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Examination of the United States Prisoner Transfer Treaties

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EXAMINATION OF THE UNITED STATES PRISONER TRANSFER TREATIES

INTRODUCTION

In recent years the United States has demonstrated an increased interest in participation and cooperation with other countries in penal matters.[1] With two bilateral prisoner transfer treaties expected to enter into force in 1985[2] and another presently under consideration by the United States Senate,[3] it is appropriate to examine the origin and nature of United States treaties currently in force on the same subject.[4] This note will do so using the constitutional limitations on the executive, legislative and judicial branches in the treaty process as a framework.

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1. In 1980 and 1981, respectively, the United States entered into treaties with Colombia and the Netherlands on mutual legal assistance. In 1982, the United States entered into a treaty with Italy on mutual assistance in criminal matters. Beginning with the Mexican treaty in 1976, the United States has also entered into six other treaties involving prisoner transfer. *See infra* notes 19-24 and accompanying text.

2. Convention on the Transfer of Sentenced Persons, Jan. 25, 1983, United States-France, _ U.S.T. _, T.I.A.S. No. _ (entered into force Feb. 1, 1985). Convention on the Transfer of Sentenced Persons, March 21, 1983, Council of Europe, _ U.S.T. _, T.I.A.S. No. _ (entered into force July 1, 1985).

3. Treaty on Cooperation in the Execution of Penal Sentences, Oct. 29, 1982, United States-Thailand, TREATY DOC. No. 8, 98th Cong., 1st Sess. (1982).

4. *See infra* notes 19-24 and accompanying text. The prisoner transfer treaties were the first of their kind entered into by the United States. "While prior laws have implemented extradition treaties, never before have we attempted to provide for imprisonment, probation and parole of Americans in this country as the result of foreign convictions." *Implementation of Treaties for the Transfer of Offenders to or from Foreign Countries: Hearings on H.R. 7148 Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 1 (1977) (statement of Rep. Eilberg) [hereinafter *House Implementation Hearing*]. Recognition of foreign judgments is an integral part of such laws, but United States Federal and state authorities cannot implement a sentence authorized by a competent court of another nation, even at the latter's request. Chief Justice Marshall's long-followed dictum states that "the courts of no country execute the penal laws of another." The Antelope, 23 U.S. (10 Wheat.) 66, 122-23 (1825). "Accordingly, in the absence of a treaty or authorizing legislation, a person convicted of a crime and sentenced to imprisonment in one jurisdiction cannot be confined in the prisons of another." George, *Penal Jurisdiction in Japan and the United States*, in CONTEMPORARY PROBLEMS IN CRIMINAL JUSTICE 15 (1983) (citing *In re* Bonner, 151 U.S. 242 (1894)).

I. CONSTITUTIONAL LIMITATIONS ON THE TREATY PROCESS AND THE UNITED STATES PRISONER TRANSFER TREATIES

The validity of a treaty entered into by a state depends upon the treaty's conformity with the limitations that state has placed on its treaty process.[5] In the United States, the constitutional limitations that apply to all exercises of the federal power apply to treaties as well.[6] A constitutional limitation on the treaty process can be defined as "any limitation or restriction contained in the fundamental law of a state which prevents a state from entering into a treaty, or, having entered into one, from performing the obligations incurred thereunder."[7] The limitations thus can be classified as those affecting the *capacity* to enter into a treaty and those affecting the *performance* of obligations arising under a treaty.[8]

A. *Capacity Limitations—The Involvement of the Executive Branch*

Capacity limitations "are those pertaining to the negotiation and ratification of treaties."[9] In the United States, the Constitution vests the executive treaty-making authority in the President, with the proviso that he obtain the advice and consent of the Senate.[10] The President's role in the treaty-making process involves appointing and in-

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5. L. OPPENHEIM, INTERNATIONAL LAW 882-83 (8th ed. 1962). In regard to a United States treaty, "the only questions . . . which can arise in the consideration of the validity of a treaty are: First, Is it a proper subject of treaty according to international law or the usage and practice of civilized nations? Second, Is it prohibited by any of the limitations in the Constitution?" People v. Gerke, 5 Cal. 381, 384 (1855).

6. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 137 (1975).

7. J. HENDRY, TREATIES AND FEDERAL CONSTITUTIONS 6 (1955). "It is now accepted that a treaty made in violation of a nation's constitution is nevertheless binding upon it unless the violation is 'fundamental' and the other party knew or had reason to know the lack of authority to make it." L. HENKIN, *supra* note 6, at 137. *Cf.* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 123 (1965) [hereinafter RESTATEMENT].

8. J. HENDRY, *supra* note 7, at 7. "[T]he nature of the constitutional structures of federal states makes this classification important, and most necessary, for analyzing the treaty processes of federal states." *Id.*

9. *Id.*

10. Article II, § 1 provides in pertinent part that "[t]he executive power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. Article II, § 2 further provides that "[the President] shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present shall concur." U.S. CONST. art. II, § 2. Alexander Hamilton suggested that the treaty-making power be viewed as a function of a fourth branch of government, the President-and-Senate (in its executive character). THE FEDERALIST No. 75, at 451-52 (A. Hamilton), (Mentor ed. 1961).

structing negotiators and following their progress in negotiations.[11] If he approves what they have negotiated, he requests the advice and consent of the Senate. Upon obtaining such advice and consent, he can then ratify or "make" the treaty.[12]

A treaty made under executive auspices and ratified by two-thirds of the Senate must "be regarded in courts of justice as equivalent to an act of the legislature . . . ."[13] Not all treaties, however, are in fact the law of the land of their own accord. "[W]hen the terms of the stipulation import a contract . . . the legislature must execute the contract before it can become a rule for the court."[14] Treaties designed to have domestic consequences can be either "self-executing" or "non-self-executing."[15] The former require no legislative intervention, whereas the latter require an act of Congress to carry out the international obligation.[16] Whether a treaty is one or the other is ordinarily a domestic question, initially for the executive, who must decide whether to "take care" that the treaty is "faithfully executed"[17] as law or to seek implementation by Congress.[18]

1. The Prisoner Transfer Treaties

During the Carter administration, the United States concluded bilateral treaties on the execution of penal sentences with Mexico,[19] Can-

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11. L. HENKIN, *supra* note 6, at 130.

12. *Id.* "The Senate gives consent to ratification, the President ratifies, but even the Supreme Court has erroneously referred to the Senate's action as 'ratification'. B. Altman & Co. v. United States, 224 U.S. 583, 600-01 (1912); Wilson v. Girard 354 U.S. 524, 526 (1957). L. HENKIN, *supra* note 6, at 130.

13. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). This conclusion derives from the Constitution: "all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." U.S. CONST. art. VI, § 2.

14. *Foster*, 27 U.S. (2 Pet.) at 314. "[W]hen either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; thus requiring legislative action." *Id.* For example, "[t]he United States makes a treaty with state A providing for protection of migratory birds and stating that the parties will enact the necessary measures for carrying out the terms of the treaty . . . . When the treaty becomes binding between the United States and A, it is not self-executing and does not take effect as domestic law of the United States until the enactment of Congressional legislation implementing its provisions." RESTATEMENT, *supra* note 7, § 141, illustration 2.

15. L. HENKIN, *supra* note 6, at 157-58.

16. *Id.*

17. Article II, § 3 provides in relevant part that "[the President shall] take care that the laws be faithfully executed." U.S. CONST. art. II, § 3.

18. *See* L. HENKIN, *supra* note 6, at 161-63, for a discussion on congressional implementation of treaties.

19. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mex-

ada,[20] Bolivia,[21] Panama,[22] Peru[23] and Turkey.[24] Pursuant to constitutionally established procedures,[25] the first of the treaties[26] was ratified.[27] Its enabling legislation[28] was introduced,[29] passed by Congress[30] and signed into law by the President.[31] This legislation enabled

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ico, 28 U.S.T. 7399, T.I.A.S. No. 8718 [hereinafter Mexican Treaty].

20. Treaty on the Execution of Penal Sentences, Mar. 2, 1977, United States-Canada, 30 U.S.T. 6263, T.I.A.S. No. 9552 [hereinafter Canadian Treaty].

21. Treaty on the Execution of Penal Sentences, Feb. 10, 1978, United States-Bolivia, 30 U.S.T. 796, T.I.A.S. No. 9219 [hereinafter Bolivian Treaty].

22. Treaty on the Execution of Penal Sentences, Jan. 11, 1979, United States-Panama, 32 U.S.T. 1565, T.I.A.S. No. 9787 [hereinafter Panamanian Treaty].

23. Treaty on the Execution of Penal Sentences, July 6, 1979, United States-Peru, 32 U.S.T. 1471, T.I.A.S. No. 9784 [hereinafter Peruvian Treaty].

24. Treaty on the Enforcement of Penal Judgments, June 7, 1979, United States-Turkey, _ U.S.T. _, T.I.A.S. No. 9892 [hereinafter Turkish Treaty.]

25. *See supra* notes 10-12 and accompanying text.

26. The first of the treaties was the Mexican treaty, *supra* note 19.

27. The Department of State entered into negotiations with Mexico on the subject of the transfer of prisoners. *See* N.Y. Times, June 14, 1976, at A11, col. 1; N.Y. Times, Sept. 6, 1976, at A3, col. 2. The negotiations resulted in the signing of a treaty with Mexico on November 25, 1976. Mexican treaty, *supra* note 19, at 7399. The treaty was submitted to the Senate for its advice and consent. S. EXEC. DOC. D., 95th Cong., 1st Sess. (1977). Hearings were conducted on the subject. *Penal Treaties with Mexico and Canada: Hearings Before the Committee on Foreign Relations of the United States Senate,* 95th Cong., 1st Sess. (1977) [hereinafter *Advice and Consent Hearings, Mexican Treaty*]. The Senate consented to ratification. S. EXEC. REP. No. 10, 95th Cong., 1st Sess. (1977).

28. Implementation of the treaty required congressional action. Ratification advised by the United States Senate was subject to the condition "[t]hat the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in article IV has been enacted." Mexican treaty, *supra* note 19, at 7399.

29. "Two identical bills were introduced at the request of the President into Congress providing for implementation of these and future treaties, that is S. 1682 . . . and H.R. 7148." 123 CONG. REC. H35016 (daily ed. Oct. 25, 1977) (statement of Rep. Eilberg).

30. Hearings were conducted in the Senate, *Transfer of Offenders and Administration of Foreign Penal Sentences: Hearings on S-1682 Before the Subcomm. on Penitentiaries and Corrections of the Senate Comm. on the Judiciary,* 95th Cong., 1st Sess. (1977) [hereinafter *Senate Implementation Hearings*] and in the *House Implementation Hearings, see supra* note 4. Reports were issued by each committee; in the Senate, S. REP. No. 435, 95th Cong., 1st Sess. (1977); and in the House, H.R. REP. No. 720, 95th Cong. 1st Sess. (1977), and both are reprinted in 1977 U.S. CODE CONG. & AD. NEWS 3146. The legislation was passed; for the Senate, see 123 CONG. REC. 30201 (1977) and the House, see 123 CONG. REC. 35029 (1977).

31. On October 28, 1977, President Carter signed into law Public Law 95-144, 91 Stat. 1212 (codified at 18 U.S.C. §§ 3006A, 3244, 4100-4115; 28 U.S.C. § 2256; 10 U.S.C. § 955 (1982)), providing for the implementation of treaties for the transfer of offenders to or from foreign countries. *Bills Concerning Indochina Refugees and Prisoner Transfers with Mexico and Canada,* 13 WEEKLY COMP. PRES. DOC. 1672 (Oct. 28, 1977). [hereinafter

prisoner transfers with Mexico to take place immediately and was intended to apply to similar United States treaties to be negotiated in the future.[32]

2. General Characteristics of the Treaties

These prisoner transfer treaties are structurally similar.[33] They can be divided into thirteen sections based on the following common elements: (1) statement of purpose; (2) statements of bilateral prisoner transfer; (3) definitions of terms; (4) conditions of application; (5) designation of authorities; (6) procedures of transfer request; (7) effects of transfer grant; (8) prohibition of double jeopardy; (9) retention of exclusive jurisdiction by transferring country; (10) provision for youthful offenders; (11) provision for legally determined mentally ill offenders; (12) provision for passing of enabling legislation; and (13) ratification, duration and termination provisions.

The purpose of each treaty is to promote the social rehabilitation of the prisoner.[34] Transfers made pursuant to the treaties are voluntary, requiring consent of the prisoner, as well as approval by both countries involved.[35] In essence, the treaties require that the remainder of a foreign sentence imposed on an offender be served in the offender's home country,[36] subject to that country's laws of parole and

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Prisoner Transfers with Mexico and Canada].

32. 123 Cong. Rec. H35016 (daily ed. Oct. 25, 1977) (statement of Rep. Eilberg). "The legislation . . . would also serve as a basis for any such future offender transfer treaties." *Id.*

33. The Turkish Treaty, *supra* note 24, however, is somewhat different. *See* S. EXEC. REP. No. 24, 96th Cong., 1st Sess. 5 (1979) (Letter of Submittal from the Department of State to the President). The Turkish Treaty is different from the others in the series because of Turkey's desire that, insofar as possible, the European Convention on the International Validity of Criminal Judgments (to which Turkey is a party) be the "point of departure." *Id.*

34. Mexican Treaty, *supra* note 19, at 7401; Canadian Treaty, *supra* note 20, at 6265; Bolivian Treaty, *supra* note 21, at 798; Panamanian Treaty, *supra* note 22, at 3; Peruvian Treaty, *supra* note 23, at 3.

35. Mexican Treaty, *supra* note 19, art. II, paras. 2, 3; Canadian Treaty, *supra* note 20, art. III, paras. 3, 4; Bolivian Treaty, *supra* note 21, art. V, paras. 2, 3; Panamanian Treaty, *supra* note 22, art. III, para. 6, art. V, para. 1; Peruvian Treaty, *supra* note 23, art. V, para. 3. (The transferring country is the country in which the prisoner has been sentenced and the receiving country is the country to which he wishes to be transferred.)

36. Mexican Treaty, *supra* note 19, art. V, para. 2; Canadian Treaty, *supra* note 20, art. IV, para. 1; Bolivian Treaty, *supra* note 21, art. VI, para. 2; Panamanian Treaty, *supra* note 22, art. VI, para. 2; Peruvian Treaty, *supra* note 23, art. VI, para. 2. The Mexican and Canadian treaties additionally provide that the receiving country may not extend the confinement of the offender beyond its original termination date. Mexican Treaty, *supra* note 19, art. V, para. 3; Canadian Treaty, *supra* note 20, art. IV, para. 3.

probation.[37] The treaties explicitly bar prosecutions subsequent to transfer based on the conduct that resulted in the original conviction.[38]

Not every prisoner can partake of the benefits afforded by these treaties. For example, a prisoner must be a citizen or national of the receiving country,[39] the offense for which he was incarcerated must be one which is generally punishable as a crime in the receiving country, and there must be at least six months remaining to be served, at the time of petition.[40] Moreover, an offender sentenced under military laws is ineligible under any of the treaties.[41] Although the Bolivian, Panamanian and Peruvian treaties exclude offenders who have been sentenced to death,[42] the Canadian and Mexican treaties exclude only immigration law offenders.[43] None of the treaties allow the offender to have review proceedings pending in the transferring country, at the

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37. The right of amnesty or pardon is reserved to the transferring country as part of its retention of jurisdiction to modify a sentence. *See, e.g.*, Bolivian Treaty, *supra* note 21, art. VII, which provides in relevant part that "[t]he Transferring State shall retain exclusive jurisdiction regarding the sentences imposed and any procedures that provide for revision, modification or cancellation of the sentences pronounced by its courts." A similar provision appears in the other treaties: Mexican Treaty, *supra* note 19, art. V, para. 2; Canadian Treaty, *supra* note 20, art. V; Panamanian Treaty, *supra* note 22, art. VII; Peruvian Treaty, *supra* note 23, art. VII.

38. *See, e.g.*, Panamanian Treaty, *supra* note 22, art. VI, para. 1, which states that "[a]n Offender delivered for execution of sentence under this Treaty may not again be detained, tried or sentenced in the Receiving State for the same offense for which the sentence was imposed by the Transferring State." *Id.* A similar provision appears in the other treaties: Mexican Treaty, *supra* note 19, art. VII; Canadian Treaty, *supra* note 20, art. VI; Bolivian Treaty, *supra* note 21, art. VI, para. 1; Peruvian Treaty, *supra* note 23, art. VI, para. 1. In international law, the recognition of a foreign penal judgment is an application of the principle of *ne bis in idem*. M. BASSIOUNI & P. NANDA, 2 INTERNATIONAL CRIMINAL LAW 269 (1973).

39. Mexican Treaty, *supra* note 19, art. II, para. 2; Canadian Treaty, *supra* note 20, art. II, para. b; Bolivian Treaty, *supra* note 21, art. III, para. 2; Peruvian Treaty, *supra* note 23, art. III, para. 2. Under the Mexican treaty an offender is ineligible for transfer if he is a domicilary of the transferring state. Mexican Treaty, *supra* note 19, art. VII, para. 3.

40. Mexican Treaty, *supra* note 19, art. II, paras. 1, 5; Canadian Treaty, *supra* note 20, art. II, paras. a, d; Bolivian Treaty, *supra* note 21, art. III, paras. 1, 4; Panamanian Treaty, *supra* note 22, art. III, paras. 1, 4; Peruvian Treaty, *supra* note 23, art. III, paras. 1, 4.

41. Mexican Treaty, *supra* note 19, art. II. para. 4; Canadian Treaty, *supra* note 20, art. II, para. c; Bolivian Treaty, *supra* note 21, art. III, para. 3; Panamanian Treaty, *supra* note 22, art. III, para. 3; Peruvian Treaty, *supra* note 23, art. III, para. 3.

42. Bolivian Treaty, *supra* note 21, art. III, para. 3; Panamanian Treaty, *supra* note 22, art. III, para. 3; Peruvian Treaty, *supra* note 23, art. III, para. 3.

43. Mexican Treaty, *supra* note 19, art. II, para. 2; Canadian Treaty, *supra* note 20, art. II, para. c.

time of the transfer request.[44]

A request for a prisoner transfer under any of the treaties must be in writing.[45] With the exception of the treaties of Canada and Mexico, transfer procedures are commenced by the Embassy of the receiving country.[46] The Mexican treaty specifies that "[e]very transfer . . . shall be . . . commenced by the Authority of the Transferring State"[47] and that "[n]othing in this Treaty shall prevent an offender from submitting a request to the Transferring State for consideration of his transfer."[48] The Canadian treaty is the only one that requires the parties to "inform an offender, who is within the scope of the present Treaty, of the substance of the Treaty."[49] In addition, it is the only one that permits the offender to commence transfer procedures.[50]

3. The Purpose of the Treaties

The emergence of a dispute from a preexisting problem can have a catalytic effect on the resolution of that problem; international problems are no exception. In fact, on numerous occasions the emergence of an international problem alone has resulted in the development of a treaty to deal with it.[51] There is no requirement that an agreement be the product of a dispute or problem between or among countries.[52] Treaties are entered into for various purposes, including trade, criminal cooperation and cultural exchange.[53] What motivates a

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44. *See, e.g.*, Bolivian Treaty, *supra* note 21, art. III, para. 5, which provides in pertinent part that "[t]his Treaty shall apply only under the following conditions: (5) That the sentence be final, that any appeal procedures have been completed and that there be no extraordinary review procedures pending at the time of invoking the provisions of this Treaty." *Id.* A similar provision appears in the other treaties: Mexican Treaty, *supra* note 19, art. II, para. 6; Canadian Treaty *supra* note 20, art. II, para. e; Panamanian Treaty, *supra* note 22, art. III, para. 5; Peruvian Treaty, *supra* note 23, art. III, para. 5.

45. Canadian Treaty, *supra* note 20, art. III, para. 3; Bolivian Treaty, *supra* note 21, art. V, para. 2; Panamanian Treaty, *supra* note 22, art. V, para. 1; Peruvian Treaty, *supra* note 23, art. V, para. 1. (A written request is not specified in the Mexican treaty).

46. Bolivian Treaty, *supra* note 21, art. V, paras. 1, 2; Panamanian Treaty, *supra* note 22, art. V, paras. 1, 2; Peruvian Treaty, *supra* note 23, art. V, paras. 1, 2.

47. Mexican Treaty, *supra* note 19, art. IV, para. 1.

48. *Id.*

49. Canadian Treaty, *supra* note 20, art. III, para. 2.

50. *Id.* art. III, para. 3 (to the authority of the transferring state).

51. *See* J. HENDRY, *supra* note 7, at 1.

52. As between sovereigns, "treaties are the sole means of adjusting conflicting claims, of regulating their mutual conduct, of making definite what they can expect from one another, and how matters stand between them." J. PUENTE, INTERNATIONAL LAW 146 (1983).

53. *See, e.g.*, Agreement on Trade and Commerce, Sept. 23, 1976, United States-Spain, 28 U.S.T. 1308, T.I.A.S. No. 8512; Agreement on Judicial Assistance, June 12,

state to enter into a treaty is a potential benefit.[54] Because some agreements are primarily national in character, their benefits are not "felt" directly by any particular citizen, but rather by the public in general.[55] Other agreements, although beneficial to the nation as a whole, operate primarily through individuals, who serve as their direct beneficiaries.[56] A prisoner transfer treaty is an unequal mixture of the two, with the individual benefit component far outweighing the public benefit component.

The executive and legislative materials generated by hearings conducted on the Mexican treaty support this proposition.[57] In urging passage of the enabling legislation designed to apply to all of the prisoner transfer treaties, Representative Eilberg[58] listed "the humanitarian justification for its passage" as its first benefit, "the increased possibility for rehabilitation" as its second benefit and "the increase in favorable bilateral relations between the signatory countries" as its third and final benefit.[59]

Additional support can be found within the provisions of each treaty. The requirement of the offender's consent to transfer, if not the offender's personal initiation of the transfer proceedings, implies only that the operation of the treaty is dependent initially upon individual action. The provision lies dormant until an offender activates it. In-

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1981, United States-Netherlands, _ U.S.T. _, T.I.A.S. No. 10734; Agreement on Cultural and Educational Relations, Feb. 15, 1979, United States-Japan, 31 U.S.T. 381, T.I.A.S. No. 9615 (entered into force Dec. 24, 1979); Agreement on Weather Stations, Apr. 29-May 22, 1968, United States-Israel, 19 U.S.T. 5180, T.I.A.S. No. 6510.

54. Legal capacity to create substantive international law is vested in the sovereign state alone. Still, a private person is capable of having subjective rights under international law. A subjective right, however, as a rule, can be enforced only through the country of such private person. BASSIOUNI & NANDA, *supra* note 38, at 141-42.

55. *Id.* Treaties of peace or extradiction are examples of agreements whose benefits are "felt" by the general public.

56. *Id.* Treaties involving a cultural exchange or a prisoner exchange are examples of agreements that operate through individual beneficiaries.

57. *See supra* notes 26-32 and accompanying text.

58. Joshua Eilberg, representative from Pennsylvania and Chairman of the House Subcommittee on Immigration, Citizenship and International Law.

59. 123 CONG. REC. 35017 (1977). The same view is articulated in S. EXEC. REP. No. 32, 96th Cong., 2d Sess. 1 (1980). There, Senator Stone noted that "the parties to these agreements generally concur that the agreements are functioning well and respond to the parties' humanitarian interest in relieving the unusual hardships which a prisoner incarcerated abroad encounters"; that the "exchange provisions enhance the prospects for prisoner rehabilitation"; and finally, that the parties maintain that the agreements serve "to improve bilateral relations . . . ." *Id. See also* S. REP. No. 435, 95th Cong., 1st Sess. 10 (1977). "This transfer of prisoners is a part of American concern about human rights, because it provides an opportunity to improve the status of the prisoners who come under it." *Id.*

deed, to the United States citizen incarcerated in a foreign country where prison conditions may be primitive,[60] parole unheard of[61] and discrimination against Americans common,[62] the benefits of the treaty provisions are substantial. Whatever the purported purpose stated at the beginning of each of the treaties, their actual purpose—from the United States point of view—is humanitarian. The driving force behind the treaties, therefore, was a Government response to the plight of United States citizens and their families.[63]

Of central importance to each treaty was the provision that permitted the transferring state to retain exclusive jurisdiction over proceedings intended to challenge, modify or set aside sentences handed down by that state.[64] This provision generated the greatest amount of constitutional concern in the Senate advice and consent hearings,[65] as well as in the congressional implementation hearings,[66] and these concerns, as well as their treatment by the judiciary in cases brought by transferees, will be discussed below.

B. Performance Limitations—The Involvement of the Legislative and Judicial Branches

Performance limitations are those that affect the ability of a state to perform commitments incurred under a validly concluded treaty.[67] In the United States, limitations affecting treaty performance emanate from three main sources: federalism, Congress and the judiciary.[68]

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60. *See Advice and Consent Hearings, Mexican Treaty, supra* note 27, at 172-237 (statements of former prisoners).

61. *See Prisoner Transfers with Mexico and Canada, supra* note 31, at 1673. President Carter stated that "in Mexico . . . there is not opportunity for parole for good service in prison." *Id.*

62. *See* 123 CONG. REC. 35021 (1977). In discussing Mexican prison conditions, Representative Brown of California stated that "[d]iscrimination against Americans is common; in the words of CBS's 'Sixty Minutes,' American prisoners are regarded as 'walking cash registers.' " *Id.* at 35021-22.

63. *See* 123 CONG. REC. 35020, 35021 (1977) (statement of Rep. Stark).

64. Mexican Treaty, *supra* note 19, art. VI; Canadian Treaty, *supra* note 20, art. V; Bolivian Treaty, *supra* note 21, art. VII; Panamanian Treaty, *supra* note 22, art. VII; Peruvian Treaty, *supra* note 23, art. VII.

65. *See Advice and Consent Hearings, Mexican Treaty, supra* note 27 *passim.*

66. *See Senate Implementation Hearings, supra* note 30 *passim* and *House Implementation Hearings, supra* note 4 *passim.*

67. J. HENDRY, *supra* note 7, at 6, 9-11, 86.

68. *Id.* at 9-11.

1. Federalism and the Treaties

Although the Constitution declares in no uncertain terms that the treaty-making power is vested in the central government,[69] " '[t]he principal attacks on the scope of the Treaty Power flew banners of Federalism and 'States rights.' "[70] The states argued that treaties could not deal with matters reserved to them as contemplated by the constitutional scheme and expressly provided for in the tenth amendment.[71] This argument was repeatedly made and repeatedly rejected by the Supreme Court.[72] Finally, in *Missouri v. Holland,* the Court definitively rejected the argument[73] in simply stating that "[s]ince the Treaty Power was delegated to the federal government, whatever was within it was not reserved to the States by the Tenth Amendment."[74]

The enabling legislation for the prisoner transfer treaties, passed by Congress and signed into law by the President,[75] is directly applicable to the Federal Government. Accordingly, foreign prisoners in the Federal Prison System of the United States become potential beneficiaries immediately upon their country's entering into a similar treaty with the United States. As a corollary, prisoners transferred to the United States are taken into federal custody. Each treaty, however, perhaps based on concerns of federalism on the part of the executive

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69. Article I, § 10 provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation" and that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with . . . a foreign Power." U.S. CONST. art. I, § 10.

70. L. HENKIN, *supra note 6,* at 143.

71. *See* J. HENDRY, *supra* note 7, at 107-08. The tenth amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

72. *See* J. HENDRY *supra* note 7, at 108-09 (citing Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840), License Cases, 46 U.S. (5 How.) 504 (1847) and Passenger Cases, 48 U.S. (7 How.) 283 (1849)).

73. Missouri v. Holland, 252 U.S. 416 (1920). Justice Holmes stated that "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Id.* at 432-34.

74. L. HENKIN, *supra* note 6, at 146. *Missouri v. Holland* notwithstanding, official American negotiators continued to assert that the United States could not, by treaty, regulate local activity reserved for regulation by the state. *Id.* "This position was officially abandoned by the Department of State in 1932." *Id.* at n.67. More recently, United States treaties have included clauses "setting obligations for federal states [that are] different from those of unitary states sometimes with arguments reflecting constitutional (reserved rights) limitations on the treaty-making powers." *Id.* The prisoner transfer treaties contain such clauses. *See infra* text accompanying notes 75-77.

75. *See supra* note 31.

branch,[76] requires individual state approval for transfer of foreign prisoners who are in state custody.[77]

2. Congressional Involvement and Constitutional Concerns in Congress

Although congressional implementation of enabling legislation for treaties was discussed in the section dealing with capacity limitations, this Congressional implementation is a source of limitation on treaty performance, as well.[78] Congress has the power to do what is "necessary and proper" to implement a treaty, even if its action is not within other congressional power.[79] For purposes of conflict between the two, the Supreme Court has treated acts of Congress and treaties as legal equivalents.[80] But the question whether Congress can properly decline to take action necessary to implement a non-self-executing treaty is unresolved.[81]

The greatest concern in Congress over the validity of the treaties[82]

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76. *See supra* note 74 and accompanying text.

77. *See, e.g.*, Peruvian Treaty, *supra* note 23, art. V, para. 6, which provides that "[i]n cases where a Peruvian national has been sentenced by a state of the United States of America, the approval of the appropriate state authorities for his transfer will be required as well as that of the Federal authority." *Id.* A similar provision appears in other treaties: Mexican Treaty, *supra* note 19, art. IV, para. 5; Canadian Treaty, *supra* note 20, art. III, para. 5; Bolivian Treaty, *supra* note 21, art. V, para. 7; Panamanian Treaty *supra* note 22, art. V, para. 7.

As of October 1, 1984, 21 states have legislation permitting state prisoner transfer under the prisoner transfer treaties. They are in alphabetical order: Arizona, California, Colorado, Florida, Kansas, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, South Carolina, Texas, Virginia, Washington, Wisconsin and Wyoming. *States Authorized by State Legislation to Transfer Foreign Citizen Prisoners to the Countries of Their Citizenship Under Prisoner Transfer Treaties in Force Between the United States and Certain Foreign Countries,* United States Department of Justice, Office of International Affairs, Criminal Division (1984).

78. *See* J. HENDRY, *supra* note 7, at 10.

79. 252 U.S. 416.

80. Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1856): "A treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can go behind an act of Congress." *Id.* at 372; Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1899). When a conflict arises between a valid treaty and a valid act of Congress, "the last expression of the sovereign will must control." *Id.* at 600.

81. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-4, at 168 (1978).

82. *See Senate Implementation Hearings, supra* note 30, at 124 (statement of Barbara M. Watson, Administrator, Bureau of Security and Consular Affairs, Department of State).

was generated by the constitutional implications of the provisions regarding the "retention of exclusive jurisdiction by the transferring country."[83] This provision was indispensable to any agreement, because neither the United States nor its treaty partner could accept review of each other's judgment.[84] The major constitutional issues raised by the provision were: (1) the legitimacy of imprisoning a United States citizen based on a foreign conviction that was possibly obtained by procedures lacking the safeguards of the Bill of Rights[85] and (2) the limitations placed on United States citizens incarcerated in United States institutions, to have access to United States courts to challenge their confinement.[86] The position of the Department of State, with respect to the due process issue, was that a trial conducted in a foreign country, with lawful jurisdiction over an offender and the offense, was outside the scope of applicability of the United States Constitution.[87] With respect to the second issue, the State Department felt that a waiver agreement could provide an adequate cure.[88] Herbert Wechsler[89] testified that the fifth amendment was inapplicable to foreign criminal procedure[90] and that the provision placed no limitation on the

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83. *See, e.g.*, Mexican Treaty, *supra* note 19, art. VI, which provides that "[t]he Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts." *Id.* A similar provision appears in other treaties: Canadian Treaty, *supra* note 20, art. V; Bolivian Treaty, *supra* note 21, art. VII; Panamanian Treaty, *supra* note 22, art. VII; Peruvian Treaty, *supra* note 23, art. VII.

84. *See supra* note 83. *See also House Implementation Hearings*, *supra* note 4, at 136 (Department of Justice responses to questions raised by the House Judiciary Committee).

85. The fifth amendment provides that "[n]o person shall . . . be deprived of . . . liberty . . . without due process of law." U.S. CONST. amend. V. "[V]irtually every Bill of Rights guarantee pertaining to the criminal process has been found necessary to due process of law . . . ." C. WHITEBREAD, CRIMINAL PROCEDURE 2 (1980).

86. The Constitution assures the availability of the writ of habeus corpus: "The Privilege of the Writ of Habeus Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. Congress authorized the federal courts to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States." 28 U.S.C. §§ 2241(c)(3), 2254 (1982); *see* C. WRIGHT, LAW OF FEDERAL COURTS 330, 331 (1983). "The scope of the writ, insofar as the statutory language is concerned, has not been altered since 1867." *Id.* at 331.

87. *Advice and Consent Hearings, Mexican Treaty, supra* note 27, at 49.

88. *Id.*

89. Herbert Wechsler, Professor of Law, Columbia University School of Law, has held the Harlan Fiske Stone Chair of Constitutional Law since 1957 and has written extensively in the fields of federal jurisdiction, constitutional law and criminal law. *See House Implementation Hearings*, *supra* note 4, at 248.

90. Professor Wechsler stated:

It has been suggested that the due process clause of the Fifth Amendment pro-

availability of the writ of habeas corpus.[91] In recommending that the Senate consent to ratification of the treaties,[92] the committee noted that the treaty provisions had the effect of denying a transferee to the United States the opportunity to challenge the validity of his conviction in a habeas corpus proceeding. The committee went on to state, however, that a valid waiver could cure the infirmity.[93]

At the implementation hearings, the waiver issue was the primary concern.[94] The Department of Justice, emphasizing the importance of ensuring the voluntariness of a potential transferee's consent,[95] strongly recommended that the Government advise a transferee on the

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hibits . . . imprisonment [based on a foreign conviction] 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.

Id. at 248.

91. Professor Wechsler stated:

> The writ remains available; it is simply 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)).

Id. at 93-94. For an opposing view, *see* Abramovski & Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275, 301 (1979). *But see* Vagts, *A Reply to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty"*, 64 IOWA L. REV. 325 (1979); and Robbins, *A Constitutional Analysis of the Prohibition Against Collateral Attack in the Mexican-American Prisoner Exchange Treaty*, 26 U.C.L.A. L. REV. 1 (1978). Allen C. Swan, Professor of Law, University of Miami Law School, also testified before the Senate Foreign Relations Committee on the due process and habeas corpus issues. Swan concluded that the treaty was constitutionally defensible and that if the Senate felt as a matter of policy that it was desirable to proceed with the treaty, he could perceive no "important constitutional barrier" to its implementation. *Advice & Consent Hearings, Mexican Treaty, supra* note 27, at 94, 97. Professor Swan's views are set forth in greater detail in Stotzky & Swan, *Due Process Methodology and Prisoner Exchange Treaties; Confronting and Uncertain Calculus*, 62 MINN. L. REV. 732 (1978).

92. S. EXEC. REP. No. 10, 95th Cong., 1st Sess. 9 (1977). "All the legal opinions received by the committee concur in the constitutionality of the treaties." *Id.*

93. *Id.*

94. *Senate Implementation Hearings, supra* note 30, at 2 (statement of Sen. Biden).

95. "A transfer may be accomplished only if the offender consents with full knowledge of the consequences of the transfer." *Id.* at 25 (statement of Peter Flaherty, then Deputy Attorney General, United States Department of Justice). "The consent argument proceeds on the basis of the fact that nobody will be transferred against his or her own will." *Id.* at 124 (statement of Barbara M. Watson).

consequences of consent,[96] as well as on specific procedures to be followed in obtaining consent to transfer.[97] The Department of State was responsible for providing counsel to indigent prisoners abroad.[98] M. Cherif Bassiouni[99] expressed reservations about the participation by government officials in this part of the process, fearing that conflict of interest would taint the voluntariness of the waiver and consent.[100] He, therefore, recommended that "[t]he consent should be done by a judge or someone appointed by the judge"[101] and that appointment of counsel be done in the usual manner, through federal defender projects and other volunteer legal services.[102]

The subcommittee also considered several memoranda of law that examined the legal issues in great detail.[103] A memorandum submitted on behalf of the Department of State concluded that, by itself, transferee consent is an adequate basis for continuing a transferee's impris-

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96. *Id.* at 26-27 (statement of Peter Flaherty).

97. *Id.* 18 U.S.C. § 4108 (1982) sets forth the procedures to be followed in verifying a transferee's consent to transfer from a foreign country to the United States. *See infra* note 113.

98. *Senate Implementation Hearings, supra* note 30, at 125 (statement of Barbara M. Watson). 18 U.S.C. § 4109 (1982) states, in relevant part, that "in proceedings to verify consent of an offender for transfer, the offender shall have the right to advice of counsel."

99. M. Cherif Bassiouni, Professor of Law, De Paul University School of Law, is the author of numerous books and law review articles on criminal law. *See Senate Implementation Hearings, supra* note 30, at 145.

100. *Congressional Implementation Hearings, Senate, supra* note 30, at 138 (statement of M. Cherif Bassiouni). Bassiouni's favorable views are set forth in detail in Bassiouni, *Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada*, 11 VAND. J. TRANSNAT'L L. 193 (1978). For an opposing view, see Paust, *The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government*, 12 VAND. J. TRANSNAT'L L. 67 (1979).

101. *Senate Implementation Hearings, supra* note 30, at 146 (statement of M. Cherif Bassiouni).

102. *Id.* at 125. Procedures for appointment of counsel are set forth in 18 U.S.C. § 4109 (1982).

103. *Senate Implementation Hearings, supra* note 30, at 177-252. The first of these was *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 HARV. L. REV. 1500 (1977). *Senate Implementation Hearings, supra* note 30, at 178-205. The second, a memorandum of law, was the treaty between the United States and the United Mexican States Providing for the transfer of penal sanctions, prepared by Cetlev F. Vagts and dated December 15, 1976 (the author was Counselor on International Law of the Department of State when he wrote the memorandum) [hereinafter Vagts]. *Senate Implementation Hearings, supra* note 30, at 206-16. The third was a Congressional Research Service Report on the legal issues raised by the treaty, prepared by Charles Doyle, the Legislative Attorney of the American Law Division of the Library of Congress [hereinafter Doyle]. *Senate Implementation Hearings, supra* note 30, at 217-52.

onment in the United States.[104] A Congressional Research Service report distinguished waiver from consent and examined the former in the light of the argument that conditions in Mexican jails might vitiate the waiver's voluntariness.[105] The report concluded that it would not, basing its decision on judicial authority.[106] Bassiouni cautioned, however, that in circumstances significantly below minimum United States standards, a waiver may not hold up.[107] He, therefore, favored separating the waiver from the consent to transfer, although requiring execution of both as a pre-condition to transfer.[108]

Wechsler found no significant constitutional issue in the provision.[109] He applied a "common sense view" that a treaty conferred a substantial benefit on transferees *with their consent* and, accordingly, found it "implausible upon its face to perceive a potential violation of the Bill of Rights in such an exercise of the treaty power."[110] If that general view is correct, a provision limiting collateral attack on a conviction or sentence introduces no additional complexity.[111] He believed there is no suspension of the writ of habeas corpus: treaty and statute being valid, detention does not violate the Constitution, laws or treaties of the United States, so that a prisoner's application for the writ must be denied.[112]

In short, in light of the conflicting opinions expressed before its

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104. Vagts, *supra* note 103, at 215. Vagts' views are set forth in greater detail in Vagts, *A Reply to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty,"* 64 IOWA L. REV. 275, 325 (1979).

105. Doyle, *supra* note 103, at 235.

106. The report cited United States *ex rel.* Delman v. Butler, 390 F. Supp. 606 (E.D.N.Y. 1975), citing Brady v. United States, 397 U.S. 742 (1970). The *Delman* court stated that "the coercive impact of the Hobson's choice of compromising valuable constitutional rights out of fear of greater punishment should they be asserted in full, does not of itself constitute impermissible coercion." *Delman*, 309 F. Supp. at 609.

107. *Senate Implementation Hearings, supra* note 30, at 138 (statement of M. Cherif Bassiouni; Professor Bassiouni did not cite any authority in support of his caveat).

108. *Id. See also Congressional Implementation Hearings, House, supra* note 30, at 144 (Department of Justice responses to questions raised by the House Judiciary Committee). For a refinement of Bassiouni's views, see Bassiouni, *A Practitioner's Perspective on Prisioner Transfer*, 4 J. CRIM. DEF. 127 (1978).

109. *See House Implementation Hearings, supra* note 4, at 248-49 (statement of Herbert Wechsler).

110. *Id.*

111. *Id.*

112. *Id.* Professor Abernathy placed the entire controversy in perspective when he addressed the questions of a citizen's right of access to courts and congressional power vis-à-vis the courts. *House Implementation Hearings, supra* note 4, at 223 (statement of Abernathy). Professors Wechsler and Abernathy agreed, however, that legislatively mandated special procedures in respect to transferee consent would ensure its acceptance constitutionally. *Id.* at 230 (Prof. Abernathy), 249 (Prof. Wechsler).

committees, Congress passed the implementing legislation[113] with the certainty that United States transferees would swiftly challenge their foreign convictions before United States courts.[114] That certainty was vindicated in a rash of habeas corpus actions.

3. Judicial Involvement with regard to Constitutional Challenges in the Courts

As a third source of limitation on treaty performance, the judiciary may find that the subject matter of a treaty contravenes a provision in the Constitution and that its application as national law is, thus, unconstitutional and void.[115] The Supreme Court addressed the issue of constitutional limitations on treaties in several opinions[116] before *Reid v. Covert*,[117] for example, firmly established that treaties are subject to the constitutional limitations that apply to all exercises of federal power, principally the prohibitions of the Bill of Rights.[118]

In *Mitchell v. United States*,[119] the petitioner, a transferee under the Mexican treaty, filed for a writ of habeas corpus, challenging his

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113. *See supra* notes 4, 30 and 31. The statutory text of the section dealing with the consent issue is at 18 U.S.C. § 4108 (1982).

114. 123 CONG. REC. 35022 (1977). "There is little doubt that American prisoners that are transfered from Mexican prisons will attempt, in our courts, to challenge the constitutionality of their convictions." *Id.* (statement of Rep. Brown). Professor Bassiouni also notes that "there is no question—and I think both the treaties and the legislation contemplate it—that there is going to be a challenge through *habeas corpus* petitions challenging the conviction and sentence." *Senate Implementation Hearings, supra* note 30, at 146 (statement of M. Cherif Bassiouni).

115. J. HENDRY, *supra* note 7, at 10. The Supreme Court has stated that interpretation of treaties is "the peculiar province of the judiciary," and not of Congress or the Secretary of the Interior. Jones v. Meehan, 175 U.S. 1, 2 (1899) (the issue of *Jones* involved rights under an Indian treaty).

116. In Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1876), the Court stated that it would require "a very clear case indeed" before it would hold a treaty void. *Id.* at 237. In Cherokee Tobacco, 78 U.S. (11 Wall). 616 (1871), the Court stated that "[i]t need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." *Id.* at 620-21. In dictum, the Court has embraced, as a constitutional limitation, Jefferson's view that a treaty "must deal with questions properly the subject of negotiations with a foreign country." L. TRIBE, *supra* note 81, at 169 (citing Geofroy v. Riggs, 133 U.S. 258, 267 (1890)). The *Geofroy* Court also stated that "it would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids . . . ." *Id.* at 267.

117. 354 U.S. 1 (1957).

118. 354 U.S. at 16-17. In *Reid,* Justice Black, writing for himself and three other Justices stated that "no agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 16-17.

119. 483 F. Supp. 291 (E.D. Wis. 1980).

conviction and sentence by Mexican courts on the grounds of denial of due process, coupled with his continued confinement in the United States. He claimed that his waiver had been involuntary, because he would have agreed to nearly anything to secure his release from the Mexican prison.[120] The court accepted Mitchell's version of the facts, which clearly demonstrated procedures grossly contrary to standards embodied in the Bill of Rights of the United States. The court, nevertheless, denied the writ,[121] finding "Mitchell's constitutional challenge to article VI meritless."[122] Mitchell's conviction was determined to have rested on legitimate Mexican jurisdiction to adjudicate,[123] rendering it immune from constitutional attack in a United States court.[124] In response to Mitchell's assertion that his waiver had been involuntary, the court reviewed the record of the magistrate's hearing[125] and concluded that Mitchell had knowingly and voluntarily waived his rights, if any, to challenge his Mexican conviction in an American court.[126]

In *Pfeifer v. United States Bureau of Prisons*,[127] the constitutional challenge was virtually identical to that in *Mitchell*. Pfeifer, another transferee under the Mexican treaty, appealed a denial of his petition for a writ of habeas corpus,[128] contending that those portions of the treaty and its enabling legislation that deny transferred prisoners the right to challenge their foreign conviction in United States courts were unconstitutional.[129] As in *Mitchell*, Pfeifer argued that his conviction was obtained in violation of due process and that his consent was not voluntarily given.[130] With respect to the due process argument, the appellate court held that "the Treaty does not create new rights which

120. *Id.* at 293-94.

121. *Id.* at 292.

122. *Id.* at 294.

123. *Id.* at 294 (citing Wilson v. Girard, 354 U.S. 524 (1957) for the proposition that a sovereign state has complete jurisdiction to adjudicate within its borders). Under the territorial principle of international law, a state has exclusive sovereignty within its own boundaries. *See* BASSIOUNI & NANDA, *supra* note 38.

124. 483 F. Supp. at 294 (citing Neely v. Henkel, 180 U.S. 109 (1901), in which the Supreme Court stated that the Constitution has "no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country").

125. The magistrate's hearing is mandated by 18 U.S.C. § 4108 (1982). *See supra* note 113.

126. The court held that petitioner's Hobson's choice alone "does not vitiate the voluntariness of the consent, since the Constitution does not forbid 'the making of difficult judgments.' " *Mitchell*, 483 F. Supp. at 294 (quoting McMann v. Richardson, 397 U.S. 759, 769 (1970)).

127. 615 F.2d 873 (9th Cir. 1980), *cert. denied*, 447 U.S. 908 (1980).

128. *Id.* at 875.

129. *Id.*

130. *Id.* at 875-76.

enable a foreign convict to have a review of an otherwise final foreign judgment."[131] The court reasoned that consent to the conditions of the treaty are a prerequisite to transfer and that the consent "constitutes a waiver of, or at least an agreement not to assert, any constitutional rights the offender might have regarding his or her conviction."[132]

Having thus established its view of consent, the critical issue became the validity of Pfeifer's waiver. As in *Mitchell*, the court examined the record of the magistrate's hearing and concluded that the waiver was valid.[133] The *Pfeifer* court, however, avoided addressing Pfeifer's due process challenge to his conviction by simply refusing to recognize it.[134] The court's reluctance to do so was apparent throughout the opinion.[135] Unlike the *Mitchell* opinion, *Pfeifer* contained no detailed recital of the petitioner's allegations, although brief mention was made of a confession obtained through torture.[136] The court focused rather on Pfeifer's "agreement" with the United States. In a contract-like analysis, it treated the offer of transfer by the United States as conditioned on the transferee's promise not to challenge his foreign conviction in a United States court. Acceptance by the transferee occurred when he signed the agreement. Because the transferee *may* have been waiving constitutional rights, however, basic fairness required that he understand the consequences of his acceptance and that his action in signing be voluntary.[137]

A contrary decision, *Velez v. Nelson*,[138] precipitated an immediate

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131. *Id.* at 876. The court stated that "a constitutional question arises when a party is required to relinquish a *vested* right as a condition for obtaining a benefit." *Id.* Furthermore, "those who accept the opportunity presented by the treaty lose nothing by consenting to limit themselves solely to Mexican remedies after the transfer." *Id.*

132. *Id.* at 876.

133. *Id.* at 877.

134. The district court held that the United States Constitution has no relation to Pfeifer's foreign conviction for a foreign crime. Pfeifer v. United States Bureau of Prisons, 468 F. Supp. 920, 923 (S.D. Cal. 1979).

135. The Court of Appeals for the Ninth Circuit stated that "the constitutionality of the conviction which led to the foreign incarceration is not before us." *Pfeifer*, 615 F.2d at 876.

136. *Id.* at 875.

137. *Id.* at 876. The court stated that "a valid waiver of constitutional rights must be voluntarily and knowingly made." *Id.* (citing McCarthy v. United States, 394 U.S. 459 (1969)).

138. 475 F. Supp. 865 (D. Conn. 1979). The facts clearly showed that petitioners transferees under the Mexican treaty were physically abused during their interrogation by Mexican authorities. The court found that the petitioners lived in constant fear, justifiably believing that they would be killed if they remained in Mexico. As a result, Judge Daly concluded that "petitioners would have signed anything, regardless of the consequences, to get out of Mexico," and granted habeas corpus. *Id.* at 874.

reaction from the Mexican Government in which it threatened to suspend future transfers under the treaty.[139] In an appeal from that decision, *Rosado v. Civiletti*,[140] the Court of Appeals for the Second Circuit unanimously reversed the *Velez* court. Judge Kaufman noted that the petitioners had "demonstrated that their convictions under the laws of the sovereign state of Mexico, manifested a shocking insensitivity to their dignity as human beings and were obtained under a criminal process devoid of even a scintilla of rudimentary fairness and decency."[141] In a lengthy opinion, which includes a detailed factual account by the transferees, as well as some legislative history and treaty highlights,[142] the court reasoned that even though the treaty is a valid exercise of the treaty-making power,[143] the resulting incarceration of American citizens under federal authority is based solely on a foreign conviction, the basis of which cannot be tested in a United States court.[144] The court, nevertheless, held that "a petitioner incarcerated under federal authority pursuant to a foreign conviction cannot be denied all access to a United States court when he presents a persuasive showing that his conviction was obtained without the benefit of any process whatsoever."[145]

Having determined that the petitioners had made such a showing, the court moved onto the merits of their claim, shifting its focus to the issue of consent. The court applied an analysis somewhat akin to that applied by the Ninth Circuit in *Pfeifer*,[146] placing the burden on the Government to show that "it [had] relied to its detriment" upon the petitioners' promise in their consent agreement[147] and that the transferee's consent had been voluntary. The test for voluntariness applied by the *Rosado* court, however, unlike the one applied by the District Court in *Velez*, was based upon meeting the requirements laid down by the Supreme Court in *North Carolina v. Alford*,[148] a case concern-

139. In accordance with article X of the Mexican treaty, Mexico was entitled to give notice of termination within ninety days prior to November 30, 1980. Mexican Treaty, *supra* note 19, at 7408.

140. 621 F.2d 1179 (2d Cir.) *cert. denied*, 449 U.S. 856 (1980).

141. *Id.* at 1182.

142. *Id.* at 1183-89.

143. *Id.* at 1193.

144. *Id.* at 1194.

145. *Id.* at 1198.

146. *See supra* text accompanying notes 126-36.

147. 621 F.2d at 1199.

148. 400 U.S. 25 (1970). *See also* FED. R. CRIM. P. 11. In *Velez*, the lower court had applied the test for voluntariness laid down by the Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). *Schneckloth* concerned the validity of a citizen's consent to a police search of his automobile. The Court stated that "[a]mong the circum-

ing the voluntariness of guilty pleas. *Alford* dictated that voluntariness should reflect a deliberate, intelligent choice between available alternatives. In the context of *Rosado*, the choice was between continued incarceration or repatriation. As both were legitimately available to petitioners, their consent to transfer was judged to be voluntarily and intelligently made.[149] The *Rosado* court also stated that the Government had relied detrimentally on the prisoners' consent, and, therefore, concluded that invalidation would defeat the United States interest in improving relations with Mexico.[150] In conclusion, the court commented that the petitioners were not intended to be the only persons whose lot was to be bettered under the treaty. Granting them a writ of habeas corpus would result in their being the last transferees under the Mexican treaty.[151]

CONCLUSION AND EVALUATION

With regard to the constitutional issues, the reasoning of *Pfeifer* and *Rosado* are unfocused. The *Pfeifer* court declined to review the foreign conviction, stating that its concern was the constitutionality of the challenged portions of the treaty.[152] It also declined to decide whether the United States Constitution has relation to the validity of a foreign conviction for a foreign crime.[153] The court did, however, state that "Americans who are incarcerated in Mexican prisons . . . have no right to relief from United States Courts."[154] *Rosado*, on the other hand, upheld the treaty as a valid exercise of the treaty-making power,[155] but only to the extent that it does not circumvent the procedural and substantive guarantees of the Bill of Rights.[156] This would imply that the United States Bill of Rights is operative in foreign countries.[157]

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stances to be considered in determining voluntariness is length of detention, prolonged nature of questioning and the occurrence of physical punishment." *Id.* at 226. In deciding to apply the voluntariness test laid down in *Alford* rather than that in *Schneckloth*, Judge Kaufman reasoned that *Schneckloth* was a fourth amendment case in which the Supreme Court was concerned with curtailing overzealous law enforcement officials and "[because] we are in no position to deter by our decision the acts complained of by petitioners, [*Schneckloth* is inapposite.]" *See Rosado*, 621 F.2d at 1189.

149. 621 F.2d at 1191-92.

150. *Id.* at 1200.

151. *Id.*

152. *See supra* text accompanying notes 139-41.

153. 615 F.2d at 876.

154. *Id.*

155. 621 F.2d at 1193.

156. *Id.*

157. In United States v. Toscanino, 500 F.2d 267, (2d Cir. 1974), the court stated that

Notwithstanding the differences in analysis by the Second and Ninth Circuits, denial of certiorari by the Supreme Court in both cases, as well as a decline in habeas corpus actions by treaty transferrees, lead to the conclusion that the treaties are taken to be valid. The last reported case involving habeas corpus under a prisoner transfer treaty examined the statutory requirement of custody for issuance of the writ.[158]

In *Tavarez v. United States Attorney General*,[159] the Court of Appeals for the Fifth Circuit denied a writ of habeas corpus to a Mexican national transferee under the Mexican treaty who, after transfer, escaped from a Mexican prison and re-entered the United States.[160] In analyzing the legal basis for custody over Tavarez, the court framed the question in terms of whether the Attorney General's authority to exercise custody over the petitioner was lost after the initial transfer was completed.[161] The court held that the authority was not lost.[162] After *Tavarez*, it appears that a writ of habeas corpus will be unavailable to transferees under the treaties, where the prisoner has been given the opportunity to have the legality of his confinement reviewed by a federal court.

Taken together, *Pfeifer*, *Rosado* and *Tavarez* effectively establish the constitutional validity of the treaties. Future litigation will probably be modest in scope, turning on the actual compliance with statutory procedures in each case. The remedy to a prevailing transferee, however, may very well be his return to the transferring country.[163]

"[t]he Constitution, of course, applies only to the conduct abroad of agents acting on behalf of the United States. It does not govern the independent conduct of foreign officials in their own country." *Id.* at 208 n.9. In Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972), the court pointed out the difference between a United States trial abroad, which must conform with the Constitution, Reid v. Covert, 354 U.S. 1 (1957), and a foreign trial of an American in which "the [United States] constitutional provisions . . . [exert] no force of their own upon the Federal Republic [of Germany] in that exercise of its sovereignty." *Holmes*, 459 F.2d at 1218.

158. *See supra* note 86. *See also* 39 C.J.S. Habeus Corpus § 18 (1955). What constitutes "custody," which is generally required as a condition to the granting of the writ, has been left open by statute and is subject to judicial determination. *Id.* at n.17.

159. 668 F.2d 805 (5th Cir. 1982).

160. *Id.* at 806.

161. *Id.* at 809. The Government argued that when it initially transferred petitioner pursuant to the treaty it never relinquished "constructive custody" over him. *Id.* at 807.

162. *Id.* at 809 (citing Floyd v. Henderson, 456 F.2d 1117 (5th Cir. 1972), which held that "a sovereign does not lose its power to keep a convict in custody by turning the convict over to another sovereign for the service of the sentence"). *Tavarez*, 668 F.2d at 809.

163. 18 U.S.C. § 4114 (1982) provides in part:

Upon a final decision by the courts of the United States that the transfer of

The effectiveness of an agreement is directly related to how well it achieves its purposes. Immediately upon entering into a prisoner transfer treaty, the mutual governmental interests in improving relations between signatory countries is realized. The humanitarian interest, however, is the main purpose[164] of the prisoner transfer treaties, and, accordingly, their use by eligible offenders is a more accurate measure of their effectiveness. As of December 31, 1983, pursuant to the treaties, 766 Americans have transferred to the United States,[165] and 509 foreign nationals have been transferred out of the United States.[166] Treaty use has been greatest between the United States and its two bordering countries, Mexico and Canada.[167] Although the dynamics of criminal activity make quantitative analysis imprecise, the number of United States citizens incarcerated in treaty transfer nations today is significantly fewer than the number imprisoned at the time President Carter signed the treaty legislation into law.[168]

There can be no doubt that the treaties are desirable and effective to governmental, as well as to individual, beneficiaries. The newest treaties[169] will be as effective in serving their intended beneficiaries.

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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.

Id. See also supra notes 157-61 and accompanying text.

164. *See supra* notes 51-63 and accompanying text.

165. These figures were compiled by the Office of International Affairs, the United States Bureau of Prisons and the United States Department of State, and were furnished by Rex L. Young, Deputy Director, Office of International Affairs, Criminal Division, United States Department of Justice [hereinafter Figures]. Broken down alphabetically by transferring country: Bolivia: 22; Canada: 89; Mexico: 627; Peru: 22; Panama: 0; Turkey: 6.

166. *Id.* Transferred to: Bolivia: 6; Canada: 94; Mexico: 395; Peru: 0; Panama: 14; Turkey: 0.

167. *Id.*

168. *See Prisoner Transfers with Mexico and Canada, supra* note 31, at 1673. President Carter stated that "we have 575 Americans in Mexican prisons and we have 250 Americans in Canadian prisons." *Id.* As of October 16, 1984, 312 American citizens were in Mexican prisons and 190 were in Canadian prisons. Figures, *supra* note 164. In addition, 44 Americans were in Peruvian prisons. S. EXEC. REP. No. 32, 96th Cong., 2d Sess. 2 (1980). As of October 16, 1984, that number was 22. Figures, *supra* note 164. Approximately 40 Americans were in Bolivian prisons. S. EXEC. REP. No. 22, 95th Cong., 2d Sess. 2 (1978). As of October 16, 1984, that number was 9. Figures, *supra* note 164.

169. *See supra* notes 2 and 3 and accompanying text.