirmatively.]

Mr. CARTER. Now I am not a lawyer, but I read this treaty thoroughly in New York City in December. It would seem to me to be a holding treaty for the nation of Mexico. It would seem to be, at best,

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a custodial type of treaty, and we would be holding these people in custody for the benefit of the nation of Mexico.

Senator GLENN. Let me read from our staff briefing sheet here, which I presume is correct, because it quotes the title, and so on.

It says—and this is merely one paragraph from the middle of the staff briefing, not the whole thing—"Transferred prisoners serve the sentence imposed upon conviction"—in other words, that would be the Mexican sentence—"but subject to the laws and procedures of the nations to which they are transferred"—that would be the United States—"including the application of parole or probation. However, only the Transferring State can grant pardon or amnesty, and access to the courts to challenge the sentence is limited to those of the Transferring State." The sentence would stand, but they could apply for parole in the United States once they were here.

PRISONERS' UNDERSTANDING AND OPINION OF TREATY

Now is this the understanding of the prisoners, and what would be their reaction to that? Would most of them apply to come home, or would most of them apply to stay there?

Mr. SMITH. Senator Glenn, let me say one thing, please. I have only been back for 2 months, so I was with the prisoners in Acapulco quite recently and I know their feelings. They would much rather take their chances here in the United States with our Government than to rot in that spittoon down there.

Ms. Carter, Senator Glenn, that is the opinion of the American prisoners in Mexico City jails also.

Senator GLENN. Thank you.

Mr. DICARO. Senator, if I may, that is the position of the prisoners in Guadalajara jail also.

Mr. JONES. Senator, I have a question, if I may ask it?

Senator GLENN. Yes?

POSSIBILITY OF U.S. BROUGHT CHARGES AGAINST PRISONERS

Mr. JONES. I will try to put this as directly as possible. This seems to be something else that concerns some prisoners in Mexico.

Will any charges be brought against these men and women by drug enforcement officials in this country regarding their arrest, prosecution, and conviction in Mexico?

Senator GLENN. The next paragraph after the one I read says this:

> Offenders are protected against double jeopardy, and the treaty explicitly states that an offender's civil rights shall not be prejudiced "beyond those ways in which the fact of his conviction in the Transferring State by itself affects such prejudice."

This would protect him from coming back and being given an additional drug sentence here at home. Isn't that correct?

Mr. MCMURPHY. On the same charge.

Senator GLENN. On the same charge only. He would not be exempted from any other drug charges that had never been brought against him. But regarding the charge brought against him in Mexico, he would not come back to be charged additionally and given an additional American sentence.

Mr. JONES. Even under the conspiracy laws?

Senator GLENN. I am afraid I have to say that you are getting beyond my depth there.

Mr. MCMURPHY. Mr. Vaghts is in the audience and he might be able to answer that.

HARASSMENT OF MR. SMITH

Mr. SMITH. Senator Glenn, there is a question which I would like to ask also.

Since my return to the United States, I have been followed, my phone has been bugged, as has the phone of Mrs. Coulter. At times, when I was talking to radio stations and I started talking about the Drug Enforcement Administration and their role in this Mexican thing, my phone has been shut off. I have been followed by agents.

Now I was acquitted of charges in Mexico. I think I have paid enough for being innocent. Do I have to be harassed here in the United States?

Senator GLENN. Obviously the answer to that would be no.

Mr. SMITH. I am speaking on my behalf as well as for all of the other Americans who will be coming home and who have been home.

WOULD ANY PRISONERS PREFER TO STAY IN MEXICO?

Senator GLENN. Under the provisions of this treaty, do you know of any prisoners who would prefer to stay in Mexico, as opposed to applying to come home.

Mr. CARTER. No.

Ms. COULTER. The prisoners in Matzalan have requested that they be brought home under the treaty. There are people there who have 7- and 8-year sentences which they would rather serve in the United States than in Mexican hellholes.

SUBSTANTIATION OF WITNESSES' CHARGES REQUESTED

Senator GLENN. I think it would be interesting, too, for the committee staff to get further information from you. Two of you have made some pretty tough charges, which I would like to see substantiated with facts, places, names, dates, telephone number. We would be very interested in following up on this and seeing if other additional action is needed. This is, of course, quite apart from the treaty. We have gotten into a different area here.

I think if you can substantiate the things that you have said with solid information, then I am sure the committee and the staff would like to go ahead and follow through on some of these things. I would like to follow up on some of the serious charges which have been made before the committee. I think it is incumbent on us to get places, dates, times, receipts, anything you have that would substantiate what you have said so that if criminal activity has been going on against you we can get into it.

But we do need substantiation. We cannot just take your verbal charges here at this table that somebody has been following you and cutting off your phone. We have to be able to prove these and for this we need concrete information from you.

Ms. COULTER. Sir, that was my phone.

Senator GLENN. I am sure we would appreciate anything that you can give us on that.

CHILDREN BORN TO U.S. WOMEN PRISONERS IN MEXICO

Mr. JONES. I have one more question that would involve prisoners, particularly women prisoners in Mexico.

There are several women who have had children while incarcerated. They have become impregnated and have had children. The children grew up with them in the prison.

I understand from a third source—again, it is a third source—that if this treaty is passed, extortion will again take its toll as these women are going to have to pay a great deal of money to take these children out, as they are now considered Mexican citizens by the Mexican Government. Now what level of government that starts at, whether it is in the prison or higher up in the government, I don't know. But it is something that I think ought to be looked into.

These babies should be allowed to come with their mothers, if and when their mothers are released, with no fee involved.

The CHAIRMAN. Do you mean children of American citizens?

Mr. JONES. Yes, sir. There have been children born to American citizens in Mexico who are in prison.

The CHAIRMAN. My understanding of the Constitution is that a child born of American parents in a foreign country has, up to a certain age, the privilege of deciding.

Senator GLENN. If the chairman will yield, I think what Mr. Jones is referring to is a question of whether the mothers, when they are repatriated to this country, can get their children out with them without having money extorted from them. Wasn't that your point?

Mr. JONES. Yes, it is. It is a matter of extortion.

Our interpretation of dual national citizenship is entirely different of what I am talking about here. I am talking about girls who will either stay in prison with their children, who will be released and have to pay a great deal of money to have the children released with them, or whose children will not be allowed to go with them.

CONCERN ABOUT TREATY'S LINGERING IN COMMITTEE

Ms. CARTER. Mr. Chairman, one great concern of all the prisoners in Mexico is that this treaty might become hung up in the committee and linger there for 2 or 3 years. They just don't think they will be mentally or physically able to handle this.

The CHAIRMAN. We cannot really assure you on that because there are 16 members of this committee who have to consider this treaty. It will receive thorough discussion in this committee, I can certainly assure you of that. Then the committee will vote on it. If the committee reports it to the Senate, then in order for it to become effective, the Senate has to vote by a two-thirds majority in order for it to be ratified.

It is getting rather late and I would like to bring these hearings to a close. I think we have explored this question quite thoroughly.

PROPER STAFFING OF ARREST AND DETENTION UNITS SUGGESTED

Mr. JONES. Mr. Chairman, may I have one more short statement, if I may?

Until this is passed, if it is, I suggest that this government can do something immediately to give instant relief to prisoners in Mexico. That would be to properly staff with personnel of experience and an adequate number of personnel the arrest and detention units throughout Mexico who deal with this problem. When they cannot get to a prison but once every 2 weeks to 2 months and must leave the prisoners at the mercy of their captors, something is wrong with the system. I think that is something that can be done now, today.

The CHAIRMAN. We cannot do it today.

[General laughter.]

Mr. JONES. I would accept tomorrow.

[General laughter.]

The CHAIRMAN. Of course I meant that figuratively. That matter can and will, undoubtedly, be a part of the discussion in this committee.

We have a lot of work ahead of us on this treaty. Don't overlook that. We will deal with it thoroughly on the basis of the testimony we have received from you people, from the constitutional lawyers, from the State Department, indeed from all who have testified before us. This is not something that will be easily and quickly handled, but I can assure you that it will receive thorough consideration by the committee.

Senator Sarbanes, do you have any questions?

Senator SARBANES. Yes, Mr. Chairman, thank you.

PRISONERS UNDERSTANDING OF TREATY

I am concerned as to how fully it is understood by the prisoners that the treaty does nothing more than bring them back to this country to serve the sentences imposed upon them in Mexico and that under the treaty they will have to serve out those sentences, except for the fact that American parole provisions could apply to the length of their service. Therefore, for all of them over time and for some of them in the short run, this may be an immediate benefit.

The treaty requires them to knowingly consent to the waiver of certain legal challenges. We have had constitutional authorities testify that they regard that as constitutional and proper and that the prisoners will be bound by that knowing consent.

Is that understood in terms of how far this goes and what it involves? This goes to the question of expectations. Do they understand that?

RECOURSE AFTER SERVING SENTENCE

Ms. COULTER. Senator Sarbanes, I would like to ask a question. The prisoners have asked me if there would be any action they could take after the time they have served their sentence. After they have served their sentence in an American prison, could they then have recourse against the United States or Mexico—without being sent back to Mexico to serve more time?

Senator SARBANES. What do you mean by recourse?

Ms. COULTER. Well, to bring a suit against either officials in the Drug Enforcement Agency, the State Department, or against Mexican officials for abusing them.

Mr. MCMURPHY. The treaty only says that the courts in Mexico would be the only courts that could determine the validity and the length of their sentence. Other related suits dealing with a tort case against the DEA agent would not apply here.

Mr. SMITH. Are you gentlemen aware of the procedures in a court of law in Mexico? Do you know that the prisoners are not taken before a judge, they do not even see a judge from the time that they start their process until they are sentenced, and even after you are sentenced a judge is not seen. Is this justice?

Senator SARBANES. I do understand that. But I think it is very important to be clear what this treaty does and not have false expectations about it.

Mr. SMITH. Senator, you are saying that regardless, even innocent people who are down there are going to have to come back and, without recourse, spend more time in prison here, and also be under the supervision of a parole office if they are paroled.

Senator SARBANES. That is what the treaty provides which has now been approved by the Government of Mexico and which you are seeking for us to approve.

IMPORTANCE OF UNDERSTANDING TREATY

I want to make sure that is understood, and that I understand that all of you here are supporting the treaty.

If you do not have a treaty these people will stay on in Mexican jails, except to the extent that we can, through diplomatic pressure, obtain their release. You can argue about how effective that will be and you will have to make your own judgment. The fact is that it is the treaty which will bring them back to imprisonment in American jails and under the American penal system. The treaty does provide that they come back and be imprisoned, and the treaty requires them knowingly to waive certain legal challenges they might otherwise have available to them. Constitutional authorities have said that that is constitutional.

Mr. JONES. Senator, I would suggest that the proper way to inform the prisoners of this would be to give all U.S. prisoners in Mexico a copy of the transcript of this hearing. I don't think it could be made any clearer than the way it has been said here.

Ms. COULTER. I would say, Senator Sarbanes, that they should be given legal counsel by one of our State Department officials and a copy of this implementing legislation should be handed to them and explain to them so they know just what the ramifications are.

BETTER STAFFING OF ARREST AND DETENTION UNITS

Senator SARBANES. Of course, that follows on your point about better staffing in terms of the services which we provide from our own Embassy people in Mexico with respect to this situation.

Mr. JONES. Senator, a serious situation could be relieved immediately. I have had acquaintance—well, acquaintance is not the proper word—I have had a great deal of use from the Embassy in Mexico City,

the arrest and detention unit, and frankly they try hard. I don't think they are given much credit, especially by the prisoners and their families. But they are limited for several reasons. No. 1, they are shamefully understaffed. They have about 4 or 5 people to handle 600 or 700 cases. They have to travel to Oaxaca, Guadalajara, to the four or five prisons in Mexico City, and they cannot do it all.

The other thing is that this is a job that comes and goes. The majority of these people are in for a certain number of months and then they go to another department.

Senator SARBANES. I understand that. I think you made a good point.

PRISONERS' DESIRE TO COME HOME

Ms. CARTER. Senator Sarbanes, the prisoners in the Mexico City area have received a copy of the treaty. They have received a copy of the implementing legislation, or a portion thereof, and they want to come home.

Here [indicating] is a little boy who has not seen his father for 1½ years. At least the man could see his son. There are many other similar cases. I am physically unable to take him down any longer to visit with his father.

So, the prisoners have many reasons for wanting to come home, even if it is to a prison in the United States. This is their plea and I was asked to please relate to you, Senators, today.

Senator SARBANES. Thank you, Mr. Chairman.

The CHAIRMAN. We thank all of you.

Ms. COULTER. We thank you.

The CHAIRMAN. This is a difficult situation, and you have been helpful to us with your suggestions. I am hopeful that when the committee gets down to considering the treaty, it may work out satisfactorily.

Mr. JONES. Thank you, Senators.

The CHAIRMAN. Thank you to all of you.

[Whereupon, at 1:20 p.m., the committee adjourned, to reconvene upon the call of the Chair.]

APPENDIX

TESTIMONY OF THE HONORABLE JAMES J. FLORIO, U.S. REPRESENTATIVE FROM THE FIRST DISTRICT OF NEW JERSEY FOR THE SENATE FOREIGN RELATIONS COMMITTEE, JUNE 16, 1977

This Committee has heard testimony of parents of young Americans who have been jailed on drug-related charges. They have told of the inhumane treatment to which these young Americans are being subjected.

I do not wish to belabor the point of personal stories, but I too have a constituent in a cell in Mexico and his parents are sitting patiently through these hearings hoping that something will be done, and done soon.

Their son, Paul Robinson, is a citizen in good standing in his home community of Atco, New Jersey. Paul has proven himself a leader in the community and is respected by church and local organizations.

Paul has been fighting the Mexican authorities and their judicial system for over two years now and his strength is wearing thin. This long nightmare began when the car in which he was riding was pulled over by Mexican authorities. The car was searched and a small amount of marijuana was found in a pack in the trunk. Unaware of its presence in the pack, Paul claimed the pack as his own and was immediately arrested for possession of an illegal drug.

Paul and his companions were taken to jail where they were visited by an American consul who gave them a list of lawyers and promised that he would see

that their personal possessions would be properly taken care of. Paul never saw this consul again. In the course of the next few days. Paul and his companions were in and out of a number of different jails until they were finally brought to the penitentiary.

Mr. Chairman, you have heard sworn statements on the conditions that prevail within the penitentiary, horror stories of drug addiction and wanton crime. Descriptions of the deplorable living conditions defy even the greatest imaginations.

Paul's parents are afraid for him. Just this past weekend there was another in a continual series of violent outbreaks within the penitentiary. A number of people were injured, including some Americans. There is a sentiment of "go for the Americans", because it is believed that the Americans have money.

Mr. Chairman, the Senate has the opportunity to bring Paul and many other Americans like him back home so they may take advantage of a system in which justice is the standard by which men are guided. The Mexicans have already agreed to the provisions listed in the treaty and I urge you, on behalf of these young Americans and their parents, to recommend this treaty to the full Senate and move quickly for its ratification.

PREPARED STATEMENT OF M. CHERIF BASSIOUNI, M.B., J.D., LL.M., S.J.D.

STATEMENT OF SUPPORT

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

It is the position of this writer after due consideration and study of the two "Treaties" and after consultation with other experts on the subject that the said "Treaties" are not in violation of the Constitution of the United States either by reason of their subject matter or form, nor do they contravene existing federal legislation. The "Treaties" provide an imaginative and valuable solution to the problems of U.S. Citizens incarcerated in foreign states and promote greater international cooperation in penal matters between states desirous of collaborating in the prevention and suppression of criminality. The laudable purposes of the "Treaties" and their innovative approach deserves full support. The ratification and entry into effect of these "Treaties" will put the United States in the forefront of the international community in this area of International Criminal Law. Hopefully, this will augure the opening of new initiatives by the United States in promoting greater international cooperation in penal matters for a more effective world-wide effort to prevent and suppress criminality. The new technique offered by these "Treaties" is added to Extradiction already practiced by the United States and hopefully other techniques, such as Taking of Testimony Abroad; Letters Rogatory; Commissions Rogatory and Transfer of Criminal Proceedings, will be developed to make more effective the prevention, prosecution and suppression of criminality.

I. Scope of the statement

1. The "Treaties" are almost identical save for minor variations in terminology. They are predicated on the same assumptions, are intended to accomplish the same objectives, are structured in the same manner and their conditions and requirements are the same. For these reasons the two "Treaties" are jointly treated in this statement and the observations made are applicable to both "Treaties."

2. It is assumed that the "Treaties" do not raise any questions pertaining to Presidential or Federal power with respect to the subject matter of the "Treaties" or the Power of the President under the Constitution of the United States.

3. The principal issue upon which the committee may be expected to focus is whether the federal government can recognize and enforce foreign penal judgments and execute their sentence provisions in the United States. It is to that issue and its underlying questions that this statement shall direct itself, specifically:

(1) Is there anything in the Constitution of the United States which prohibits the execution of the arrangements proposed in the "Treaties?"

(2) Is the recognition and enforcement of foreign penal judgments violative of United States laws or public policy?

(3) Is the execution of a foreign penal sentence based on a foreign penal judgment contrary to the public policy of minimum criminal justice standards of the United States?

II. Designation and scope of the "Treaties"

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

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

III. Rationale for the "Treaties"

The "Treaties" are predicated on three correct assumptions:

(1) That a state has an interest in the treatment of its citizens abroad.[1]

(2) That a state has an interest in the future behavior of its citizens;[2] and,

(3) That states have a common and mutual interest in cooperating in the prevention and suppression of criminality.[3]

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

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

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

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

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

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

[2] Rehabilitation is the heart of modern theories of criminal sanctions, and is the basis of the American Law Institute's model penal code, adopted by 22 States of the United States. The importance ofthe 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, for example, 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. Law and Iits Processes" (1969) at p. 33; and report to the Fifth U.N. Congress on crime Bassiouni; for a historical basis, see J. Bentham, "Principles of Penal Lak," pt. 11, bk. J, ch. 6 (Browning edition, 1948).

[3] H. Grutzner, "International Judicial Assistance and Cooperation in Criminal Matters," p. 189, in M. C. Bassiouni and V. P. Nanda, "Problems Arising From the Practical Application of the European Convention on Mutual Assistance in Criminal Matters" (1971).

1. A state's interest in the treatment of its citizens abroad is essentially a humanitarian one. Thus its concern for the manner and conditions of their custodial and detentional control is warranted. Such a concern however, extends beyond this purely humanitarian aspect.

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

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

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

(1) Conditions of custody and treatment of offenders abroad would not be a major factor in the decision to prosecute U.S. offenders abroad;

(2) It would not place any pressure on the U.S. or foreign government at the stage of prosecuting U.S. offenders abroad;

(3) It would encourage the extradition of nationals to states wherein they have committed offenses for purposes for their trial in such states and their eventual transfer to the U.S. for the execution of their sentences;

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

(5) It would provide a national and cultural context to their detention and custody more appropriately designed to enhance their rehabilitation and resocialization in their country of origin.

(6) It would create not only a specific device for international cooperation in penal matters, but also would enhance the climate of international cooperation in the prevention and control of criminality in a more humane concern for the person of the offender in a manner consonant with national cultural values and practices.

IV. Distinction between: Recognition, enforcement and execution of sentences

1. The term "Recognition" means that a foreign penal judgment's legal existence and validity is recognized.[4] It does not necessarily imply that the foreign penal judgment shall be enforced in whole or in part, nor that by its enforcement certain facts thereof shall be executed as if it were a national penal judgment. Thus a foreign penal judgment can be recognized for its juridical existence and validity, but not enforced or executed. However, a foreign penal judgment cannot be enforced or executed unless it is first recognized. Recognition is therefore the critical legal prerequisite for the enforcement and execution of a foreign penal judgment.

2. Enforcement means the use of a state's power processes to give effect to a foreign penal judgment.[5] In that respect, a state can do so on behalf of the rendering state or domesticate the judgment and act on it as if it had been rendered by its own tribunals.

3. The execution of a penal sentence is a form of enforcement of a foreign penal judgment whose validity has been recognized. However, it is a specific process whereby the executing state uses its power processes as if it were acting either on behalf of the rendering state (as an agent thereof) or on its own behalf as if the foreign penal judgment had been domesticated by the executing state (which is thereby executing the sentence as if it were its own national judgment).

4. A question arises as to whether the transfer of custody of detainees by one state to another constitutes an enforcement of the foreign penal judgment of the sending state by the receiving state and an execution of the sentence of the said judgment, or whether it is merely a custodial compact for the neutral administrative benefit of the parties. This question arose with respect to compacts between states within the U.S. and between states and municipal authorities and federal authorities for the housing, detention and custody of offenders.[6] Invariably, such compacts or contracts (between states or between federal and state or municipal authorities) have been considered as administrative arrangements for the use of facilities and the physical handling of the detainees. There has never been the inference that the state or municipality receiving custody of an offender convicted in another state or by the federal judiciary would be enforcing or executing the sister state's penal judgment or that of the federal courts. In fact, the full faith and credit clause of the Constitution does not mandate the recognition or enforcement of the Penal Judgments of sister states (or the federal judiciary) and the practice throughout the history of the U.S. has been not to acknowledge the recognition and enforcement of such penal judgments.

V. The recognition and enforcement of penal judgments: Within the U.S. and as between the U.S. and foreign states

1. A confusion has traditionally existed in the legal literature with respect to the terms "Recognition" and "Enforcement" of a foreign judgment whether it be civil or penal, as between sister states and as between the U.S. and foreign states. The confusion has led to the generally held belief that the U.S. and states within the U.S. do not "recognize" let alone "enforce" the penal judgments of foreign states or sister states.[7] This belief is erroneous. In fact, the U.S. and states within the U.S. have always recognized the existence and legal validity of foreign or sister state penal judgments and have used their power processes to give such judgments some form of enforcement.

2. This practice has been known as "extradition"[8] which has existed as between sister states and as between the U.S. and foreign states since Jay's Treaty of 1791.[9] Extradition is the process by which one state demands from another state the surrender of an individual located within the territory of the requested state because the said individual is accused of or has been found guilty of the commission of a crime in the requesting state. In that latter case, the basis for the extradition request rests on the recognition given to the requesting state's penal judgment and thus to some extent, its enforcement by virtue of the requested state's use of its power processes to surrender the convicted offender so that he or she may be made to execute the prescribed sentence. This may explain why the "Treaties" contain conditions very similar to those found in extradition treaties.

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

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

(1) The existence of a treaty, whether bilateral or multilateral; and,

(2) The existence of implementing federal legislation.

The essential conditions embodied in such treaties are:

(1) The accused or convicted offender has committed a violation of the criminal laws of the requesting state; and,

(2) The crime in question is listed in the treaty or constitutes a crime in the laws and jurisprudence of both states.

The "Treaties" establish the same essential conditions.

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[4] See A. Ehrenzweig, "Treatise on the Conflict of Laws," p. 215 (1962).

[5] D. Oehler, "Recognition of Foreign Penal Judgments and Their Enforcement," in M. C. Bassiouni and V. P. Nanda, supra note 3.

[6] Arrangements of this kind, based on such Federal legislation as 14 Stat. 484 (Mar. 2, 1867), have been found valid and discretionary in character despite complaints by the party imprisoned. *Brede* v. *Powers*, 263 U.S. 4, 68 L. Ed. 123 (1923); Ex parte Henderson, 93 U.S. 405, 23 L. Ed. 892 (1876); Ex parte Karstendick, 93 U.S. 396, 23 L. Ed. 889 (1876).

[7] In "The Antelope," 10 Wheat. 66, 123 (U.S. 1825), Chief Justice Marshall declared: "The courts of no country execute the penal laws of another."

It may be noted that the penal sentences involved in the 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.

[8] See M. C. Bassiouni, "International Extradition and World Public Order" (1974).

[9] Discussed in S. F. Bemis, "Jay's Treaty: A Study in Commerce and Diplomacy" (2d edition, 1965).

[10] See *"United States* v. *Rauscher*, 119 U.S. 407 (1886).

[11] See Bassiouni, supra note 8 at 24–44; and I. A. Shearer, "Extradition in International Law" (1971).

VI. Precedents in the United States

1. The "Full Faith and Credit" clause of Article III of the U.S. Constitution does not apply to the judgments of foreign states.[13] In civil matters foreign judgments have been recognized and enforced on the basis of reciprocity or comity.[13] The Uniform Foreign Money Judgment Recognition Act[14] provides that such a judgment, which is predicated on notice and opportunity to be heard and minimum contacts between the rendering state and the case and the parties thereto, shall be recognized and enforced. Foreign Penal Judgments which are not entitled to "Full Faith and Credit" have not been given formal recognition and enforcement in any state of the United States, nor by the federal judiciary. Furthermore, such judgments have not been granted formal recognition and enforcement on the basis of reciprocity or comity. But, Foreign penal judgments have been implicitly given recognition and enforcement through the process of extradition, where a requesting state's penal judgment is at the basis of its request. In those cases, subject to the existence of a treaty and compliance with, inter alia, the rule on "double criminality," the federal judiciary has conceded extradition by using its power processes to seize and deliver the requested person located in the United States.

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

(1) Through extradition when based on the penal judgment of a sister state by virtue the Inter-State Rendition Compact;[16] and,

(2) By giving credit in some states to the penalty received and executed in sister states or in federal sentences for crimes[17] which are punishable in the legal systems in question which 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 fect the oldest of specific legislation.

3. The existence of prison compacts between states and as between states and municipalities and the federal government for the detention and custody of offenders (adults and juveniles) clearly establish a practice, in some cases supported by legislation, for the administrative execution of sentences. This practice though never characterized as being for the execution of foreign panel judgments has been invariably treated as an administrative custodial arrangement for the benefit of the sending authority whereby the receiving authority is either providing space and services or is acting as the agent of the sending authority.

4. In recent times more specific examples are found supporting the concept of and judicial opinions is nonetheless practiced and is in fact the object of specific instances are:

(1) The enforcement in the U.S. of penal sanctions imposed by foreign consular officers,[18]

(2) The Agreement between the United States and the Republic of Korea on the status of U.S. Armed Forces in Korea,[19]

[12] Ehrenzweig, *supra* note 4 at 160.

[13] *Id.* at 161–166. See also, Homburger, "Recognition and Enforcement of Foreign Judgments," 18 A.M.J. Com. L. 367 (1970); See also, *Hilton* v. *Guyot*, 159 U.S. 113, 16 Ct. 139 (1895) and *Ritchie* v. *McMullen*, 159 U.S. 235 (1895); *Johnston* v. *Compagnie Generale Transatlantic*, 242 N.Y. 381, 152 N.E. 121 (1926); for an excellent discussion see, *Cherun* v. *Frishman*, 236 F. Supp. 292 (D.D.C. 1964).

[14] 9B Uniform Laws Annotated (1957).

[15] See, Ehrenzweig, supra note 11 at 204.

[16] Uniform Extradition Act, 9B "Uniform Laws Annotated" (1957), e.g., Ill. Rev. Stat. Ch. 60, § 18 (1977).

[17] Interstate Corrections Compact, e.g., Ill. Rev. Stat. Ch. 38, § 1003–4–4 (1977), and § 709 "American Law Institute," "Model Penal Code" (Proposal Official Draft, 1962).

[18] See, Gordan B. Baldwin, "Report on Prisoner Exchange Agreements," Department of State, 20 July 1976, who refers to various U.S. precedents on the enforcement of foreign criminal penalties such as: Sec. 5 of the "Service Courts of Friendly Forces Act," Act of 30 June 1944, 58 Stat. 643, 22 USC 705, which authorizes confinement in Federal facilities of persons serving sentences imposed by foreign courts-martial and the enforcement in the U.S. of criminal sanctions imposed by foreign consular officers, 22 USC 256–258a, upheld in *Dallemagne* v. *Moisan*, 197 US 169 (1905).

[19] 17 U.S.T. 1677; T.I.A.S. 6127, signed at Seoul 9 July 1966, effective 9 February 1967.

(3) The specific recognition by the court of appeals of the tenth federal judicial circuit in 1975 o fa foreign penal judgment.[20]

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

VII. United States public policy in minimum standards of criminal justice and the recognition and enforcement of foreign penal judgments and the execution of foreign penal sentences

1. It is a well settled principle of private international law that no state shall recognize or enforce the judgments of other states if they are contrary to the public policy of the recognizing and enforcing state.[21] This principle has been applied in the United States with respect to the recognition and enforcement of foreign civil judgments.[22] It is also applicable as between sister states notwithstanding the "Full Faith and Credit" Clause of the Constitution.[23]

2. The question arises therefore as to whether certain minimum standards of criminal justice as embodied in the meaning of the "Due Process" clauses of the Fifth and Fourteenth Amendments to the Constitution and those specific rights enunciated in the Bill of Rights which have been incorporated in the "Due Process" clauses, must be observed in the process leading to a foreign penal judgment.

It must be noted that nothing in the Constitution requires that only systems of criminal justice which are similar to that of the United States be given recognition. In fact, the position of the United States Supreme Court on extradition[24] and on the constitutionality of Status of Forces Agreements[25] has been to respect other criminal justice systems even though they may be different from that of the United States.

3. However, a distinction between such instances and the matter of executing a foreign penal judgment in the United States must be made whereas the United States would not deny surrendering jurisdiction over a person who is requested by a foreign state for the commission of a crime within the jurisdiction of the requesting state, it is a different matter altogether for the United States to use and make available its power processes to execute in its terriory a foreign penal judgment which may have been rendered by virtue of a judicial process which may be potentially offensive or obviously contrary to minimum standards of criminal justice. There is clearly a public policy in the United States with respect to minimum standards of criminal justice. The execution of a foreign penal sentence rendered in potential violation of such standards would contravene the public policy of the United States and would warrant its reflection. However, such issues can only be determined on an *ad hoc* basis since the denial of such minimum standards to a given individual would depend on the facts and circumstances of each case.

4. There is nothing in the criminal justice system of Canada which is so alien to the Common Law system which is the foundation system of the United States to warrant a general denial of its compliance with the public policy of minimum criminal justice standards of the United States.[26] Thus clearly with respect to the treaty with Canada nothing on the face of existing laws and practices in that State would support the contention that its legal system is *per se* potentially offensive to the public policy of the system of the United States.

5. With respect to Mexico, that State's criminal justice system represents a greater variation from that of the United States than Canada's. Notwithstanding such differences, the Mexican system of crimial justice offers certain minimum

[20] *Cooley* v. *Weinberger*, supra note 6.

[21] A. A. Ehrenzweig, "Private International Law" (1973).

[22] Ehrenzweig, supra note 11, at 204 and *Huntington* v. *Attrill*, 146 U.S. 657, 13 S. Ct. 244 (1892).

[23] *Intercontinental Hotels Corp. (Puerto Rico)* v. *Golden*, 15 N.Y. 2d 9, 254 NYS 2d 527, 203 N. 2d 210; Paulsen and Sovern, "Public Policy in the Conflict of Laws" 56 Colum. L. Rev. 969 (1956); Stinson, "Conflict of Criminal Laws," p. 20 et seq. (1936) and H. F. Goodrich and E. F. Schoss, "Conflict of Laws" (9th ed. 1964) p. 14–15.

[24] See, note 7, supra.

[25] *Reid* v. *Covert*, 354 U.S. 1, 77 S. Ct. 1222 (1957).

[26] See "Law Reform Commission of Canada, Toward a Codification of Canadian Criminal Law," (1976); Grosman, "Annual Survey of Canadian Law: Criminal Law," 3 Ottawa L. Rev. 537 (1969).

guarantees which make it not so incompatible with the minimum justice standards of the United States so as to render the whole system per se patently offensive to the public policy of the United States. The Mexican Criminal Justice system affords an accused: the right to be adequately apprised of the charges; the right to counsel; to open and public hearings conducted by an impartial judge; proof of guilt by competent testimony; the right to appeal.[27] Thus, on its face the criminal justice system of Mexico is not violative of the public policy of the United States.

6. There is therefore no reason to find that with respect to either Canada or Mexico the Supreme Court of the United States would find that either criminal justice system is on its face patently offensive to the minimum standards of criminal justice of the United States for purposes of recognition and enforcement of these states' penal judgments and the execution of their sentences in the United States. This conclusion is reached because of the assumption that the execution of the sentences of Canada and Mexico as is required by the "Treaties" extends only to the transfer and custody of offenders and to nothing more, and that the alternative to such an arrangement would not enhance the position or rights of United States Citizens in the custody of these two States.

VIII. International precedents for the execution of foreign penal sentences

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

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

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

The Scandinavian Act of Enforcement of May 22, 1963, a parallel legislation in

[27] All constitutional guarantees of the Constitucion Politica de los Estados Unidos Mexicanos are expressly made applicable to foreigners by Article 33 of the document. The guarantees here relevant include:

Article 14—Prosecution before "previously established tribunals in which the essential formalities of procedure shall be complied with and in conformance with laws . . ."
Article 16—Arrest orders will be issued only by competent judicial authority upon a complaint supported by an affidavit of a reliable person, except when the crime occurs in the presence of a detaining officer.
Article 19—No detention may exceed three days unless there is a formal judicial order stating the crime alleged, its elements, and establishing a prima facie showing of responsibility.
Article 20 (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 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].

[28] European T. S. No. 70, May 28, 1970. The International Association of Penal Law has consistently advocated this approach, see, M. S. Harari, R. J. McLean, J. R. Silverwood, "Reciprocal Enforcements of Criminal Judgments," 45 Rev. Int. de Droit Penal 585 (1974), for a proposed convention on reciprocal enforcement. European Committee on Crime Problems of the Council of Europe, "Aspects of the International Validity of Criminal Judgments," (1968) and "Explanatory Report on the European Convention on the International Validity of Criminal Judgments" (1970).

[29] The Convention Among Belgium, Luxembourg and the Netherlands on the Cooperation in the Field of Customs and Excises of Sept. 5, 1952, Kraelle, K., "Le Benelux Commente, Textes Officiels" 147, 209, 306 (1961). An additional Benelux Convention, the Treaty on Execution of Criminal Judgments, was signed Sept. 26, 1968.

the five Scandinavian countries,[30] provided for recognition and enforcement of a wide range of criminal judgments.

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

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

IX. Extra territorial application of the Constitution and laws of the United States

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

The protections of the "Bill of Rights" as they have been embodied in the meaning of the Fifth and Fourteenth amendment "due process" clauses have not however, been extended extra-territorially. The United States Supreme Court faced that issue with respect to two subject-matter areas (to which to extend these constitutional rights to U.S. citizens abroad but restricted it). They are: (1) Status of Forces Agreements and (2) Unlawful seizure of persons abroad.

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

(2) Unlawful seizure of United States citizens abroad which constitutes a more serious problem than relinquishment of jurisdiction over United States service persons who committed crimes in the host country, have been sanctioned by

[30] Reproduced in H. Grutzner, "Internationaler Rechtshilfeverkehr in Strafsachen," pt. IV (1967).

[31] Reproduced in 52 Rev. Critique de Droit International Prive 863 (1963), discussed in Shearer, "Recognition and Enforcement of Foreign Criminal Judgments," 47 Australian L.J. 585 (1973).

[32] *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). See also, 6 M. Whiteman, "Digest of International Law," 889 (1968).

[33] Bassiouni, "Theories of Jurisdiction and Their Application in Extradition Law and Practice", 5 Cal. West. Int. L.J. 1374 and George, "Extra-territorial application of Penal Legislation," 64 Mich. L. Rev. 609. (1976) and Feller "Jurisdiction over offenses with a Foreign Element," in Bassiouni and Nanda, supra note at p. 5.

[34] See, Bassiouni, supra note 7, page 40–43.

[35] See, Bassiouni, supra note 7 at 47–50.

[36] See, Cocker, "The Status of Visiting Military Forces in Europe" in Bassiouni and Nanda, supra note 3 at 1–15.

[37] *Wilson* v. *Girard*, 354 U.S. 524 (1957). *See*, howeevr, *Reid* v. *Covert*, supra note 25; also see *Homes* v. *Laird*, 459 sd 1211 (1972).

the Supreme Court. Indeed, since 1883 [38] the position has been that the constitutional protections of the fourth, fifth, sixth and fourteenth Amendments do not apply to United States citizens even when these violations were committed in order to secure the presence of such persons before a United States Court.

The Supreme court has consistently held since then that a Court has jurisdiction over the person of an accused defendant irrespective of how such presence was secured.[39] While this writer strongly disagrees with this position, it has been consistently upheld on the assumption that such violations were not committed by United States officials, even though U.S. law enforcement ultimately benefits therefrom. However, recent decisions of United States Circuit Courts indicate a possible change, particularly where United States officials are directly involved in the abduction or other constitutional violation against United States citizens abroad.[40]

The conclusion remains, however, that as a general proposition the Constitution and its criminal justice guarantees do not apply to United States citizens abroad. They could however, be deemed extra-territorially applicable if the violations of citizens' rights are committed by United States officials.

Nevertheless, the question arises as to whether the Supreme Court may find the execution of a foreign states' penal sanctions patently offensive to minimum standards of criminal justice in the United States. It must be emphasized that this issue is not to be construed as meaning that the United States will or should refuse to give any recognition or enforcement to a foreign penal judgment which is rendered by a system that does not offer the same criminal justice guarantees as ours, but whether the power processes of the U.S. will be employed to effectuate a result which would be predicated on a legal basis patently offensive to the minimum standards of criminal justice as perceived in this country and in particular as applied to its citizens.

X. Conclusions and recommendations

1. It is very unlikely that the United States Supreme Court would hold the "Treaties" to be unconstitutional because they purport to recognize, enforce and execute the penal sentences of a foreign state whose minimum criminal justice standards are per se patently offensive to United States standards, if for no other reason than to avoid facing the question of ranking constitutional sources of law. In that respect however, I defer to experts in Constitutional law.

2. What the court is likely to consider is whether on an *ad hoc* basis the foreign conviction of a United States citizen transferred to the United States under the terms of the "Treaties" for execution of a sentence has been secured in a manner so patently offensive to U.S. minimum standards of criminal justice that the further detention of such a person by the United States would be contrary to its public policy. Thus, the concern should not be over the constitutionality of the "Treaties" but over the criteria of minimum standards of criminal justice which the United States Supreme Court would hold to be applicable to United States citizens abroad as a condition to the use of the power processes of the United States to execute the sentences of a foreign penal judgment, and the manner to ascertain the facts and apply these criteria thereto.

3. It is the belief of this writer that the United States Supreme Court is most likely to hold that:

(*a*) The "Treaties" are not violative of or in conflict with the Constitution (although it is possible for the court to evade that question altogether);

(*b*) That the United States does recognize and enforce in some ways foreign penal judgments (e.g., extradition);

(*c*) That to execute a foreign penal sentence is either (i) an administrative matter akin to the interstate and federal compacts on detention and custody of prisoners or (ii) that it is the ultimate in enforcement of a foreign penal judgment and therefore the United States shall only use it power processes in the event that the foreign judgments meet certain minimum standards of criminal justice;

[38] *Ker* v. *Illinois*, 119 U.S. 436 (1886); *Frisby* v. *Collins*, 342 U.S. 519 (1952).
[39] Bassiouni, "Unlawful seizure and Irregular rendition Devices as alternative to Extradition," 7 Vanderbilt J. Trans. L. 25 (1973) reprinted in M. C. Bassiouni, "International Extradition and World Public Order" (1974), p. 121–201.
[40] *U.S.* v. *Toscanino*, 500 F. 2d 267 (2d Cir. 1974), (Subsequently limited in U.S. ex rel. *Lujan* v. *Gengler*, 510 F. 2d 62 (2nd Cir. 1975) and *U.S.* v. *Lira*, 515 F. 2d 68 (2d Cir. 1975).)

(*d*) That certain minimum standards of criminal justice had to have been applied in the original conviction of the relator and that such standards are: Notice, opportunity to defend, fair and impartial trial, right to counsel, proof of guilt by competent evidence not secured through unreasonable means (though not necessarily measured as in the U.S.), right to appeal;

(*e*) That a determination of whether or not such standards have been followed or unreasonably denied is a judicial, factual determination which will depend on the facts and circumstances of each case.

4. The outcome of such a decision would be to let the "Treaties" stand, but to open the door to litigation by each and every relator who would then have access to all criminal justice guarantees available in the United States to U.S. citizens which include inter alia: right to court appointed counsel, free transcript, discovery of the government's evidence and right to appeal. Thus, it must be anticipated that each transferred relator will add another case to United States dockets and will pursue all avenues of appeal. In addition, in each case the government may have to produce a record, transcript, or abstract of the entire conviction rendered by the foreign states. The United States must therefore expect that the judicial impact of these treaties is likely to be quite significant considering that only in Mexico at this point in time there are almost 630 likely transferees. In addition, to which the impact of the transfer of several hundred persons on the already strained correctional system of the United States will be noticeable. The economic consequences of the "Treaties" should therefore be taken into consideration for budgetary purposes otherwise the "Treaties" will enter into effect but their effective implementation and success will be thwarted.

5. A final problematic issue remains with the "Treaties," namely the "return" [41] of the relator to the "Sending State" if the "Receiving State's" judiciary finds the detention and custody invalid, unlawful or contrary to public policy. The issue of "return" is in the opinion of this writer the most sensitive and difficult one, sensitive because in the event that a relator is released by a United States court and his or her "return" to the "Sending State" is denied it would be undoubtedly constitute a serious offense to the national dignity of the "Sending States." Considering also, the freedom with which some United States courts express themselves, an embarrassing situation can occur. However, assuming that no embarrassing language is employed in any court decision, the outcome may still be the release of the relator and the question of "return" would arise. That question is difficult because it can only be answered in light of the proposed implementing legislation which was well thought out and carefully drafted. There is however one flaw in the process of "return" which in the opinion of this writer, cannot be cured by the implementing legislation, namely to consider the relator as subject to extradition and to presume that the offense for which the relator is requested is an extraditable offense irrespective of whether it is a treaty offense between the United States and the requesting state.[42] Existing United States law and practice hold that only a treaty offense is extraditable and the "Treaties" with Mexico and Canada do not:

(*a*) Specifically require extradition, or

(*b*) Specifically refer to extraditable offenses, or

(*c*) Refer to the bilateral extradition treaties (U.S.-Mexico and U.S.-Canada), or mention that these treaties are complementary with respect to the issue of "return" which would become extradition (under the proposed implementing legislation) and therefore subject to the extradition treaty and U.S. laws and practices.

6. It is the specific recommendation of this writer that an amending protocol to these "Treaties" be made to state specifically that the "return" of the transferee is to be deemed an act of "extradition" and that the Protocol is to serve as an amendment to the bilateral extradition treaty between the two respective countries whereby the special procedures set forth in the proopsed implementing legislation can be included in the Protocol and thus become enforceable by treaty.

Failure to amend the "Treaties" as suggested is likely to result in the judicial release of the relator in the United States and the inability to "return" them

[41] Proposed implementing legislation, Title 18 U.S.C., ch. 303, § 4114.
[42] See, Bassiouni supra note 39 at 1–85.

to the "Sending States" to the embarrassment of all countries concerned and a likely deleterious effect on their respective friendly relations.

PREPARED STATEMENT OF FRANCIS L. DALE, BOARD MEMBER AND FORMER CHAIRMAN, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, FORMER U.S. AMBASSADOR, UNITED NATIONS AT GENEVA

Thank you for this opportunity to support Senate approval of treaties between the United States and Mexico, and the United States and Canada on the Execution of Penal Sentences.

The National Council on Crime and Delinquency has supported the underlying concept of these treaties for several years and as the head of our U.S. Mission in Geneva, I had an opportunity to become very familiar with the need for the United States to join with other countries in the development of bilateral and regional agreements for the transfer of offenders to their home country for completion of sentences in institutions, where appropriate, or on probation or parole.

As you know, between states in this country such transfers have long been practiced under two interstate compacts, one for supervision of parolees and probationers and the other for transfer of inmates of institutions.

In the international scene, the Scandinavian countries have a very workable regional agreement and the Council of Europe has provided an excellent framework for agreements between member nations. In addition, a number of bilateral agreements exist between other nations in Europe and the Middle East.

As a delegate to the Fifth United Nations Congress on Prevention of Crime and Treatment of Offenders, I, along with other members of the U.S. delegation, supported the recommendation which was adopted for the development of bilateral arrangements to facilitate the international exchange of offenders. It should be noted that it was at this Congress that officials from Canada and the United States first met to discuss the feasibility of a treaty between these two countries.

I hope that the treaty between the United States and Mexico, and the United States and Canada will set a precedent for the United States to take the initiative in developing bilateral agreements with other nations as well. as there are a number of Americans serving sentences in Europe, the Middle East, Asia, and Central and South America. Also, there are many foreign nationals serving sentences in federal and state prisons of this country whose transfers to their home country would serve the best interest of all concerned.

The National Council on Crime and Delinquency's study of this problem in 1972, found that citizens of 68 countries were reported in the prison populations of the 43 states for which data was available. Based on information from these states and the federal system, it was estimated that over 2,000 foreign nationals are serving sentences in the United States at any given time. The number in jails would probably be several times this number.

From other sources, it was estimated that up to 3,000 United States citizens were imprisoned in foreign jails and prisons.

The cost of maintaining these foreign nationals in our state and federal prisons, not to mention jails, can be conservatively estimated at $10 million annually (2,000 x $15,000). The value of institutional space occupied by foreign nationals in our state and federal institutions at today's construction costs would be about $100 million.

But economic consequences aside, for foreign offenders in this country as well as our own citizens in foreign jails and prisons, the ends of justice would be better served by their return. The staff of the National Council on Crime and Delinquency interviewed hundreds of our young people in foreign institutions and report that negative consequences of incarceration in a foreign jail or prison are indeed real.

Not always as a matter of physical neglect or abuse, although in some places this is a problem, but because of language barriers, isolation from family and friends, unfamiliarity with the system of justice, strange diets, lack of information, and ineligibility for early release, the anxiety level among our own citizens in foreign prisons is usually very high because of so many uncertainties resulting in feelings of desperation, depression, despondency, and hopelessness. From a correctional point of view, the goals of reintegration, rehabilitation, treatment, or whatever else might be the appropriate approach for a person in prison in

his own country does not apply to a foreigner and incarceration becomes punishment for punishment's sake.

The concept of allowing an offender to return to his own country to serve or complete a sentence in an institution or on probation or parole under the usual provision for such cases in the country of residence, is too sound an idea not to be implemented everywhere.

The urgency for beginning a process of transfer is given added emphasis when we consider the ever increasing volume of international travel. For example, in the United States alone the National Education Advertising Service reported that 20% of all college students now travel outside the United States. This is approximately one million students. The number of foreign visitors to the United States has increased, as also has illegal entry. It is now estimated that in the United States there are some 7 to 12 million illegal aliens. The number of foreign migratory workers increases the number of foreign nationals in our country at any one time.

Studies find that most U.S. citizens in foreign prisons are young, many are tourists and students arrested for drug related offenses, some quite minor, such as possession of small amounts of marijuana, hashish, ganga, or cocaine.

As you know, the role of U.S. Corsular officials abroad has been very limited in such cases. Their apparent helplessness to intervene in behalf of U.S. citizens, even where mistreatment occurs, is very disillusioning to those in prison.

Compared with U.S. citizens in foreign prisons, NCCD's analysis of foreign nationals imprisoned in this country provide some interesting contrasts. For example, only 30% of the foreign prisoners were under 26 years of age, whereas 75% of the Americans were under 26 years of age. Only 25% of foreign prisoners were being held for drug related offenses compared to 80% of Americans in foreign jails and prisons. Therefore, foreign prisoners in the U.S. tend to be older and their offenses cover a wider range, including serious felonies such as robbery, burglary, rape, and murder.

As a part of the NCCD study a large number of foreign embassies in the U.S. were contacted to determine their level of knowledge and interest concerning their citizens in United States' prisons. We found a surprising lack of information about the number and where their citizens were imprisoned in this country. Also, it did not seem to occur to our own officials at any point in the process of arrest, arraignment, trial, or after being sentenced to an institution, to inform the representatives of the foreign offenders government about the problem.

Despite differences in the characteristics of offenders and offenses, or degree of concern of the home country, repatriation of offenders should be routine rather than exceptional. In all cases where reintegration of the offender into society can best be achieved in his own country, where language and cultural differences in a foreign land would impede the process of rehabilitation, the individual should be transferred back home.

While international relations and cooperation are often complicated and difficult to achieve, and especially in light of the serious problems posed by some of our young people abroad, it would seem fundamental that our government as well as other governments should do more than is being done to assist their citizens in conflict with the law of other countries as well as citizens of other nations here. While we hope that our citizens will respect the laws and customs of countries that they visit, we know that some will not. At the same time, we would seem to have some responsibility for relieving other countries of the burden and expense of dealing with the problem our citizens have created for them, and we should have a means of correcting the behavior of our citizens for offenses committed abroad as well as at home.

Winston Churchill, in an often repeated quotation, said "The treatment of crime and criminals is one of the unfailing tests of the civilization of any country." Implementation of the proposed treaties between the U.S. and Mexico and the U.S. and Canada, enabling each to accept responsibility for their own, may be an even higher test.

I urge the Senate to ratify the treaties in question.

Thank you.

PREPARED STATEMENT OF NANCY K. VAN DEN BRINK, MOTHER

My two sons left on March 21, 1975 to drive to Guatemala and expected to return to Newport Beach on or before June 10th. The June 10th date was definite because of family graduation party. The trip had been planned as a pleasure-

able event and they were also interested in purchasing handmade arts and crafts, that would indicate the culture of the small villages and large towns they were to visit.

June 1st I received a phone call and they informed me they were in need of some money for repairs on their G.M.C. truck. I told them I would wire it immediately. A few hours later they phoned and related that they had met a young Mexican man whom they had meet on their way to Guatemala. He stated that he would help them out by paying for the truck repairs if they would drive a V.W. to his brothers house who lived a few miles away. His brother needed the car and he could not lose work to take it to him. My sons said they had checked the car thoroughly and could not find anything illegal and it seemed to be a reliable auto.

They left feeling good about the situation. They had money for the truck repairs and all seemed fine. When they were approaching Ameca, they were stopped by the Federales road block. They were beaten, tied to a tree and the Federales took a cutting torch and cut the V.W. to pieces—finding it had a complete metal sub flooring placed in it. Housed under the flooring was marijuana. The boys were then taken to the Guadalajara secret service jail. They did not have me notified because at this time they did not feel they had a serious problem because they were innocent of any knowledge regarding the marijuana in the car.

We have always been a very close family. They are honest, reliable, industrial and hard-working young men. I had no reason to doubt their word then nor do I to this day. The nightmare of the past two years most assuredly would have brought out facts to the contrary. Because it has been just that—a financial, emotional and physical hardship. Not to mention the beatings and cattle proddings and just the day to day existence they have had to withstand in the prison.

As a parent, in order to expedite their release from prison, I have tried every avenue to help them legally, medically, and personally at the cost of an excess of $51,000.00 I have records to verify this figure. It is my sincere hope that the evidence presented to you and your committee will bring forth a decision that will demonstrate what Americans believe in; human rights and dignity for all mankind.

Sincerely,

NANCY K. VANDENBRINK.

Attachment.

MAY 28, 1975

Call from sons, Tony and Dirk, from Mexico. They wanted to come home for the graduation of their cousin on June 12 but needed money. Called back a short time later and said they had worked out the car repair costs and would make it home in time for the graduation.

JUNE 2, 1975

Tony and Dirk arrested in Ameca by Federal Mexican authorities.

JUNE 12, 1975

A young Mexican man came to my door at approximately 10:00 P.M. to inform me of their arrest. He said they were in Guadalojara. He claimed to be a friend of my sons. He said he had a friend who is an attorney by the name of Perez Duarte who would act in their behalf. That I should send $2,000 immediately to him. This was imperative or the condition of *my* health would change drastically, he also said. He also threatened that if I didn't do thing his way I would be putting my sons situation in jeopardy. This, by the way, is the first I had even heard of my sons arrest.

JUNE 13, 1975

Sent $2,000 through United California Bank. The copy obtained from the bank shows the Banco De Londres in Guaymas credited the money to Victor Duarte-Account #457. An interpreter called with a message from Victor Duarte. He asked that I meet Duarte in Mexico City on July 3. He said I was to bring $4,000 in cash and also character references for the boys. Some with official titles, if possible.

JULY 3, 1975

A friend accompanied me to Mexico City. When we met Duarte in a coffee shop he gave me a large stock of legal papers in spanish. They appeared to be legal papers. The interpreter was brought by Duarte. My friend upset Duarte by asking questions about any past cases and what success he had had. The meeting ended on a very unfriendly note and no money was given. We then spoke with a Mr. Danielson who was duty officer at the American Embassy. He was interested and courteous, but stated that due to the fact that my sons were being held in Guadalalara he was limited as to giving us direction as to how to proceed. He did call Guadalajara and tried to contact a Mr. Summers. He could not be reached.

JULY 5, 1975

We went to Guadalajara to see the boys. Their physical conditions were not at all good. I was shocked. They were physically injured and emaciated. Tony was jaundiced from viral hepatitis and they had both lost weight, between 30 and 40 pounds.

My sons at this time related to me their story. Following their arrest they were taken to a jail called the Federal Palace where they were held for 18 days. During this time they were subject to physical assault with various types of objects, including a cattle prodder as well as being beaten by guards. They were given one cup of water a day with a bread roll. There were no bathing facilities. The rats would come out at night and chew the blood stained parts of their clothing. They recalled that a man from the American Consulate had come to see them once after they had been there over a week, but he had made no attempt to help them. They asked him to send medical help and food or at least try to recover some of the money they had had in their possession when they were arrested so they could attempt to pay a guard to buy something for them. They never heard from this man again. On June 21, Tony's 21st birthday, in a state of unconsciousness to semi-consciousness they were moved to the Federal Penal. The guards had taken their money and wallets and thus they had no means to pay for food or purchase a cell. They slept on the streets of a cellblock for nine days and had to eat in what is called the beanline. Without their own container they could only have as much as would fit in their hands. They could not take a shower because they had not the needed money for that privilege. They were so weak that they could not stand for long without falling down. They had been starved for so long that their vision had been effected. At times they could only tell light from dark. There bodies were covered with bruises and open lesions. All bony prominces were either calcious or abraised from having slept on the concrete for nearly a month. After a few days in the Penal a few fellow American prisoners helped them with a little money and blankets.

After having seen my sons deplorable condition I gave them the necessary money for food and brought in medication that a medical doctor, a fellow prisoner, advised me to purchase. This prisoner doctor told me that in his professional opinion he did not believe either one of the boys would live when he first saw them.

I went to the American Consulate and talked with a Mr. Charlie Brown and a Mr. Bill Rosmore and inquired regarding their position. I was told that one member did go to see my sons when they were first arrested but then this member went on vacation and neglected to leave the information regarding my sons situation with the replacement. I asked them about the money and other possession that had been taken from Tony and Dirk at the time of their arrest and was told "that is one of the illegal occurances that happens in Mexico". It is the Mexican way and there was nothing they could do for me. Their whole attitude, in general, was such that I had to remind them that I was not a criminal. I wanted to set up a trust fund for the boys so I would feel assured they would always have the necessary money for food and other necessities since I knew that nothing was free at the Penal. Mr. Rosmore and Mr. Brown discouraged this because of the time and paper work it would involve them. A young man prisoner, Jorge, had convinced Tony and Dirk that a judge in the 5th Court had been very successful in getting the release of prisoners. His name was Raul Solis-Solis. Jorge told them that for $15,000 Solis-Solis would destroy their papers and set them free. I returned home to see about borrowing money.

JULY 25, 1975

I returned to Guadalajara. I stayed at the hotel Marriot. While out of my room one day my room was ransacked. The door knobs were removed and everything was searched. I had put my money in the safe at the hotel. I checked out and asked the hotel to get me an english speaking cab driver. I hired him for one day.

His name is Raul Flores. With his assistance I bought food and supplies to take to the Penal. He went to the Penal with me and offered to help me whenever I needed him.

Tony and Dirk still had faith in the prisoner Jorge's connection with the Judge. I spoke with Jorge myself and he assured me that I could deposit the money ($15,000.00) into Judge Raul Solis-Solis's account. He convinced me that to contact the Judge personally would place the Judge in jeopardy.

AUGUST 9, 1975

Returned to Guadalajara after wiring $15,000.00 to the Londres Y Mexico Bank of Guadalajara. I had borrowed the money. I had arranged for Raul Flores to meet my plane. During the time I had stayed with him and his family on my previous visit he had informed me that he was a tour guide for a large reputable international travel agency. I trusted this man completely. At the airport Sr. Flores was accompanied by another young Mexican man who claimed to be Judge Raul Solis-Solis's attorney. Sr. Flores had already established the credibility of this attorney and I had complete confidence in his judgment. We went immediately to the bank where I withdrew the money in pesos. Since we had to walk down the street to Banco De Commercio where Solis-Solis had his account I was escorted by the attorney, who had a gun, and Sr. Flores. I deposited the money in Judge Raul Solis-Solis's account—Tolsa 17–01175–8. This was witnessed by Raul Flores.

SEPTEMBER–OCTOBER 1975

Waiting for the release of my sons. Jorge continued to encourage the boys that everything was alright. He had Solis-Solis's lawyer speak to them several times. Around the end of August Jorge was released from prison but told them not to worry, they would hear from him soon. A week later they received a telegram from him from Mexico City saying everything was looking good. They never heard from him again. We realized then that we had lost the money. I had no direction for recourse.

Lawyer Javier Navarro F. (address Angelo Peralta No. 24, Guadalajara) came to the Penal and contacted Tony and Dirk. My sons called and relayed the information that he promised great help and he would file as their legal representative. He would need $1,250.00 for a starting fee. He would be in Tijuana on October 1, 1975 and would meet me there.

My attorney Robert Huckenphler contacted a friend who was a businessman in Tijuana who would let us meet Sr. Navarro in his office and would also act as an interpreter. During this meeting I gave Sr. Navarro $1,250.00. His fee was to be $30,000.00 if he freed the boys. He never returned to the Penal nor gave any assistance.

NOVEMBER 1975

During Thanksgiving holiday I again went to Guadalajara where I met a good friend of Raul Flores. His name is Lic. Agustin Vazquez Villegas. He is a Public Minister of the No. 2 Criminal Court. (Telephone No. 17–56–50 and 17–17–71)

DECEMBER 1975

Sr. Vasquez had checked into Tony and Dirks case and was convinced of their innocence and quoted $12,000.00 to $15,000.00 to free the boys. He explained that as a public official he could not represent them himself but would use someone from his office as legal representation. I gave Sr. Vasquez $12,000.00. I have this cancelled check.

FEBRUARY 1976

After a call from the friend of a fellow prisoner informing me that Dirk was ill, I flew to Guadalajara with a doctor.

APRIL 1976

Sr. Vasquez called saying everyone but one secretary had signed the release of my sons and that I should come and bring two airline tickets for Tony and Dirk. When I arrived in Guadalajara I found out that the secretary was out of town and had not yet signed the forms. I left the plane tickets with Sr. Vasquez for the boys when they were released.

During this time Sr. Vasquez said the case was more involved and needed $10,000.00 more. I gave him a check payable to himself but before cashing had to be countersigned by Tony and Dirk in the USA.

SUMMER 1976

Spent six weeks with the Raul Flores family. Visited the boys. Sr. Vasquez always said "Don't worry." Always new problems arising.

During this stay, and with the help of Sr. Vasquez, I filed a civil complaint against Judge Raul Solis-Solis. There is legal documentation of this action on file in Guadalajara.

AUGUST 1976

Raul Flores, his wife Berta and myself appeared before the Judge who was to hear the case. This was four days before the trial date and 14 months since the arrest of my sons. We spent one hour talking to him. He did look at Tony and Dirks character references. At Bertas insistance he did move the trial date up so I would still be there.

At the trial he questioned the boys through an interpreter. Approximately three weeks later the decision was handed down. 5 years and six months. Vasquez said "don't worry." He would put in an "impara." He again mentioned needing the $10,000.00 more but Sr. Flores said it would *only* be available when the boys were free.

DECEMBER 1976

Returned to Guadalajara. I contacted Sr. Vasquez's lawyer frequently who always said not to worry, that the "impara" would be acted upon the first of the year. Found out from my sons that members of Sr. Vasquez's staff had been to the Penal bothering the boys for more money.

APRIL 1977

While in Guadalajara for Easter vacation from my duties as school nurse, on Wednesday I waited all day for Sr. Vasquez to come tell me the status of the "impara." Thursday a staff person, Maria, brought a letter to the Penal. It said a typographical error had been corrected and the sentence was now 5 years and 3 months. So I'm in doubt as to whether an "impara" was submitted or not.

APRIL 28, 1977

I received a call from the mother of another American prisoner who said a riot at the Penal between two Mexican groups had started on the 26th. She also said that the American Council had succeeded in moving the American prisoners to another jail in Guadalajara for their safety.

UNIVERSITY OF MINNESOTA,
Minneapolis, Minn., June 13, 1977.

Senator JOHN SPARKMAN,
Chairman, Committee on Foreign Relations,
U.S. Senate,
Washington, D.C.

DEAR SENATOR SPARKMAN: I am obliged to you for drawing attention in your letter of May 24 to the proposed prisoner exchange treaties with Mexico and Canada. They certainly do present interesting legal questions, the answer to which is not wholly clear.

That part of the language of the supremacy clause of the Constitution (Art. VI, Sec. 2) that refers to treaties does not (as it does in the case of statutes) say they must be made pursuant to (i.e., consistently with) the Constitution but says rather that they must be "made under the authority of the United States." This formulation was probably adopted so that the constitutionality of treaties concluded prior to the present Constitution would not be placed in doubt. It has never been thought by the Supreme Court (although it was by Senator Bricker) to relieve treaties from the basic requirement of consistency with the Constitution (see esp. *Reid* v. *Covert; Kinsella* v. *Krueger* [1957] 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 1148).

It is true that in the case of *Missouri* v. *Holland* ([1920] 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641) Mr. Justice Holmes mooted the question whether the "authority of the United States means more than the formal acts prescribed to make the convention" (i.e., that it be made by the President and ratified by him after obtaining the advice and consent of the Senate, two-thirds present concurring). But Holmes went on to say that he did "not mean that there are no qualifications to the treaty-making power," only that they must be ascertained in a different way. It has since been generally considered by constitutional lawyers, following the analysis of Charles Evans Hughes (*Procs. of the Amer. Soc. of Int'l Law, 1929*, p. 194), that a treaty would be held unconstitutional if it violated express or implied prohibitions of the Constitution or if it were used in lieu of domestic legislation to deal with subject matter not demonstrably related to international relations. A long line of precedents, of which *Missouri* v. *Holland* is but one and by no means the earliest, has established that if these tests are met the fact that the subject matter falls within the reserved powers of the States is not an obstacle.

To take the last test first, it is of course true that in the absence of a treaty our courts have declined to give effect in the United States to a judgment of a foreign court that imposes a criminal penalty or fiscal obligation. In most other types of cases foreign judgments will be enforced by our courts provided they have been pronounced by courts of competent jurisdiction, are final and conclusive in the country where given, satisfy basic principles of due process and natural justice, and are not based upon causes of action contrary to our public policy such as deprivation of property under a confiscatory law.

The rule against enforcement of a foreign judgment imposing a criminal penalty is an old one. Story seemed to put it upon the ground that criminal law is a matter wholly within domestic jurisdiction:

"The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country, where they are committed. No other nation, therefore, has any right to punish them; or is under any obligation to take notice of, or to enforce any judgment, rendered in such cases by the tribunals, having authority to hold jurisdiction within the territory, where they are committed. . . ." (Commentaries on the Conflict of Laws [6th ed., 1865], 812).

In support of this proposition he cited English authorities and then referred to Chief Justice Marshall's remarks, given as obiter dicta in The Antelope (1825) 23 U.S. (10 Wheaton) 66, 123, 1 AILC 35, 45–46:

"If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say in this Court, that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the [slave] trade, cannot exist. The Courts of no country execute the penal laws of another; . . ."

Marshall had previously stressed the equality of national states, so that none could impose a rule on another, holding that the abolition of the slave trade by some had not altered the law of nations and could not bind those states which had not yet abolished it.

From these and other cases we can infer that courts have considered criminal law a peculiarly territorial prerogative of sovereignty, or what we should call a subject of purely domestic jurisdiction. Does it follow that a treaty providing on a reciprocal basis for the repatriation of nationals to serve foreign prison sentences at home would be held unconstitutional as an attempt to deal with a purely domestic issue by treaty?

I know of no judicial expression directly on this point, but I do not see that the subject is by its very nature so exclusively domestic in character as to be exempt from regulation by treaty. The line between what is domestic and what is international, as the Permanent Court of International Justice once remarked, ". . . is an essentially relative question; it depends upon the development of international relations." (Tunis-Morocco Nationality Decrees [1923] Series B, No. 4, at p. 24; 1 Hudson, World Court Reports, 143, 156). The Court found that nationality was a subject not in principle regulated by international law yet capable of being restricted by particular obligations states had assumed by treaty. Certainly there is a great network of treaties today that regulate matters such as conditions of labor that fifty years ago might have been considered purely domestic. The draft treaties under consideration would create arrangements new to United States practice, except for the Status of Forces Agreement with Korea, but not unknown in European practice. Consequently, they cannot be considered repugnant to universal conceptions of what must be considered domestic. In their nature they certainly have international aspects in accomplishing the return of nationals from foreign countries to serve prison sentences at home. Presumably this is expected to produce a reciprocal advantage in prison administration as well as a benefit to nations, who can serve their terms without the disadvantages of foreign language barriers, alien customs, xenophobic attitudes of other prisoners, dietary differences, remoteness from relatives and friends. This seems to me quite sufficient to establish the subject matter of the treaties as a mixed domestic and international character which can appropriately be regulated in its international aspects by treaty. Obviously the objectives sought could not be accomplished in any other way.

Given the conclusion that the subject is one appropriate for international action, it seems clear that a policy with respect to it that is established by treaty must prevail over any contrary State policy as part of the supreme law of the land. This was held by the Supreme Court to be true as to a foreign policy declared by an executive agreement (*United States* v. *Belmont* [1937] 301 U.S. 324, 57 S. Ct. 258, 81 L. Ed. 1134; *United States* v. *Pink* [1942] 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796); a fortiori it should be true of one declared by treaty. And the treaty would in itself be a sufficient basis for any federal legislation or regulations needed to implement it (*Missouri* v. *Holland*, supra).

As any treaty must also meet the requirement that it does not violate constitutional prohibitions, express or implied, the Senate should consider whether the proposed conventions are consistent with the prohibitions in the Fifth and Fourteenth Amendments against imprisonment without due process of law. This is a somewhat perplexing question in the present context because of a tendency to treat the due process standard as culture-bound in the sense that it is a product of the English common law system and its derivatives in English-speaking countries. Does this mean that imprisonment in the United States requires conviction by a court having jurisdiction within the United States, or a least conviction in a trial that observed the procedural standards of such courts?

In Magna Carta, the fountainhead of such standards, the provision of Chapter 29 is that "no freeman . . . shall be taken or imprisoned . . . except by a legal judgment of his peers or by the law of the land." A later statute (28 Edw. III, c. 3 [1335] introduced the phrase "due process of law," but apart from specific provisions in such instruments as the Petition of Right, the Bill of Rights, and the Habeas Corpus Act, the requirement historically has meant only that regular procedures as developed in then current English criminal law must be used. Some of these showed no great consideration for the accused. Our federal Constitution of course specifies in the first eight Amendments a number of detailed procedural standards for federal practice. States followed the English tradition but often introduced more detailed standards in their constitutions and statutes. With the addition in 1868 of the Fourteenth Amendment to the federal Constitution the States were required to follow procedures that assure equal protection of the laws and do not deprive anyone of life, liberty, or property without due process of law. Originally this was probably intended to assure that the regular procedures of the State courts would not be denied to blacks. But later judicial opinion has divided on the question whether the phrase "due process of law" in the Amendment incorporates for State procedure all the restraints specified in the first eight amendments to the federal Constitution. Some of them have already been specifically held to apply to States, such as the prohibitions against cruel and unusual punishments, failure to provide the accused with adequate legal counsel, use in evidence of property unlawfully seized, denial of the right to confront adverse witnesses, denial of the privilege not to incriminate oneself. Present thinking, however, is against complete incorporation of federal guaranties into State practice, so that there will continue to be variations in due process standards among the several jurisdictions. What the States are required by the Fourteenth Amendment to guarantee is now thought to be not a set of specific procedures formulated in the federal bill of rights but those procedural safeguards universally considered to be essential to fairness and justice.

If it were thought necessary that imprisonment within the United States should be by judgment of an American court or even by a foreign court following standards equivalent to American due process standards, the treaties might be supposed by those who support a full incorporation theory of the Fourteenth Amendment to face serious obstacles. But the present view that only a selective incorporation of essential principles is required opens the way for courts to fol-

low the approach they have traditionally taken in giving effect to foreign judgments in other classes of cases. This has been to give effect to a foreign judgment if it was reached by procedures not contrary to natural justice, i.e., to the most basic due process principles, even though these procedures are not identical to those followed by the court of the forum. I do not think the Constitution prevents the extension of this practice to giving effect to foreign criminal judgments under the proposed treaties.

I do not pretend to competence to speak with authority on due process matters, but hope these suggestions to open issues which you will be able to explore. Finally, it may be worth noting that the probability that anyone will be able to complain of a lack of due process in the treaty procedures seems small, for the prisoners must voluntarily request transfer, and both the transferring and the receiving states must approve. Thus all parties in interest will have freely accepted the arrangements for imprisonment and therefore may be estopped to make due process objections. The treaties appear to be sound in their policy objectives, they will be terminable after three years if difficulties arise, and a good case for their constitutionality can be made. Hence I feel that consent should be given to their ratification.

Very sincerely yours,

CHARLES H. MCLAUGHLIN,
Professor.

ALLIANCE OF NGOS ON CRIME AND CRIMINAL JUSTICE,
New York, N.Y., June 9, 1977.

RALPH MCMURPHY,
Professional Staff Member, Senate Foreign Relations Committee, 4229 Dirksen Senate Office Building, Washington, D.C.

DEAR MR. MCMURPHY: As you requested, the following is a brief summary of the activities of the Alliance and statements and plans of the United Nations on the subject of transfer of incarcerated foreign nationals to their home countries for service of sentence.

In 1973, the Alliance identified the numbers of individuals serving prison sentences in countries other than their own as a growing problem of international dimensions. A Working Party of interested members was established to go further into the issue. (Coincidentally, the Canadian Coordinator for the 5th UN Congress on Crime Prevention and Treatment of the Offender was present at the meeting when the subject was discussed. He took the idea back to his own government, which led to the initiative offered by the Canadians at the 5th Congress.) Some graduate law students were assigned the task of researching the subject and preparing a draft international convention. The major criticism of the convention was that it did not provide for the voluntary consent of the individual to be transferred.

The Alliance Working Party held a professional seminar on the subject during the 5th Congress. One of the presentations was a survey of imprisoned foreign nationals conducted by the UN Social Defence Research Institute in Rome. At the Congress, the Canadian government offered to enter into negotiations with any interested country on exchange of parolees. (At the time, they thought that transfer of incarcerated individuals would not be readily accepted.) The report of the 5th Congress (A/Conf. 56/10) calls for the development of policies and practices to facilitate the return of individuals serving sentences in foreign countries.

In June, 1976, the UN Committee on Crime Prevention and Control considered the topic at its fourth session. There was support from the members of the Committee for the concept. The subject was included in the International Plan of Action, the blueprint for activity of the UN Section on Crime Prevention and Criminal Justice. Specifically, it was felt that "the UN could play a role in this effort, with the goal of establishing an international convention in this field or of suggesting a model for bilateral or multilateral agreements." (E/CN.5/536. Annex IV, p. 18, par. 68.) This effort will become part of the active work of the Section starting in 1981.

Meanwhile, the Working Party of the Alliance continued its effort, providing assistance to the governments of the U.S., Canada and Mexico. Enclosed is a list of basic principles to be included in any transfer treaty which was drawn up

by Donald H. Goff. The Alliance also coordinated the briefing seminar held by the State Department on 2 March of this year to discuss the legislation which would implement the treaties. We are currently attempting, through the national affiliate of one of our members, to keep Americans in Mexican jails apprised of the situation regarding passage and implementation of the treaty.

I hope the above has been helpful. If you have any further questions, please let me know. I hope to be in Washington sometime in the next two weeks and will call you at that time.

Sincerely,

JUDITH F. WEINTRAUB,
Executive Secretary.

[Additional statements are in the Committee files.]

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