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Treaties— Mexican-American Treaty on the Execution of Penal Sentences— Custody of a Prisoner Under the Mexican-American Treaty is Unlawful When Consent to the Transfer is Coerced

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Treaties– Mexican-American Treaty on the
Execution of Penal Sentences– Custody of a
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David Vaida

Abstract

Looks at the arrest of Raymond Bayron Velez, Efran Morales Caban and Pedro Rosado and their relation to the Treaty between the United States of America and the United States Mexican States on the Execution of Penal Sentences (Treaty).

RECENT DEVELOPMENT

TREATIES—MEXICAN-AMERICAN TREATY ON THE EXECUTION OF PENAL SENTENCES—CUSTODY OF A PRISONER UNDER THE MEXICAN-AMERICAN TREATY IS UNLAWFUL WHEN CONSENT TO THE TRANSFER IS COERCED. *Velez v. Nelson*, 475 F. Supp. 865 (D. Conn. 1979).

Raymond Bayron Velez, Efran Morales Caban and Pedro Rosado, all American citizens, were arrested¹ in Mexico on November 18, 1975.² After being imprisoned for about two months, during which they were subjected to torture³ and exploitation,⁴

1. The court found that petitioners Velez and Caban, flying from New York City to Acapulco, met for the first time at the airport while awaiting departure. *Velez v. Nelson*, 475 F. Supp. 865, 867 n.4 (D. Conn. 1979). While stopping over in Mexico City, six armed men in civilian clothes arrested them without producing an arrest warrant, and without charging them with any crime. *Id.* at 867.

Petitioner Rosado was arrested in a similar manner after arriving in Acapulco on a direct flight from New York City. *Id.* at 868. All descriptions of petitioners' confinement and interrogation have the weight of a court finding and not a mere allegation. *See id.* at 867 n.3.

2. Since "[o]n the eighth day, November 26, petitioners were taken to the district attorney's office . . .," *id.* at 869, November 18 is calculated to have been their date of arrival in Mexico.

3. At the Mexico City airport Caban was handcuffed, bound by his legs and asked about the identity of a certain individual. Upon denying any knowledge of the individual, an electric cattle prod was applied repeatedly to his mouth and testicles. The interrogators beat Caban with their fists and threatened to kill him. Unable to extract a positive identification, they hung him by one arm from the ceiling for the entire day. As a result, Caban suffered intermittent loss of consciousness, his arm broke and his hand ripped apart from his wrist. Velez received similar treatment at the airport. *Id.* at 867-68. Rosado was taken to an interrogation center in Mexico City known as *Los Separos*, where he was asked by his interrogators if "he was ready to tell the truth." An inquiry by Rosado into the information sought resulted in his being beaten, ordered to drop his pants and an electric cattle prod applied to the lower parts of his body. *Id.* at 868.

In the Mexican prison of Lecumberri a group of inmates and their leader, known as the "Major," terrorized petitioners and other inmates. The prison guards were in concert with the "Major" and his men, who forced petitioners to work *faena*, whereby for hours at a time they would squat and move across the prison floor wiping up soap and water which the guards deliberately poured over them. Failure to move quickly or steadily resulted in punishment. *Id.* at 869-70.

4. At Lecumberri petitioners had to pay large sums of money for basic necessities, including food, clothing and cell space, and to escape *faena*. *Id.* at 870. Each petitioner initially paid two thousand dollars for their cells, *id.* at n.13, spending a to-

they were formally charged by the Mexican government with conspiring to import cocaine.⁵ Tried and sentenced to nine years imprisonment⁶ by a judge *in absentia*,⁷ they remained in Mexican jails for two years before being transferred to the United States under the Treaty between the United States of America and the United Mexican States on the Execution of Penal Sentences (Treaty).⁸

tal of approximately four thousand dollars each to survive throughout their imprisonment in Mexico. *Id.* at 872 n.19.

5. *Id.* at 870.

6. Rosado's sentence was subsequently reduced to eight years and three months; Velez and Caban had theirs reduced to eight years and nine months. *Id.* at 871 n.16.

7. The judge who presumably convicted and sentenced petitioners was not present at *los hugados [sic]*, the location where petitioners were informed of their crime, *id.* at 870, where they were tried without a jury and where their guilt was pronounced. *Id.* at 871.

8. Treaty on the Execution of Penal Sentences, November 25, 1976, United States-Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718 [hereinafter cited as Treaty]. The mechanics of the Treaty are set out in 18 U.S.C. § 4108 (Supp. I 1977):

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

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

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

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

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

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

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

Once in the United States, petitioners filed a petition for habeas corpus relief challenging their custody under the Treaty.⁹ They claimed that the intolerable conditions in the Mexican prisons coerced them into consenting to transfer.¹⁰ Judge T. F. Gilroy Daly found for petitioners and granted habeas relief.¹¹

The Treaty requires an American offender imprisoned in Mexico to consent to waive the fundamental right¹² of habeas corpus¹³ prior to the transfer to the United States.¹⁴ Once transferred, the offender can nevertheless challenge the voluntariness of the waiver.¹⁵ A successful challenge releases the offender from Ameri-

(d) The verifying officer shall make the necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements, and that the offender accepts the transfer subject to the conditions set forth in subsection (b). The consent and acceptance shall be on an appropriate form prescribed by the Attorney General.

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

9. *Velez v. Nelson*, 475 F. Supp. 865, 867 (D. Conn. 1979).

10. *Id.*

11. *Id.* at 874.

12. These rights have been found in a variety of places. *See, e.g.*, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973) (the text of the Constitution); *United States v. Guest*, 383 U.S. 745, 758 (1966) (what is implicit in the premises underlying the Constitution); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965) (the "penumbras" of the Bill of Rights); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784, 793-94 (1969) (the concept of ordered liberty); *Pierce v. Society of Sisters*, 268 U.S. 510, 520 (1924) (the history and traditions of Anglo-American jurisprudence); *Twining v. New Jersey*, 211 U.S. 78, 106 (1908) (the very idea of free government). *See generally* *Roe v. Wade*, 410 U.S. 113, 152-54 (1973); Note, *Of Interests Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U.L. REV. 462 (1977).

13. U.S. Const. art. I, § 9, cl. 2. Known as the "Great Writ," *see, e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.), habeas corpus means literally, "you have the body." Basically, it is a procedure for obtaining a judicial determination of the legality of an individual's custody. *See generally* *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970) [hereinafter cited as *Federal Habeas Corpus*].

14. Treaty, *supra* note 8, art. VI reads in part: "The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts." To this article the American offender in Mexico must give "his express consent to his transfer . . .," *id.* art. IV, para. 2, so as to allow his sentence, "imposed in the United Mexican States . . . [to] be served in penal institutions . . . of the United States of America . . ." *Id.* art. I, para. 1.

15. *See* 18 U.S.C. § 4108(b)(3) (Supp. I 1977); note 46 *infra* and accompanying text.

can custody.¹⁶ Therefore, *Velez v. Nelson* raises the serious issue of a prospective breach of the Treaty by the United States.¹⁷

Velez also raises the question of whether the conditions in Mexican prisons make the required waiver of constitutional rights inherently defective under the "grisly choice" test¹⁸ originated in *Fay v. Noia*.¹⁹ A court finding in the affirmative would cause the Treaty to be struck down as unconstitutional.

I. THE TREATY

Torture and harassment of Americans in Mexican prisons is well known and has been documented in several Congressional hearings.²⁰ These hearings and numerous individual complaints prompted Congress to pressure the Department of State into evaluating the problem.²¹ The Department of State determined

16. Custody of the offender by American authorities is based on the valid consent to that custody. As the court in *Velez* observed, "[c]onsent, in fact, is the lynchpin of the Treaty. It is essential to conferring upon the receiving state custodial jurisdiction over the offender." *Velez v. Nelson*, 475 F. Supp. 865, 872 (D. Conn. 1979).

17. The Treaty was not breached the moment the court in *Velez* found for petitioners since, under the right-of-return provision of the Treaty's implementing legislation, petitioners may be returned to Mexico "[u]pon a final decision by the courts of the United States . . ." 18 U.S.C. § 4114(a) (Supp. I 1977). Since the case will undoubtedly be appealed, the decision in *Velez* is not final. If it were final, see note 56 *infra*.

18. Though in existence prior to *Fay v. Noia*, 372 U.S. 391 (1963), from which the test name was taken, the test looks to what is at stake when a petitioner waives a right to see whether there was a meaningful choice to make. *E.g.*, *Garrity v. New Jersey*, 385 U.S. 493 (1967) (no waiver when police officers were given a choice between self-incrimination and retaining employment); *Green v. United States*, 355 U.S. 184 (1957) (no waiver when defendant was given a choice between appealing his conviction and retaining his right to be free from double jeopardy). See generally *Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977); *Spritzer, Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978).

19. 372 U.S. 391 (1963).

20. See *U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International and Military Affairs of the House Comm. on International Relations*, (pt. II), 94th Cong., 1st & 2d Sess. 45-92 (1975-1976); *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. 253 *et seq.* (1977) [hereinafter cited as *Transfer of Offenders*]; *Penal Treaties with Mexico and Canada: Hearings on Ex. D and Ex. H Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 172 *et seq.* (1977) [hereinafter cited as *Penal Treaties*].

21. *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.,

that a treaty with Mexico,²² to be followed by similar treaties with other countries,²³ was the solution.²⁴

Under the Treaty, the transferring state has exclusive authority to commence a transfer,²⁵ though an offender may request the transferring state to consider his transfer.²⁶ Upon express consent of the offender²⁷ and approval of the receiving state,²⁸ the transfer may take place. The following conditions, however, must be met: (1) the offense for which the offender was convicted and sentenced must be one which would be generally punishable as a crime in the receiving state,²⁹ (2) the offender must be a national of the receiving state,³⁰ (3) the offender must not be a domiciliary of the transferring state,³¹ (4) the offense must not be a political crime within the meaning of the Treaty of Extradition of 1899,³² nor an offense under immigration or military laws,³³ (5) at the time of petition, at least six months of the offender's sentence must remain to be served,³⁴ and (6) there must be no appeal or collateral attack upon the offender's sentence pending in the transferring state and the prescribed time for appeal must have expired.³⁵

1st Sess. 1-2 (1977) (opening statement by subcommittee chairman Rep. Joshua Eilberg) [hereinafter cited as *Implementation of Treaties*].

22. The Mexican-American Treaty was prepared by the State Department and signed by the United States and Mexico on November 25, 1976. Treaty, *supra* note 8, at 1. Senate ratification took place on July 21, 1977. *Id.* Implementing legislation soon followed. Act of Oct. 28, 1977, Pub. L. No. 95-144, 91 Stat. 1212 (codified at 10 U.S.C. § 955, 18 U.S.C. §§ 4100-4115, 28 U.S.C. § 636(f), 28 U.S.C. § 2256 (Supp. I 1977)).

23. A treaty has been entered into with Canada. Treaty on the Execution of Penal Sentences, March 2, 1977, United States-Canada, ____ U.S.T. ____, T.I.A.S. No. ____ (this treaty can be found in *Implementation of Treaties, supra* note 21, at 244-47). The most recent treaty was entered into with Bolivia. Treaty on the Execution of Penal Sentences, February 10, 1978, United States-Bolivia, ____ U.S.T. ____, T.I.A.S. No. 9219.

24. *Implementation of Treaties, supra* note 21, at 2.

25. Treaty, *supra* note 8, art. IV, para. 1.

26. *Id.*

27. *Id.* para. 2.

28. *Id.*

29. *Id.* art. II, para. 1.

30. *Id.* para. 2.

31. *Id.* para. 3.

32. Treaty of Extradition of 1899, United States-Mexico, February 22, 1899, 31 Stat. 1818, T.S. No. 242. The treaty does not define a political crime, but merely states that extradition shall not take place "[w]hen the crime or offense charged shall be of a purely political character." *Id.* art. III, cl. 2.

33. Treaty, *supra* note 8, art. II, para. 4.

34. *Id.* para. 5.

35. *Id.* para. 6.

Once the transfer takes place, "the completion of a transferred offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise."³⁶ The transferring state, however, retains the power to pardon or grant amnesty, a decision which the receiving state will implement upon being notified.³⁷

II. THE HABEAS CORPUS PROBLEM AND ITS SOLUTION

Congressional hearings dealt with the constitutional objections to the Treaty prior to its signing.³⁸ Of paramount concern was Article VI, which denies American offenders access to American

36. *Id.* art. V, para. 2.

37. *Id.*

38. See *Transfer of Offenders*, *supra* note 20, at 218:

1. Do the provisions of the United States Constitution apply to Mexican convictions of American nationals for conduct committed in Mexico?
2. Does the acceptance by the United States of the transfer of prisoners from Mexico represent such an involvement in the Mexican proceedings as to render the United States Constitution applicable?
3. Does the consent of the prisoner to be transferred cure what would otherwise be due process infirmities?
4. Does continued incarceration after transfer constitute cruel and unusual punishment in violation of the Eighth Amendment?
5. Does continued incarceration after the transfer constitute a violation of the constitutional prohibition against ex post facto laws or bills of attainder?
6. Does the Treaty operate as an unconstitutional restriction on the pardoning power of the President?
7. Would compliance with the Treaty require an unconstitutional withdrawal of the jurisdiction of the federal courts?
8. Would the Treaty unconstitutionally deny access to federal courts?
9. Assuming the federal courts ordered the release of a transferred American prisoner, could he be extradited back to Mexico to serve the remainder of his Mexican sentence?

See generally *Implementation of Treaties*, *supra* note 21, at 187-230; *Penal Treaties*, *supra* note 20, at 82-171; Abramovsky & Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275 (1979) [hereinafter cited as *Critical Evaluation*]; Robbins, *A Constitutional Analysis of the Prohibition Against Collateral Attack in the Mexican-American Prisoner Transfer Treaty*, 26 U.C.L.A. REV. 1 (1978) [hereinafter cited as *Constitutional Analysis*]; Note, "Justice With Mercy": *The Treaties With Canada and Mexico for the Execution of Penal Sentences*, 4 BROOKLYN J. INT'L L. 246 (1978); Note, *Constitutional Problems in the Execution of Foreign Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 HARV. L. REV. 1500 (1977) [hereinafter cited as *Constitutional Problems*]; Comment, *the Mexican-American Penal Sentences Treaty: A Run-On Sentence*, 6 PEPPERDINE L. REV. 149 (1978) [hereinafter cited as *Run-On Sentence*]; Comment, *Execution of Foreign Sentences in the United States: A Treaty with Mexico*, 9 ST. MARY'S L.J. 118 (1977).

courts, *i.e.*, the right of habeas corpus.³⁹ Under Article VI, “[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.”⁴⁰ This contradicts Article I of the United States Constitution, which prevents the suspension “of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it.”⁴¹

To circumvent the unconstitutionality of Article VI, a clause was added to the Treaty which allows the receiving state to verify that the offender’s consent to the transfer was “given voluntarily and with full knowledge of the consequences thereof”⁴² Congress enacted legislation which calls for the verification of an offender’s consent to transfer, and the ensuing waiver of habeas corpus, by “a United States magistrate, or by a citizen specifically designated by a judge of the United States”⁴³ As any constitutional claim may be waived,⁴⁴ with the exception of attacks on the jurisdiction of the court⁴⁵ and review of the voluntariness of the waiver itself,⁴⁶ an American in a Mexican prison can waive the

39. *See, e.g., Penal Treaties, supra* note 20, at 168-71; *Implementation of Treaties, supra* note 21, at 227-30.

40. Treaty, *supra* note 8, art. VI.

41. U.S. Const. art. I, § 9, cl. 2.

42. Treaty, *supra* note 8, art. V, para. 1.

43. 18 U.S.C. § 4108(a) (Supp. I 1977). *See* note 8 *supra*.

44. The origin of this principle in Supreme Court decisions seems to be Clay v. Smith, 28 U.S. (3 Pet.) 411 (1830) where the plaintiff, a citizen of Kentucky, by voluntarily making himself a party to certain bankruptcy proceedings, abandoned his extraterritorial immunity from the operation of the bankruptcy law of Louisiana. *Id.* at 411-12. The principle was explicitly embraced in Phillips v. Payne, 92 U.S. 130, 132 (1875) (“Under certain circumstances, a constitutional provision may . . . be waived by a party entitled to insist upon it.”) and reaffirmed in Pierce v. Somerset Railway, 171 U.S. 641, 648 (1898) (“A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute”). Subsequent decisions have focused on the waiver of specific rights. *See, e.g.,* Farreta v. California, 422 U.S. 806 (1975) (waiver of right to assistance of counsel); Murch v. Mottram, 409 U.S. 41 (1972) (waiver of post-conviction remedy); Boykin v. Alabama, 395 U.S. 238 (1969) (guilty plea waives privilege against compulsory self-incrimination, right to trial by jury and right of confrontation); Fay v. Noia, 372 U.S. 391, 438-39 (1963) (waiver of right to habeas corpus relief).

45. *See, e.g.,* Blackledge v. Perry, 417 U.S. 21, 30-31 (1974); United States v. Spada, 331 F.2d 995, 996 (2d Cir.), *cert. denied*, 379 U.S. 865 (1964).

46. *See, e.g.,* Boykin v. Alabama, 395 U.S. 238, 241 (1969) (the Supreme Court has jurisdiction to review the voluntary character of petitioner’s guilty plea, even if the question was not raised in state court); McCarthy v. United States, 394 U.S. 459, 468-69 (1969) (failure of a district court to ascertain the voluntariness of a guilty plea

right of habeas corpus for any claim, other than the aforementioned exceptions, as a precondition to the transfer.⁴⁷ Despite United States courts' presumption against the waiver of a fundamental constitutional right,⁴⁸ this presumption can be rebutted by having an officer of the court verify the consent.⁴⁹

III. THE EFFECT OF VELEZ

The court in *Velez* found that even though a magistrate had verified petitioners' consents,⁵⁰ "the verification proceeding, by nature, is limited in scope and does not preclude constitutional scrutiny of petitioners' consents."⁵¹ After examining the evidence supporting petitioners' allegations of torture and abuse,⁵² the court decided that petitioners' consents to transfer were involuntary.⁵³ Custody of petitioners by American authorities ended forthwith,⁵⁴ thereby relieving petitioners from completing their sentence, precisely the opposite of what the United States guaranteed in signing the Treaty.⁵⁵

The embarrassing situation created by *Velez* can be overcome by the United States enforcing the right-of-return provision of the

will result in the guilty plea being set aside and the case remanded for another hearing where petitioner may plead anew); *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (coerced plea of guilty has no validity as a waiver of the right to assail the conviction based on the plea and the right of habeas corpus); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (it is the duty of the federal courts in a criminal trial to determine whether there is an intelligent and competent waiver of right to counsel by the accused).

47. This raises the problem, not explored in this Recent Development, of whether the required waiver places an unconstitutional condition on the right of habeas corpus. See *Constitutional Analysis*, *supra* note 38, at 33-42. See generally Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

48. See *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

49. See *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969); *McCarthy v. United States*, 394 U.S. 459, 465 (1969); FED. R. CRIM. P. 11.

50. *Velez v. Nelson*, 475 F. Supp. 865, 872 (D. Conn. 1979).

51. *Id.* at 873 n.21. This follows the review of voluntariness exception to the waiver of constitutional rights. See notes 44-47 *supra* and accompanying text. For a discussion of where in the Treaty's implementing legislation the court finds its jurisdiction, see note 57 *infra*.

52. See notes 1, 3 & 4 *supra*.

53. *Velez v. Nelson*, 475 F. Supp. 865, 874 (D. Conn. 1979).

54. See note 16 *supra*.

55. "Sentences imposed in the United Mexican States on nationals of the United States of America may be served in penal institutions or subject to the supervision of the authorities of the United States of America in accordance with the provisions of this Treaty." Treaty, *supra* note 8, art. I, para. 1.

Treaty's implementing legislation.⁵⁶ Under the provision, if an American court determines that the transfer of an offender was not accomplished in accordance with a treaty or law of the United States, upon the transferring state requesting the return of the offender, the United States may return him.⁵⁷ The statute has never been enforced,⁵⁸ but the predicament generated by *Velez* gives the United States little choice if Mexico requests the return of petitioners.

Enforcement of the statute will undoubtedly lead to a challenge of its constitutionality,⁵⁹ even though in the past attacks on similar provisions have met with no success.⁶⁰ Petitioners would

56. 18 U.S.C. § 4114 (Supp. I 1977) reads:

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

57. *Id.* This provision seems to, in effect, solve the problem of an American transferee being deprived of the right of habeas corpus, since it assumes the offender can come before an American court to challenge the transfer. The court in *Velez* drew the same inference from other parts of the Treaty's implementing legislation by finding its jurisdiction to rule on the validity of petitioners' consents to transfer in 28 U.S.C. § 2256(4) (Supp. I 1977) and 18 U.S.C. § 4108(b)(3) (Supp. I 1977). *Velez v. Nelson*, 475 F. Supp. 865, 867 n.2 (D. Conn. 1979). Jurisdiction to entertain habeas corpus proceedings directed at an American transferee's confinement under the Treaty has also been found in 28 U.S.C. § 2241 (1976). *Pfeiffer v. United States Bureau of Prisons*, 468 F. Supp. 920, 921 (S.D. Cal. 1979). In the only case so far dealing with the Canadian-American Treaty on Execution of Penal Sentences, the court concluded that it had no jurisdiction to consider petitioner's motion to secure good time and/or early release on parole. *Hamilton v. United States*, 464 F. Supp. 210, 212 (M.D. Fla. 1979). In that case, however, petitioner was a Canadian convicted in the United States. Serving his sentence in Canada, he sought to modify the Canadian laws and procedures dealing with reduction of the term of confinement. *Id.*

58. But American citizens have been returned to Germany under the terms of the Supplementary Agreement to the NATO Status of Forces Agreement, Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351. See *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972).

59. Attorneys for *Velez* and *Caban* have said as much. Nat'l L.J., August 13, 1979, at 12, cols. 1-2.

60. They have arisen in an extradition context, where petitioner claims that the trial awaiting him will not comport with American constitutional standards. See, e.g.,

naturally argue that the right-of-return provision applied to them meets the "shocks the conscience" test⁶¹ originated in *Rochin v. California*.⁶² This type of argument is supported by cases where American officials participated in or induced gross violations of human rights abroad.⁶³

Velez can be distinguished from such cases on the ground that no American official participated in or induced petitioners' torture.⁶⁴ Thus, the unresolved question presented if petitioners were to be returned to Mexico is whether, *in the absence of involvement by American authorities*, knowledge of petitioners' torture, the practice of torture in Mexican prisons and the possibility of petitioners being tortured if returned to Mexico would so shock the conscience of the court, that it would not permit the enforcement of 18 U.S.C. § 4114, the Treaty's right-of-return provision.

Wilson v. Girard, 354 U.S. 524 (1957); Neely v. Henkel, 180 U.S. 109 (1901); Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972); Gallina v. Fraser, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960); Argento v. Horn, 241 F.2d 258 (6th Cir.), *cert. denied*, 355 U.S. 818 (1957).

Since *Neeley v. Henkel* the answer has been that "[w]hen 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 . . ." 180 U.S. at 123.

61. The test frowns upon, among other things, any activity which "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples . . .," *Rochin v. California*, 342 U.S. 165, 169 (1952) (quoting from *Malinski v. New York*, 324 U.S. 401, 416-17 (1944)).

62. 342 U.S. 165 (1952).

63. See *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), where it was alleged that American officials paid the Uruguayan police to kidnap defendant, a known heroin smuggler, in order to exercise personal jurisdiction and bring him before the United States District Court of New York to answer charges. Once arrested, defendant was tortured for seventeen days by electric shock, starvation, deprivation of sleep, pinching of fingers with pliers, flushing of eyes with alcohol, and forcing of other liquids into the rectum, before being drugged and sent on a plane to awaiting authorities in the United States. The Second Circuit held that, should the allegations be proven, it would release defendant since it "could not tolerate such an abuse without debasing 'the process of justice.'" *Id.* at 276. See, e.g., *United States v. Emery*, 591 F.2d 1266, 1268 (9th Cir. 1978) (participation which reached the level of a "joint venture"); *Birdsell v. United States*, 346 F.2d 775, 782 n.10 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965) (dictum) (inducing foreign police to "engage in conduct that shocked the conscience . . .").

64. For the counter-argument that the relationship between the United States and Mexico established by the Treaty amounts to a joint venture, thus making each fully responsible for the acts of the other at any point before, as well as after, the transfer, see *Transfer of Offenders*, *supra* note 20, at 221-34; *Run-On Sentence*, *supra* note 38, at 155-68; *Critical Evaluation*, *supra* note 38, at 303-05.

IV. THE INHERENTLY DEFECTIVE WAIVER PROBLEM

The classical definition of a waiver "is ordinarily an intentional relinquishment or abandonment of a known right or privilege."⁶⁵ Under certain circumstances a valid waiver has been held to be impossible.⁶⁶ The Supreme Court in *Fay v. Noia*⁶⁷ decided that the choice of a convicted murderer, sentenced to life imprisonment, to forego an appeal in state court which could have ended with his being sentenced to death on remand was, in effect, no choice at all. Since Noia only had a "grisly choice"⁶⁸ the Court refused to find a waiver.

It has been argued that *Noia* poses no threat to the Treaty since it is factually distinguishable from the situation of a prisoner consenting to transfer.⁶⁹ Unlike Noia, who was convicted in the United States and thereby entitled to constitutional protections,⁷⁰ an American in Mexico has no such rights.⁷¹ Violating Mexican law within Mexico, he cannot claim American constitutional safeguards. Noia, by choosing not to appeal, waived his vested right to petition for habeas corpus relief for his right to life. The American offender, on the other hand, unsupported by the United States Constitution while imprisoned in Mexico, relinquishes no vested right in exchange for the right to be transferred to the United States to complete his sentence.

The problem with the preceding argument is that the American offender is, in fact, waiving the *vested* right of habeas corpus, by agreeing not to attack collaterally the Mexican sentence, in exchange for the transfer. If the right had not vested, it could not have been waived in the first place.⁷² Thus, what remains is a situ-

65. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

66. See note 18 *supra*.

67. 372 U.S. 391 (1963).

68. *Id.* at 440. See note 18 *supra*.

69. Professor Allan C. Swan in *Penal Treaties*, *supra* note 20, at 126-27; *Constitutional Problems*, *supra* note 38, at 1525. For a similar understanding of the argument, see *Run-On Sentence*, *supra* note 38, at 167.

70. See, e.g., *Logan v. United States*, 144 U.S. 263 (1892).

71. See, e.g., *Neeley v. Henkel*, 180 U.S. 109 (1901); *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972). Cf. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812) (Marshall, C.J.) ("The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself.")

72. It would be absurd to require an offender to waive a right he does not have. In this regard it has been suggested that the consent given under the Treaty

ation where the offender either waives his right to habeas corpus to escape the abuses of the Mexican prisons, or he does not waive the right and risks the abuses.⁷³

If an offender can prove that he was tortured while in the Mexican prisons there seems to be a forceful argument for the coercion of the waiver.⁷⁴ It is not difficult to conclude with the court in *Velez*, that under truly oppressive conditions an American transferee "would have signed anything, regardless of the consequences, to get out of Mexico."⁷⁵ The abuse incurred, however, is a factual question⁷⁶ which varies from offender to offender. In *Pfeiffer v. United States Bureau of Prisons*,⁷⁷ the only other case so far involving the Treaty, the petitioner was denied habeas corpus relief for *inter alia* his inability to prove his allegation of involuntary consent.⁷⁸ In *Velez*, on the other hand, the court decided that "under the unique facts of this case, petitioners' consents were not truly voluntary"⁷⁹

A case by case approach to the question of consent appears sound and should be followed by the courts. In the absence of facts which point to compulsion, there is no reason to find that the offender's waiver was coerced. Thus, the decision of whether or not a waiver under the Treaty is involuntary as a matter of law can be avoided, thereby eliminating the risk of unconstitutionality on this count.

CONCLUSION

Due to *Velez v. Nelson* the United States may be faced with a prospective breach of the Mexican-American Treaty. This result can be avoided by enforcing 18 U.S.C. § 4114 and returning to

implicates the law of estoppel rather than the law of waiver, in that the American offender "may be 'estopped' from asserting a constitutional right . . . and . . . may be 'estopped' from challenging the constitutionality of a statute under which he has sought and received a benefit." *Implementation of Treaties*, *supra* note 21, at 270. Substituting estoppel for waiver leads nowhere. The offender still cannot be deprived of the right to contest his acquiescence to be estopped from relying on the Constitution. *See* note 46 *supra*.

73. This raises the problem of unconstitutional conditions. *See* note 47 *supra*.

74. *See* note 46 *supra*.

75. *Velez v. Nelson*, 475 F. Supp. 865, 874 (D. Conn. 1979).

76. *Cf. id.* at 873 ("The determination of petitioners' consents is a question of fact to be determined from *all* surrounding circumstances." (emphasis in original)).

77. 468 F. Supp. 920 (S.D. Cal. 1979).

78. *Id.* at 925.

79. *Velez v. Nelson*, 475 F. Supp. 865, 874 (D. Conn. 1979).

Mexico those offenders who give an involuntary consent to transfer. Enforcement of the statute, however, appears certain to bring on its challenge. The fate of the challenger, as well as the Treaty, will then hinge upon the success or failure of this attack.

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