American Prisoners in Foreign Prisons: The Prisoner Transfer Treaties

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I. Introduction

For the average American traveler, being apprehended and arrested in a foreign country on criminal charges can be an unimaginable and bizarre experience. Whether he is in England,\(^1\) which has a legal system relatively similar to ours, or in China,\(^2\) which has a very different legal system, he is likely to be equally mistaken in believing that his status as an American citizen will be of any real assistance. Unfortunately, unless he happens to be with United States military forces,\(^3\) or protected by some form of diplomatic or other immunity, his criminal case will proceed from start to finish entirely within the framework of the foreign legal system.\(^4\)

In 1977, the United States took a significant step toward recognizing the practical impact this principle of territorial jurisdiction has had upon American citizens incarcerated in foreign prisons. Prompted by numerous accounts of torture and substandard prison conditions, the United States negotiated a prisoner transfer treaty with Mexico.\(^5\)

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2. Id. at 129. As of 1974 there were no defense attorneys in China. Although there was some statutory law, the legal system until very recently has been based on “self-criticism” and Maoist values. There were no written criminal or civil codes. Id. at 130.
4. As the Supreme Court has emphasized, “apart from those persons subject to the Status of Forces and comparable agreements and certain other restricted classes of Americans, a foreign nation has plenary criminal jurisdiction . . . over all Americans—tourists, residents, businessmen, government employees . . . who commit offenses against its laws within its territory.” Reid v. Covert, 354 U.S. 1, 15 n.29 (1957).
5. President Carter’s Proclamation provided as follows:

The Treaty between the United States of America and the United Mexican States on the Execution of Penal Sentences was signed at Mexico City on November 25, 1976, the text of which Treaty, in the English and Spanish languages, is hereto annexed;

The Senate of the United States of America by its resolution of July 21, 1977, two thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Treaty;

The Treaty was ratified by the President of the United States of America on August 2, 1977, in pursuance of the advice and consent of the Senate, and was duly ratified on the part of the United Mexican States;

It is provided in Article X of the Treaty that the Treaty shall enter into force thirty days after the exchange of instruments of ratification;

The instruments of ratification of the Treaty were exchanged at Washington on October 31, 1977; and accordingly the Treaty will enter into force on November 30, 1977.
The legislative history behind the statutes enacted by Congress to implement the Mexican treaty indicates that members of the Senate and the House were both relieved and optimistic at the adoption of such a solution. Records of congressional debates and speeches reflect an almost unanimous endorsement of the prisoner transfer treaty as the long-needed answer to the difficult problems facing American citizens confined in foreign jails. As one Representative stated in his speech on the floor of the House, the concept of the prisoner transfer treaty was:

[a] novel and creative approach to resolving many of the problems that have confronted Americans arrested, tried, convicted, and imprisoned abroad especially in Mexico. [He continued by commending the Departments of State and Justice] for the energy and imagination devoted to overcoming the constitutional and legal questions so that many of our citizens can return to the United States before the holidays.

Approximately seven years have passed since the first prisoner transfer treaty entered into force. This Comment presents an overview of the prisoner transfer treaty system in both the general context of international law, and in the more specific context of its interpenetration into American law.

II. Criminal Jurisdiction in International Law

A. In General

Under traditional rules of international law, each state has the exclusive right to try, convict, sentence, and incarcerate any nonnationals for criminal offenses committed within its borders. International conventions, custom, general principles of law recognized by


6. President Carter endorsed the signing of implementing legislation as follows: I think this is a major step forward. It indicates a compatibility between our own country and our neighbors. It shows that we have a respect for their judicial system, the fairness of their courts, and the trial processes. . . . I think it's always easier for someone who is in prison in their own land to have closer connection with their peer groups. . . . so that they can work harder toward a rehabilitation effort.


7. A previous Council of Europe Treaty provided for transfer of prisoners among various member nations. This treaty differed significantly from the American treaties in that it did not provide for consent by the prisoner to his transfer. T. SIMON & R. PISANI, PRISONER TRANSFER TREATIES IN THE AMERICAS: AN OVERVIEW (Nov. 9, 1982) (unpublished manuscript) (footnote not in original).


9. See, e.g., Declaration on Principles of International Law Concerning Friendly Rela-
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civilized nations,11 expert writers in the field of international law,12 and American judicial decisions13 all tend to support this concept. As one commentator has noted:

When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.14

Territorial jurisdiction is so pervasive a principle that in some instances it has been used to extend jurisdiction over a nonnational despite the absence of physical entry into the territory.16 For example, a foreign-based conspirator may be deemed to have entered one state for purposes of jurisdiction if the conspiratory act alone has occurred within the state.

B. An Exception—The Military Traveler

One type of treaty that creates a very different legal environment for the individual arrested in a foreign country arose under the aegis of the North Atlantic Treaty Organization (NATO).16 These treaties, entitled Status of Forces Agreements (SOFA),17 were designed to anticipate a certain, inevitable degree of social interaction between foreign military forces and the domestic peacetime


communities within which they were to be deployed. To provide adequate safeguards for the visiting as well as the host countries, NATO-SOFAs contain both jurisdictional and procedural provisions for criminal acts perpetrated in the foreign country by members of the specific peacekeeping military forces. The United States has subsequently signed similar reciprocal agreements with certain non-NATO countries in which its peacekeeping forces are stationed.

Under SOFA, the country whose troops are stationed on foreign soil is termed the “sending state” while the country acting as host is the “receiving state.” For all criminal offenses, jurisdiction is defined as either exclusive or concurrent. For instance, each country typically has exclusive jurisdiction over any acts which represent violations of its own criminal or military code but which would not violate the criminal or military code of the other country, while concurrent jurisdiction exists for most other crimes.

Further, with concurrent jurisdiction, certain types of offenses grant primary jurisdiction to either the sending or the receiving state. Thus, under SOFA, the United States and other NATO members have formally agreed to depart from certain principles of international criminal law. The second aspect of SOFA grants procedural safeguards to the members of the sending country who are subject to a foreign judicial system. Thus, NATO member countries have agreed to grant visiting troops certain procedural safeguards characteristic of the American Bill of Rights.

Unfortunately, however, the average nonmilitary American traveler cannot invoke the provisions of SOFA. He is confined to only those legal processes which are customary to the country of arrest. Therefore, although an American citizen may carry his pass-

18. INTERNATIONAL LAW DESKBOOK, JUDGE ADVOCATE GENERAL’S SCHOOL, UNITED STATES ARMY (1978).
20. See SOFA, supra note 17.
21. Id.
22. SOFA guarantees members of the U.S. military who commit crimes while stationed in a member nation the right:
   (a) to a prompt and speedy trial;(b) to be informed, in advance of trial, of the specific charge or charges made against him; (c) to be confronted with the witnesses against him;(d) to have compulsory process for obtaining witnesses in his favour . . . ;(e) to have legal representation of his own choice . . . ;(f) . . . to have the services of a competent interpreter; and(g) to communicate with a representative of the Government of the sending State, when the rules of the court permit, to have such a representative present at his trial.
SOFA, supra note 17, at art. VII, § (9); see Gordon, Individual Status and Individual Rights under the NATO Status of Forces Agreement and the Supplementary Agreement with Germany, 100 MIL. L. REV. 49 (1983) (viewing SOFA within the traditional framework of international territorial jurisdiction).
port with him at all times, the procedural safeguards which are implicit in the United States Constitution do not travel with him but remain at home.

C. The Need for a Similar Exception—The Nonmilitary Traveler

As increasing numbers of American tourists began to be arrested in foreign countries on drug related charges in the 1970's, stories of torture and substandard criminal process found their way to the American public. Billy Hayes published *Midnight Express*, which depicted graphically the torture, deprivation, and corruption encountered by a young college student imprisoned in Turkey on a narcotics charge. A group of parents staged a sit-in at the White House to protest the continued incarceration of their children in Bolivian jails. A young woman from Pennsylvania, following her release from a Bolivian prison, held a press conference in Washington to describe the “horror movie” conditions to which she had been subjected. In addition, various politicians, most notably Congressman Fortney H. Stark of California, began to take an active personal interest in the circumstances of American citizens incarcerated in foreign jails.

As the United States Government sustained increasing demands to alleviate the various injustices confronting Americans arrested abroad, a perplexing legal question began to emerge. This question centered on concepts of independent governmental sovereignty and the inherent right of a nation to exercise exclusive jurisdiction over offenses committed within the bounds of its territorial limits. Under traditional principles of international law, if a foreign offender is nonmilitary, he is subject to the criminal laws and procedures of the arresting country. The legal solution to this question eventually emerged in the form of the prisoner transfer treaty. Beginning in 1977, the United States signed and ratified one of these treaties with each of the following countries: Mexico, Canada, Bolivia, Panama, Peru, and Turkey. Subsequently, similar

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24. Hayes was unfortunate in that his imprisonment occurred before the 1981 prisoner transfer treaty with Turkey. He was fortunate in that his second attempt at escape was successful. B. Hayes, *Midnight Express* (1977).
26. Michelle Fryer, from Pennsylvania, was twenty-one years old at the time of her release. She gave the following description of the conditions in the prison: “Our dormitories are overcrowded, with chipping paint, mice, bugs and exposed wires.” *Id.*
28. See supra note 4 and accompanying text.
31. Treaty on the Execution of Penal Sentences, Feb. 10, 1978, United States-Bolivia,
treaties have been signed but not ratified with France,\(^{35}\) Thailand,\(^ {36}\) and the Council of Europe.\(^{37}\)

III. The Prisoner Transfer Treaty

\textit{A. In General}

Careful drafting of the prisoner transfer treaties has preserved for each country the traditional right to territorial jurisdiction over all crimes committed within its borders. At the same time, however, the treaties grant to the nonnational prisoner an opportunity to be released to return home to complete his sentence. Under the terms of the prisoner transfer treaties, the home country of the offender does not become involved in either the adjudication or the sentencing of its national.\(^{38}\) The provisions of the treaties do not become effective until after completion of all foreign judicial processes and final sentencing. Thus, the purpose of the treaty is:

\begin{quote}

...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 . . . two countries of the strains that arise from the imprisonment of a substantial number of each country's nationals in the institution of the other.\(^ {39}\)
\end{quote}

In exchange for agreeing to maintain a position of noninvolvement, the United States acquires an opportunity for its citizens to return to America to fulfill the obligations of a foreign criminal sentence.\(^ {40}\)


\(^{37}\) Signed Mar. 21, 1983. N.Y. Times, Mar. 22, 1983, at 5, col. 2. Fourteen European countries have signed: Austria, Belgium, Denmark, France, West Germany, Greece, Lichtenstein, Portugal, Luxembourg, Netherlands, Sweden, Spain, Switzerland, United Kingdom. In addition, the United States and Canada have signed by invitation as special signatories for having participated as advisors with special knowledge on prisoner transfer treaties. Telephone interview with Michael Abbell, Esq., Assoc. Dir., Office Int'l Affairs, Dep't Justice (Nov. 22, 1983).

\(^{38}\) Article VI of the U.S.-Mexico Treaty provides that the United States will not only give up jurisdiction over the initial adjudicatory process, but also that 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." U.S.-Mexico Treaty, \textit{supra} note 5, at art. VI.


\(^{40}\) Article V of the U.S.-Mexico Treaty provides that "the completion of a transferred offender's sentence shall be carried out according to the laws and procedures of the Receiving
Simultaneously, the agreement relieves the sentencing country of the burden of providing prison services.

The scope and significance of these transfer treaties can best be illustrated with an understanding of certain characteristic general provisions. Reference in this Comment will be made to the first prisoner transfer treaty, which was negotiated between Mexico and the United States. With some exceptions, to which additional reference will be made, this treaty has served as a blueprint for those which have followed.

B. Conditions to be Met

Under the treaty, for a petitioner to transfer, certain conditions must exist:

1. The prisoner must be beyond the sentencing stage.\(^4\)
2. The prisoner must be a national of the receiving state.\(^2\)
3. The prisoner must not be a domiciliary of the transferring state.\(^3\)
4. The crime must not have been one which was of a political or military nature.\(^4\)
5. The prisoner must have given his consent to the transfer both voluntarily and with full knowledge of the consequences thereof.
6. The offense must be one which would also be punishable in the receiving state, but it does not have to be subject to identical criminal sanctions.
7. The prisoner must have at least six months of his original sentence remaining at the time of his petition.\(^6\)
8. The time for appealing the sentence must have already passed, and there must be no collateral attacks currently pending.

Thus, the treaty narrowly defines the type of prisoner for whom its provisions become effective. Persons arrested for purely military or political offenses are excluded.\(^4\) Therefore, neither terrorists nor an-

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\(^{41}\) This requirement is especially significant in Turkey, where pretrial detention can last several years. In Turkey, one tactic used by American defense attorneys is to employ a Turkish resident familiar with the local court system to monitor the placement of the prisoner's trial papers within the docketing stack. Telephone interview with Robert L. Pisani, Esq., Exec. Dir., Int'l Legal Defense Counsel, Philadelphia, Pa. (Nov. 1, 1983).

\(^{42}\) Turkey's terminology is "requesting," "requested" state.

\(^{43}\) Mexico and Turkey define "domiciliary" as present in the foreign country for five years with an intent to permanently remain.

\(^{44}\) Bolivia and Peru additionally require that the offender not have been sentenced to the death penalty. Mexico and Canada preclude application of the transfer treaties to prisoners convicted of violating immigration laws.

\(^{45}\) Turkey includes transfers for suspended sentences.

\(^{46}\) However, a military member convicted in a country with which the United States
archists would qualify for the special treatment that the treaty ac-
cords. In addition, to petition for transfer the prisoner must be some-
one who has substantial ties to his homeland. Mere status as a
 citizen in name or by passport alone will not suffice. The petitioner
must successfully demonstrate that he has not become a domiciliary
of the country in which the offense was committed.

C. The Role of Each State

In addition to outlining the conditions which must be met by an
offender to qualify for a transfer, the treaties delineate specific limi-
tations on the authority and appropriate functions granted to each
state involved in the transfer process:

(1) The authorities in each state “shall bear in mind all factors
bearing upon the probability that the transfer will contribute to
the social rehabilitation of the offender.”

(2) The transferring state must have imposed final sentencing.

(3) The receiving state will enforce all such sentencing pursuant
to its own procedures or laws, including any applicable provi-
sions for parole or conditional release.

(4) The transferring state will maintain exclusive jurisdiction
over any subsequent proceedings to review, change, or invalidate
the original sentence.

(5) The receiving state will acknowledge and enforce whatever
modifications or reversals the transferring state may

(6) The transferring state will retain the exclusive right to grant
amnesty or to pardon the prisoner.

(7) The receiving state will recognize and implement any such
changes as they occur.

Thus, the treaties carefully demarcate the respective roles of both
the individual’s own state and the state within which the offense has
occurred. Only after a sentence has been handed down by one state
does it become appropriate for the other state to become involved.
Additionally, an element of discretion has been interjected into the
determination of whether or not a transfer should take place. The
acceptance of the prisoner’s petition is made dependent upon a sub-
jective determination by each state as to whether prisoner rehabilita-
tion, one of the general purposes of punishment, is likely to be furth-
ered by the transfer.

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47. U.S.-Mexico Treaty, supra note 5, at art. IV(4).
48. Id. at art. V(2).
49. Id. at art. VI.
50. Id.
51. Id. at art. V(2).
52. Id.
In examining the categories of enumerated conditions and limitations, a certain pattern begins to emerge. It is clear that under the treaties an attempt has been made to skirt the entire sphere of potential conflict posed by the principle of territorial jurisdiction. The receiving state becomes caretaker and custodian, while the transferring state serves as adjudicator and disciplinarian.

D. The Role of the Transferee

The treaties are further designed to require a written bargain between the prisoner who wishes to transfer and the two countries that are capable of granting his request. Under the treaties, and pursuant to the domestic implementing legislation, the American prisoner must meet with an American magistrate or other appointed official while he is still imprisoned in the foreign country. In the presence of an official recorder, he must acknowledge that he has certain rights, and must agree to assume certain obligations arising from the transfer process.

The scope of the rights that the transferee acquires is as follows:

1. The prisoner's country must be given a complete set of records concerning his sentencing as well as any credits earned for imprisonment or good behavior.
2. The prisoner has the right to have his country verify that his consent was voluntary and knowing, and he has the right to counsel at the time his consent is given.
3. The prisoner's country cannot extend the length of his sentence as set by the adjudicating country.

53. The implementing legislation provides:

Prior to the transfer of an offender to the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof shall be verified in the country in which the sentence was imposed by a United States magistrate.


54. The implementing legislation provides that “[T]he verifying officer shall make the necessary inquiries to determine that... the offender accepts the transfer subject to the conditions set forth in subsection (b).” 18 U.S.C. § 1408(d) (1982). Subsection (b) provides:

[T]he transfer will be subject to the following conditions:

1. only the country in which he was convicted and sentenced can modify or set aside the conviction or sentence, and any proceedings seeking such action may only be brought in that country;
2. the sentence shall be carried out according to the laws of the United States and that those laws are subject to change;
3. if a United States court should determine upon a proceeding initiated by him or on his behalf that his transfer was not accomplished in accordance with the treaties or laws of the United States, he may be returned to the country which imposed the sentence for the purpose of completing the sentence if that country requests his return; and
4. his consent to transfer, once verified... is irrevocable.


55. See U.S.-Mexico Treaty, supra note 5, at art. IV(7).
57. See U.S.-Mexico Treaty, supra note 5, at art. V(3).
(4) The fact of his transfer cannot affect the prisoner's civil rights in his own country to any greater extent than would the fact of his incarceration abroad.8
(5) The prisoner's country cannot retry him upon his arrival for the same offense as that from which his sentence and transfer arose; there can be no double jeopardy.9

The scope of the obligations agreed to by the transferee is as follows:

(1) The entire sentence must be enforced regardless of whether the transfer treaty itself remains in force.60
(2) Once consent has been verified it is irrevocable.61
(3) Any proceedings to challenge, modify, or set aside the conviction can only be brought about in the courts of the sentencing country.62
(4) If an American court determines that his transfer was not in accord with either the treaty or the laws of the United States, he can be returned to the sentencing country to complete his sentence.63

Thus, under both the framework of the treaty and the more substantial format of the American implementing legislation, the prisoner will know that each country is made aware of and has agreed to certain rights and limitations in relation to both the other country and to the prisoner himself. Additionally, the prisoner is made aware of and agrees to certain rights granted to each country, as well as certain restrictions which apply to his post-transfer status.

E. The Efficacy of the Treaties to Date

According to the United States Department of Justice, as of August 31, 1983, a total of 741 American citizens had been returned to the United States under the provisions of various transfer treaties to serve out the balance of their foreign sentences in federal prisons.64 Additionally, 485 foreign citizens had been transferred from American prisons to their home countries as of the same date.65 As of the end of July 1983, however, a total of sixty foreign prisoners had been rejected for transfer to their own countries by the Depart-
ment of Justice.  

On a practical level, much has been done to facilitate the transfer process. For example, the United States Department of Justice, Criminal Division, has published a series of informational booklets for distribution to Americans imprisoned in countries with which the United States has a prisoner transfer treaty. In addition, at least one private American organization, the International Legal Defense Counsel, has produced a booklet offering practical guidelines for American citizens who find themselves subjected to foreign criminal procedure. Canada, through the office of its Solicitor General, has similarly published a handbook for its citizens imprisoned in American jails.

Both the publications of the United States Department of Justice and those of the Canadian Government contain not only the text of the appropriate transfer treaties, but excerpts from any relevant implementing legislation as well. These booklets, meant to be given by the Consular Officer or some other official to the imprisoned citizen, contain extensive and detailed question-and-answer sections drafted to anticipate questions deemed most likely to be asked by an individual incarcerated in a foreign jail.

Despite the practical success of the treaties in transferring many prisoners, and despite the logistical support systems which have developed to augment their provisions, the treaties have not gone unchallenged in the American judicial system. The nature of these challenges can best be understood by considering the general legal relationship which exists between foreign treaties and the American Constitution.

IV. The United States Constitution and the Prisoner Transfer Treaties

A. In General

As a basic rule in American constitutional law, provisions of a treaty cannot stand if they are found to conflict with similar provisions of the Federal Constitution. For example, in Reid v. Covert,
the United States Supreme Court made it clear that it would not hesitate to find certain provisions of a treaty unconstitutional and, therefore, ineffective. In Reid, the agreement which the Court found to be in conflict with the Constitution was one signed by the United States and Great Britain in 1942. This treaty granted jurisdiction to the United States military over all crimes committed by military dependents while residing in the foreign country.

Under the terms of the agreement, Mrs. Covert, a civilian, was tried and sentenced pursuant to the Uniform Code of Military Justice (UCMJ). In response, Covert petitioned for habeas corpus on the grounds that the UCMJ does not grant certain of the safeguards guaranteed by the Bill of Rights. She contended that her conviction and sentence were in violation of basic constitutional rights to which she was entitled as an American citizen. The Supreme Court agreed and found unconstitutional those provisions of the agreement that limited civilian military dependents to only the rights and remedies granted by the UCMJ. As the Court stated, "[N]o agreement with a foreign nation can confer power on the Congress, or even on any other branch of Government, which is free from the restraints of the Constitution."

Thus, after Reid v. Covert, it is clear that any treaty to which the United States wishes to become a party will likely undergo careful scrutiny by Congress to discover and correct any provisions which look as though they might be susceptible to constitutional challenge. In the case of the first of the prisoner transfer treaties, those with Mexico and Canada, a strong undercurrent of concern for possible constitutional attack surrounded both the ratification and legislative implementation processes. As a result of such concern, the implementing legislation was carefully drafted under the auspices of

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**Byrd, Treaties and Executive Agreements in the United States** (1960).


73. Reid v. Covert, 354 U.S. 1, 16 (1957). Justice Black further stated:

"At the time of Mrs. Covert's alleged offense, an executive agreement was in effect . . . which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents. For its part, the United States agreed that these military courts would be willing and able to try and to punish all offenses against the laws of Great Britain by such persons. . . . Even though a court martial does not give an accused trial by jury and other Bill of Rights protections, the Government contends that Art. 2(11) of the UCMJ . . . can be sustained as legislation which is necessary and proper to carry out the United States' obligations . . . ."

Id. at 15-16.

74. Id.

prominent American legal advisors such as Professors Herbert Wechsler6 and Detlev Vagts.7 Additionally, Congress sought to identify possible constitutional violations inherent in the treaties by consulting various civil rights organizations.8

B. In the Context of the Prisoner Transfer Treaty

As one American writer observed prior to ratification of the Mexican treaty, “questions about the constitutionality of this Treaty demand an examination of the elusive notion of due process and of the foundation of federal jurisdiction.”9 In other words, the question is whether a treaty, which vests authority in the federal government to enforce a foreign sentence against an American citizen, is constitutional when the foreign country’s criminal procedures have not afforded “American-style” due process.

Under basic principles of international law, the country in which a criminal offense has occurred is clearly entitled to try, convict, sentence, and incarcerate most nonmilitary offenders.80 It is equally clear under basic principles of constitutional law that the United States is fully entitled to proscribe certain domestic activities as criminal, and to define and enforce any appropriate punishment.81 A more complex constitutional issue arises in the unique environment of the prisoner transfer treaties. There the United States seeks to exercise its legitimate power to enforce sentences, but it does so in an unusual context. It seeks to enforce upon its own citizens punishments that are determined exclusively outside the American legal system and which are imposed solely by a foreign governmental entity.

V. Challenges to the Treaties

A. Velez v. Nelson

Shortly after the first group of Americans was returned to the

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8. In 1977, Joel Gora, then legal director for the American Civil Liberties Union, questioned the constitutionality of the treaties on three grounds: (1) the imprisonment of an American whose arrest and search were unconstitutional; (2) the denial of the right to habeas corpus, and (3) the confinement of an individual in an American prison when he had not been charged with violating a United States law. Legal Issues Posing Further Delays in Mexico-U.S. Prisoners' Treaty, N.Y. Times, Apr. 30, 1977, at 8, col. 1.
9. See Note, supra note 77, at 1502.
80. See supra notes 1-7 and accompanying text.
81. Article one, section eight of the United States Constitution grants Congress the power "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof." U.S. CONST. art. I, § 8. See also 18 U.S.C. §§ 1-6005 (1982) (Crimes and Criminal Procedure).
United States to finish out their Mexican sentences, several of the transferees filed petitions for habeas corpus in federal district court. In *Velez v. Nelson*, three American citizens had been arrested, imprisoned, tortured, convicted, and sentenced almost simultaneously on narcotics charges in Mexico. In each instance, the petitioner had been subjected to protracted episodes of torture, inhumane prison conditions, and extortionate fees for even the most minimal provisions of room and board. The postarrest experiences of these prisoners indicated a lack of any formal criminal procedure.

At each subsequent stage of the Mexican criminal judicial process, each of the prisoners was merely led into a courtroom within the prison where he was placed inside a chain-link pen. Each prisoner was then presented to a “law secretary” who informed him of the progress of his particular case. Beginning with the introduction of his initial narcotics charge, and continuing through to the eventual sentencing, none of these men were ever allowed to appear before a judge or jury, nor were they given an opportunity to confront or present witnesses.

At the American district court level, the federal judge focused specifically on the issue of the voluntariness of the consent given by the prisoners at the time they submitted their petitions to transfer. He cited several American criminal law cases for the premise that whether or not consent is voluntary is a matter of fact “to be determined from all the surrounding circumstances.” Further, he said that “[a]mong the circumstances to be considered in determining voluntariness is length of detention, prolonged nature of questioning, and the occurrence of physical punishment. . . . Consent which is the result of . . . brutality or violence is constitutionally suspect.” Applying these principles to the facts of the case, he concluded that the consent given by the transferees was not voluntary and therefore not valid. As a consequence, he granted the prisoners’ petitions for habeas corpus.

It is important to note two particular aspects of the district court’s decision. First, by choosing to focus on the issue of voluntariness as a matter of fact, the court effectively avoided any need to
discuss the constitutionality of the treaty per se. Second, the decision to grant habeas corpus, and thereby potentially to allow the transferees to go free, points out a possible loophole in the American implementing legislation.

Section 4108 of Title 18 of the United States Code provides that the prisoner's petition to transfer be made both voluntarily and with full knowledge of certain significant consequences that will result from the consent to transfer. The legislative provisions concerning both knowledge and voluntariness are as follows:

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

(1) only the country in which he was convicted and sentenced can modify or set aside the conviction or sentence . . . .

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

Thus, because the requirement of consent is written in the conjunctive—"voluntary and with full knowledge of the consequences thereof"—the legislation leaves open a potential means whereby the transferee can subsequently effect legal escape from the enforcement of his foreign sentence. Under the literal wording of the statute, he can be fully cognizant of the bargain which he appears to be striking with both countries, and yet at the same time secretly intend to dishonor those provisions the moment he reaches home soil.

Under Velez v. Nelson, as long as the verifying officer believes that consent is voluntary and subsequently verifies the transfer, the petitioner can simply come home and bring suit in federal district court denying his voluntariness. If he is successful, he will prove that one prong, voluntariness, of the two-pronged requirement was absent at the time of consent. Because the legislative requirement is written in the conjunctive, once that first prong is disproved, the second prong necessarily falls as well. Thus, the prisoner can simply erase both the obligations he assumed on the bargain with his own country and those which he assumed with the country in which his offense has occurred. The only substantial risk which remains for the prisoner following a finding that his consent was invalid is that the

90. Id. at n.25.
foreign country may request his return.\footnote{94}{See supra note 54. See also 18 U.S.C. § 4114(a) (1982) which provides:}

\begin{quote}
Upon a final decision by the courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return. The Attorney General shall notify the appropriate authority of the country which imposed the sentence, within ten days, of a final decision of a court of the United States ordering the offender released.
\end{quote}

\footnote{95}{Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980), cert. denied, 449 U.S. 856 (1980), reh'g. denied, 449 U.S. 1027 (1980).}

\footnote{96}{Id. at 1197.}

\footnote{97}{Note, American Nationals Transferred from Mexican Prisons to Serve the Remainder of Their Sentences in Federal Penal Institutions May Raise Due Process Claims in Federal Courts, but They are Estopped from Challenging Their Sentences in American Courts if They Consented to Abide by the Terms of the Treaty on the Execution of Penal Sentences, 15 Tex. Int'l L.J. 565, 568 (1980).}

B. Rosado v. Civiletti

In Rosado v. Civiletti, the Court of Appeals for the Second Circuit focused on the question of due process. There the issue was whether the petitioners as transferees could rightfully challenge the constitutionality of their American incarceration on the grounds that it was prescribed by a judicial system devoid of the Bill of Rights. Surprisingly, Judge Kaufman held that under the facts of the particular case, the transferees were entitled to bring due process claims before American federal courts despite the fact that the process of which they complained occurred solely within the jurisdiction of a foreign government.\footnote{96} He based this decision on a finding that no process at all had been granted by the judicial system in Mexico:

[A]t no time did they receive even the barest rudiments of a process calculated to arrive at the truth of the accusations against them. They did not receive the assistance of counsel. . . . [T]hey were not permitted to address the charges against them. . . . Most egregious of all, the law secretary who presided over the proceedings . . . offered the influence of his position . . . for a fee.\footnote{96}

Thus, based on the total absence of criminal process granted the Americans by the Mexican legal system during the pretrial through post-sentencing period, Judge Kaufman held that the petitioners were entitled to bring the issue of foreign due process into the American courts.

As one writer has pointed out, Judge Kaufman's finding that the transferees could bring a due process claim before a federal court was a "startling conclusion."\footnote{97} Article VI of the treaty, agreed to by the United States and ratified by the Senate, clearly specifies

\begin{quote}
Upon a final decision by the courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return. The Attorney General shall notify the appropriate authority of the country which imposed the sentence, within ten days, of a final decision of a court of the United States ordering the offender released.
\end{quote}
that the "[t]ransferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify, or set aside sentences handed down by its courts."\(^{98}\)

Consequently, to have held for any reason at all that a transferee could have access to the court of the receiving state to question the process or any other aspect of the transferring state's judicial functions in relation to the transferee is to have directly violated one of the provisions reciprocally agreed upon by both the United States and Mexico. The above mentioned "startling conclusion" however has had little practical effect on the endurance and stability of the prisoner transfer treaties.

In resolving the second main issue in *Rosado v. Civiletti*, Judge Kaufman held that the question of voluntariness should not be allowed to undermine the general intent and overall purpose behind the treaty. In this portion of his opinion he approached the issues presented by the petitioners from more of an international perspective than had the district court judge. In examining the general climate from which the basic concept for the treaty had grown, he noted the degree of care and concern that had been employed by Congress to enact implementing legislation designed to withstand all possible challenges. In sharp contrast to the way in which he had dealt with the issue of due process, Judge Kaufman viewed the issue of voluntariness not from the perspective of the specific facts and circumstances peculiar to the individual petitioners, but rather from the point of view of two important policy considerations.

First, he noted "the Government's substantial interest in promoting good relations with Mexico by honoring its criminal convictions and recognizing the integrity of its criminal justice system."\(^{99}\) Second, and even more importantly, he cited the practical effect likely to result from allowing a transferee to escape through a legislative loophole as was done in *Velez v. Nelson*. As the Second Circuit saw it, if voluntariness were allowed to be litigated following transfer on the grounds of the "conduct of Mexicans on Mexican soil" no magistrate would ever again be willing to certify that any consent in Mexico had been voluntarily given.\(^{100}\) In other words, to endorse the *Velez* decision would be to effectively close the door to transfer for countless other Americans hoping to escape the torture and substandard conditions of a foreign prison system.

Thus, *Rosado* granted prisoner transfer treaties the judicial endorsement for which Congress had long been hoping. Despite his rather surprising deviation from the explicit provisions of the treaty

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100. *Id.*
concerning the petitioner's right to challenge foreign sentences in domestic courts, Judge Kaufman's holding on the question of voluntariness clearly removed any potential loophole created by the legislative conjunctive requirement of "voluntary and with full knowledge."

VI. Conclusion

Each year the State Department in its Report to Congress of Americans Incarcerated Abroad compiles statistics concerning the number of United States citizens officially imprisoned in foreign jails.\(^\text{101}\) According to the report for 1982, a total of 1729 Americans were confined in foreign prisons. Additional State Department statistics indicate that from 1977 through 1982, an average of approximately 3158 American citizens were arrested in foreign countries.\(^\text{102}\) Drug related arrests were on the increase by thirty-five percent in 1982, and Mexico and Canada were two of the countries in which the greatest number of total arrests occurred.\(^\text{103}\)

In light of such statistics, the role of the prisoner transfer treaty is clearly an important one. Without violating any of the traditional rights of a sovereign nation to exert its own territorial jurisdiction, it creates one certain and well regulated means by which American citizens can escape the dangers and trauma of a foreign prison. For this reason it is especially important that in Rosado v. Civiletti Judge Kaufman chose as he did to "hold open the door for others similarly victimized to escape their torment."\(^\text{104}\)

Patricia M. Wilson

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\(^{101}\) The following figures reflect the total number of nonmilitary American citizens arrested in foreign countries from 1977 through Nov. 1, 1983.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
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</tr>
<tr>
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<td>3260</td>
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<tr>
<td>1982</td>
<td>3087</td>
</tr>
<tr>
<td>1983 (Nov. 1)</td>
<td>2572</td>
</tr>
</tbody>
</table>

\(^{102}\) Id.

\(^{103}\) Id.

\(^{104}\) See Rosado v. Civiletti, 621 F.2d at 1201.