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## Comments

### The Mexican-American Penal Sentences Treaty: A Run-On Sentence

#### I. INTRODUCTION

For some of the Americans who stepped off the plane in San Diego, California a few days before Christmas in 1977, their long entanglement with the Mexican judicial system was nearly over.<sup>1</sup> Transferred to the United States under the recently ratified Penal Sentences Treaty between the two countries,<sup>2</sup> they would be released to enjoy the holidays with their family and friends.<sup>3</sup> For others whose convictions were for more serious offenses the entanglement would continue, albeit at a distance, thanks to the

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1. Los Angeles Times, December 10, 1977, Part II, at 1, col. 2.

2. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico, T.I.A.S. No. 8718 [hereinafter cited as *Treaty*]. While negotiations for the treaty were in progress, Canada proposed to enter a substantially similar agreement with the United States. The two treaties were ratified by the Senate in July of 1977. Reprints of both may be found in H.R. REP. NO. 720, 95th Cong., 1st Sess. 9-12, 19-23 (1977).

3. Once in the United States, the prisoners are, by the terms of the treaty, subject to American sentence and parole procedure, *Treaty*, art. V § 2. Because the American system is generally more lenient, many transferees with time remaining on their Mexican sentences have already served the full American sentence or are immediately eligible for parole.

treaty, which provides for American execution of Mexican convictions. Unprecedented in American legal annals, the treaty renews the long-standing constitutional debate over the rights of American citizens accused or convicted of crimes by a foreign court. At the vortex of this debate is the treaty's express denial of any challenges proceeding in the courts of one country against a conviction handed down by the courts of the other.<sup>4</sup> It is the position of this author that the execution of a foreign conviction obtained by means shocking to the American judicial conscience should, on constitutional grounds, invalidate this denial; that a waiver of individual constitutional rights may be equally invalid under the circumstances; but that political exigencies require judicial abstention.<sup>5</sup> This article will examine the origins of the treaty and its constitutional infirmities, and propose a non-judicial remedy.

## II. THE BACKGROUND OF THE TREATY: INTERNATIONAL NARCOTICS TRAFFIC AND THE DRUG ENFORCEMENT ADMINISTRATION

In 1976 Alberta Sicila Falcon and a number of other defendants were convicted of charges stemming from narcotics trafficking. All were key members of an international organization, headed by the thirty-two year old Falcon, which had been reaping profits from the illicit traffic of an estimated 3.6 million dollars a week. A U.S. federal court handed down sentences averaging 1.6 years for each of the defendants.<sup>6</sup>

In 1975 Dirk and Tony Van Der Brink, vacationing in Mexico,

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4. *Treaty, supra* note 2, art. IV.

5. Constitutional objections to the treaty have been treated at length in hearings before the Senate Foreign Relations Committee by a host of noted experts as well as others less well known. See, *Penal Sentences Treaties with Mexico and Canada: Hearings before the Senate Committee on Foreign Relations*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Senate Treaty Hearings*], particularly the testimony and prepared statements of Professor M. Cherif Bassiouni at 260, Professor Alan C. Swan at 94, Professor Herbert Wechsler at 90, and Richard W. Petree, Jr. and Michael Chertoff, two law students who wrote and edited a lengthy article on the subject, Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: the Mexican American Prisoner Transfer Treaty*, 90 HARV. L. REV. 1500 (1977), reprinted in *Senate Treaty Hearings, supra* at 139. See also, Comment, *Execution of Foreign Sentences in the United States*, 9 ST. MARY'S L.J. 118 (1977).

This comment is to some extent a recapitulation of the discussion in these hearings and articles, but in examining the history of drug enforcement cooperation between Mexico and the United States finds a more monolithic, transnational system confronting the accused drug offender. The recognition of such a unitary system necessitates a different conclusion on the issue of waiver (discussed *infra* at notes 75-86 and accompanying text) and a resort to the political question doctrine as an escape from what would otherwise be a practically devastating judicial intrusion (discussed *infra* at notes 87-89 and accompanying text).

6. *Federal Drug Enforcement: Hearings before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs*, 95th Cong., 1st Sess. 1439 (1977) (statement of Senator Sam Nunn).

were stopped by the Mexican federal police at a roadblock. The Volkswagen bus, in which they were traveling, loaned to them by an apparently kind-hearted Mexican man when their truck broke down, was stripped, and marijuana was found in a secret sub-flooring. The youths were beaten and taken to jail, where for eighteen days they were subjected to more beatings and assaults with an electric cattle prod. They were then transferred to a federal prison where, without money to buy a dry place to sleep, they spent their nights on the cell block streets. Their mother, notified in the United States, was finally able to obtain some medical services for them—one had spent much of the initial detention in a state of semi-consciousness as a result of the frequent beatings. Fourteen months later, and after more than forty thousand dollars had been extorted from Mrs. Van Der Brink, the youths were finally tried and sentenced to more than five years each.<sup>7</sup>

The Drug Enforcement Administration (DEA), America's active and controversial narcotics control organization,<sup>8</sup> is especially cognizant of the disparity between Mexican and American drug sentencing records. "If we were to put a chart with our prosecution figures on it and the Mexican figures on it, it would show that the Mexicans do much better than our courts on convictions and penalties," stated Mexican program coordinator Humberto E. Moreno. "Mexico has much stiffer narcotics laws and a much stiffer attitude toward enforcing them. The Mexicans are giving defendants six years in cases that we are losing in American courts."<sup>9</sup> The DEA is significantly involved in existing Mexican

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7. *Transfer of Offenders and Administration of Foreign Penal Sentences: Hearings before the Subcommittee on Penitentiaries and Corrections of the Committee on the Judiciary*, 95th Cong., 1st Sess. 280 (1977) [hereinafter cited as *Transfer of Offenders*]. The account comes from a letter written to the subcommittee by Mrs. Van Der Brink. It is representative of the testimony of former prisoners and the relatives of then current ones. For other accounts, see *id.* at 253 *et seq.*, and *U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International Political and Military Affairs of the Committee on International Relations*, 94th Cong., 1st & 2d Sess., Part II, 45 *et seq.* (1975-1976) [hereinafter cited as *U.S. Citizens Imprisoned in Mexico*].

8. Many articles have appeared in newspapers and magazines both attacking and supporting the DEA. Of those reprinted in Congressional committee hearings investigating the agency, most are unfavorable. One particularly scathing article, Browning, *An American Gestapo*, *PLAYBOY*, Feb. 1976, is reprinted in *The Global Connection: Heroin Entrepreneurs: Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary*, 94th Cong., 2d Sess. 56-70 (1976) [hereinafter cited as *1976 Hearings*].

9. Meisler, *War on Drugs: Mexico No Place to Get Caught*, *Los Angeles Times*, Dec. 12, 1974, reprinted in *U.S. Citizens Imprisoned in Mexico*, *supra*

enforcement agencies in narcotics investigation leading to arrests in that country.<sup>10</sup> It has been suggested that the strategic decision to pursue arrests across the border rather than in the United States may have been based on considerations other than the theory of stopping the flow of illicit drugs at its roots. Although it would be just as easy to "put the finger" on smugglers once they enter the states, the DEA prefers to have Mexican authorities make the arrests because of the greater likelihood of severe sentences.<sup>11</sup>

As a result of American encouragement and assistance in the field, drug related arrests in Mexico increased dramatically in the first half of this decade.<sup>12</sup> The number of American citizens imprisoned in Mexico more than quadrupled during the first five years of Mexican-American cooperation in narcotics enforcement operations. With this increase came reports of gross injustices perpetrated by the Mexican police and judicial agencies and of inhuman treatment in Mexico's prisons.<sup>13</sup> Congressional hearings on the matter revealed tales of water torture, forced confessions, long confinement without trial, and totally inadequate health facilities and medical treatment.<sup>14</sup> Disregard of procedural safeguards, nominally guaranteed by the Mexican Constitution,<sup>15</sup> was

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note 7, Part I at 89. DEA Administrator Peter Bensinger called U.S. drug sentencing "woefully inadequate." He told a house subcommittee that "an essential ingredient in our criminal process must be stronger sentencing and realistic bail in order for our laws to have a meaningful deterrence." *Id.* Part III at 17.

10. DEA Administrator Bensinger told a House subcommittee in 1976, "We intend to pursue a course of recommending vigorous enforcement of drug laws in foreign countries . . . . Make no mistake about it, many Americans are responsible for furthering the drug traffic into the U.S. When they are caught in the foreign country, I find no fault in their being subjected to the system of justice they chose to violate." *Id.*

11. *U.S. Citizens Imprisoned in Mexico*, *supra* note 7, Part I at 89. The comment was ascribed by Meisler to an unnamed narcotics agent.

12. While the U.S. embassy in Mexico kept no statistics on the matter before the initiation of "Operation Cooperation" in 1970, it estimated that 100 Americans were in Mexican jails, most for failure to pay their hotel bills. In 1970, the number had increased to 187 on drug charges alone. By 1971 the number was 234, and by 1974, 441 Americans were imprisoned in Mexico on drug-related charges. *Id.* at 91. State Department figures are slightly lower; *e.g.*, an official list of all Americans detained abroad showed that 387 of 515 Americans in Mexican prisons were there for narcotics violations. *Id.* at 35-37.

13. *Senate Treaty Hearings*, *supra* note 5, at 201-37.

14. *Id.* at 6 (statement of Fortney H. Starke).

15. The Mexican Constitution contains many of the same protections as our own. Among others, the constitution provides: no retroactive laws; no deprivation of "life, liberty, property, possessions or rights without trial by a duly created court" with "the essential formalities of procedure"; no harassment of persons, family, domicile, papers or possessions except by written order of competent authority on legal grounds; no arrest but on evidence indicating probable guilt; no detention for more than three days without formal order of commitment stating the offense charged and the allegations upon which the charge is based; no ill

reportedly rife, and included denials of counsel, interpreters, and access to information relevant to the defense of the imprisoned Americans.<sup>16</sup> While the abuses of Mexican officials and agents could not in most instances be blamed directly on the DEA, the Congressional inquiry into Mexican prison conditions did not bode well for the already unpopular agency.<sup>17</sup>

It was the government of Luis Echeverria that saved the day for the DEA by proposing a treaty for the exchange of citizens of each country imprisoned in the other.<sup>18</sup> The treaty, among other things,<sup>19</sup> reserves to the *transferring state* all powers of review over the conviction proceedings.<sup>20</sup> The function of the *receiving*

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treatment during arrest or confinement; no contributions levied in prison; the right of bail for any offense not punishable by more than five years imprisonment; no forced confessions; confrontation of the accusing witnesses; public jury trial; trial within four months for offenses with a maximum penalty of two years imprisonment, within one year for greater offenses. *Reprinted and analyzed in* R. MEDINA, MEXICAN CONSTITUTIONAL PROTECTIONS: BASIC ELEMENTS OF DUE PROCESS OF LAW IN MEXICO (1976).

16. Studies conducted by the office of Congressman Fortney Starke of 159 Americans in Mexican prisons uncovered the following reported procedural abuses: 60 cases of self-incrimination (defendants either not informed of their rights or told they had none); 61 cases in which defendants were forced to sign confessions in Spanish without an interpreter; 96 cases of physical torture used to obtain confessions; 80 cases of incommunicado detention; 46 cases of denial of access to counsel for over 72 hours; 23 cases of incarceration without sentence for over one year; 21 cases of denial of access to information necessary to the defense; 19 cases of no interpreter at the proceedings; 18 cases in which charges were not made known to the defendants; 50 cases of physical abuse in prison. *U.S. Citizens Imprisoned in Mexico, supra* note 7, Part III.

17. The DEA and its predecessor, the BNDD (Bureau of Narcotics and Dangerous Drugs) have been the subject of a number of congressional inquiries. *See, e.g.,* H.R. REP. NO. 228, 93d Cong., 1st Sess. (1973), *U.S. Citizens Imprisoned in Mexico, supra* note 7, Part III.

18. The treaty was first proposed in the summer of 1976 (*see* N.Y. Times, June 14, 1976 at 2, col. 1) and was signed in Mexico City on November 25, 1976 (*see Treaty with Mexico on the Execution of Penal Sentences*, S. EXEC. DOC. D, 95th Cong., 1st Sess. (1977)). It was ratified by the Senate on July 21, 1977 (H.R. REP. NO. 720, *supra* note 2, at 25).

19. The treaty provides for the transfer of each country's foreign nationals, with certain exceptions ((1) offenders convicted of a crime not generally punishable as a crime in the receiving state, (2) domiciliaries of the transferring state, (3) political offenders, (4) military offenders, (5) offenders under immigration laws, and (6) offenders with less than six months to be served at the time of petition (art. II)), after the time for appeal has expired (art. II § 6), and upon consent of the transferring state, the receiving state, and the prisoner concerned (art. IV §§ 2, 3). Aside from that, the sentence is executed according to the laws of the receiving state (art. V § 2). H.R. REP. NO. 720, *supra* note 2, at 17-19.

20. Article VI provides: "The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts." *Id.* at 21-22.

*state* is to execute the sentence, however modified by its own parole system,<sup>21</sup> handed down by the foreign court. Appeal of a Mexican conviction in an American court is thus foreclosed along with recourse to the precious remedy of habeas corpus.

Whether by design or not, the effect of such an arrangement is to permit the DEA to obtain convictions of suspected narcotics offenders without the hinderance of irritation of our judicial system and its solicitude for the constitutional rights of the accused. A new edition of the old "silver platter"<sup>22</sup> is cast, one more inimical to the rights of the accused. While the old doctrine allowed federal prosecutors to use evidence illegally obtained by state agents to convict defendants in federal court, the new doctrine relieves the prosecutor of the trouble of even trying the case. The new platter serves up a convicted felon to be placed in an American prison without any question of the constitutional validity of his conviction. The prosecutor is relieved, therefore, not only of the task of explaining a search without cause or a forced confession, but also of the burden of prosecuting any trial whatsoever.

Although courts in this country have been extremely reluctant to review the acts of foreign agents by subjecting their behavior *vis-à-vis* an accused to American constitutional standards<sup>23</sup> the combination of circumstances surrounding the Penal Sentences Treaty are so unique and may amount to such a fusion of the judicial processes of the two countries that American courts may reserve a power to disapprove the acts of foreign officials or risk, by their imputation, "debasement of the [American] process of justice."<sup>24</sup>

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21. Article V § 2 provides: "Except as otherwise provided in this Treaty, the completion of the transferred offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise. The Transferring State shall, however, retain the power to pardon or grant amnesty to the offender and the Receiving State shall, upon being advised of such pardon or amnesty, release the offender." *Id.* at 21. See note 3 *supra*.

22. In 1914 the Supreme Court decided *Weeks v. U.S.*, 232 U.S. 383 (1914), establishing the rule which excludes in a federal prosecution evidence obtained by federal agents in violation of the defendant's fourth amendment rights. The Court, however, sustained the admission of certain evidence, unlawfully obtained by local police, on the theory that the fourth amendment applied only to federal officials. *Id.* at 398. For the next thirty-five years, this was the basis of the "silver platter" doctrine by which evidence unlawfully seized by state agents was admitted at federal trials. The doctrine was overruled by the Court's decision in *Elkins v. U.S.*, 364 U.S. 206 (1960).

23. See *Neely v. Henkel* (No. 1), 180 U.S. 109 (1901); *Ker v. Illinois*, 119 U.S. 436 (1886); *U.S. v. Morrow*, 537 F.2d 120 (5th Cir. 1976); *U.S. v. Lira*, 515 F.2d 68 (2d Cir. 1975); *U.S. ex rel. Lujan v. Gengler*, 510 F.2d 26 (2d Cir. 1975); *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972); *Williams v. Rogers*, 449 F.2d 513 (8th Cir. 1971); *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960); *U.S. ex rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954), discussed *infra* at text accompanying note 38.

24. *U.S. v. Toscanino*, 500 F.2d 267, 276 (2d Cir. 1974). See discussion of the significance of this case in relation to the treaty in the prepared statement of Alan

The diplomatic necessities of the situation would seem, however, to dictate a less public and formal mode of review if the treaty is to remain vital.

### III. THE APPLICABILITY OF CONSTITUTIONAL REVIEW TO FOREIGN CONVICTIONS AND POLICE CONDUCT

The treaty provision for the *execution*<sup>25</sup> of foreign criminal judgments is unprecedented in American legal history.<sup>26</sup> However, American courts have *recognized* and even *enforced* foreign convictions. As suggested by one eminent witness, in testimony before the Senate Foreign Relations Committee,<sup>27</sup> an analysis of the degree of domestic involvement, or state action, inherent in each manner of handling a foreign conviction is crucial to a decision regarding the constitutionality of the treaty.

#### A. *Recognition and Enforcement of Foreign Judgments: A Question of Domestic Involvement*

*Recognition* of a foreign judgment requires minimal domestic involvement in the foreign system. Through recognition, the judgment of a foreign court is given collateral effect as a basis for the denial of certain individual rights or privileges. For example, aliens convicted abroad of crimes involving moral turpitude are excluded from admission to this country under the Immigration and Nationality Acts.<sup>28</sup> Similarly, social security benefits have been denied to a woman who was convicted of the murder of her husband by an Iranian court.<sup>29</sup> In that case, the claimant spouse contended that the foreign conviction did not comport with American constitutional standards and, therefore, should not be recog-

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Swan, *Senate Treaty Hearings*, *supra* note 5, at 106-07. See also *Rochin v. California*, 342 U.S. 165 (1952), and *U.S. v. Morrow*, 537 F.2d 120 (5th Cir. 1976), discussed *infra* at text accompanying note 55.

25. "The word 'execution' as it relates to criminal sentences, is defined as 'the process of performing a judgment or sentence of court.'" *State of Louisiana v. Morgan*, 306 So. 2d 701, 702 (S.C. La. 1975). Also, *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 44 (1822).

26. It is a common rule of international law that, "The courts of no country execute the penal laws of another." *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825).

27. Testimony of Professor M. Cherif Bassiouni of DePaul University before the Senate Foreign Relations Committee, *Senate Treaty Hearings*, *supra* note 5, at 262.

28. 8 U.S.C. § 1182(a)(9) (1970).

29. *Cooley v. Weinberger*, 518 F.2d 1151 (10th Cir. 1975).



nized by the American court.<sup>30</sup> While the administrative law judge at the hearing found all of the claimant's allegations were contradicted by the evidence, the court emphasized that even had variations from American procedural safeguards existed, only a variation "so shocking to the forum community that it cannot be countenanced" would warrant non-recognition.<sup>31</sup> "The mere fact that the law of the foreign state differs from the law of the state in which recognition is sought is not enough to make the foreign law inapplicable."<sup>32</sup>

*Enforcement* of a foreign conviction calls for a higher degree of domestic governmental involvement than does recognition. Treaties form the basis of American enforcement in criminal matters,<sup>33</sup> Status of Forces Agreements (SOFA)<sup>34</sup> and extradition treaties<sup>35</sup> being the principal examples. These international agreements provide for the return of American citizens to those foreign countries in which they have been accused or convicted of crimes for the purpose of trial or execution of sentence. The function of U.S. authorities in such matters has been characterized as *custodial*, since primary jurisdiction over accused criminals rests in the state where the criminal activity occurred and whose laws

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30. She contended, "(1) that she was not allowed to consult with her attorney; (2) that she was not advised of her rights; (3) that she was denied the right to post bail; (4) that an indictment was not issued in her case; (5) that she did not have the right to cross-examine witnesses; and (6) that the prosecution did not prove her guilty beyond a reasonable doubt." *Id.* at 1154.

31. *Id.* at 1155, quoting from *Brennan v. University of Kansas*, 451 F.2d 1287, 1290 (10th Cir. 1971). The *Brennan* court continued, "Indeed, this Court is reminded of the oft-paraphrased advice of St. Ambrose, Catholic bishop of Milan in the Fourth Century, to St. Augustine. 'When you are at Rome, live in the Roman style; when you are elsewhere, live as they do elsewhere.'" *Id.* at 1290, quoted in *Cooley v. Weinberg*, 518 F.2d at 1155.

32. *Cooley v. Weinberg*, 518 F.2d at 1155, quoting from *Brennan v. University of Kansas*, 451 F.2d at 1290.

33. With respect to American armed forces stationed in foreign countries, RE-STATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 57 and 62 (1965) are relevant. Section 57 states, ". . . A state's consent to the presence of a foreign force within its territory does not of itself imply that the state waives its right to exercise enforcement jurisdiction over members of the force for violations of the criminal law of the territorial state." Section 62 reads, "The rules stated in §§ 55-61 may be varied by international agreement between the sending state and the territorial state."

Section 9 comment (e) says, with respect to extradition generally, "States generally refuse to enforce in their territory the criminal law of another state and to surrender fugitives from the criminal jurisdiction of another state, *except as they may have committed themselves to do so by international agreement.*" [Emphasis added]. See also *Valentine v. U.S. ex rel. Neidecker*, 299 U.S. 5 (1936).

34. SOFAs set down the terms upon which American armed forces are admitted to be stationed in other countries. Each contain an article setting out the jurisdiction of the parties over the criminal acts of American servicemen in the host country. See 17 A.L.R. FED. 725 (1973).

35. See 31 AM. JUR. 2d *Extradition* § 22 (1967).

it offended.<sup>36</sup> Although this usually requires arrest and temporary detention by American authorities, such involvement has not been regarded as creating any need of, or right to, American review of foreign judicial proceedings.<sup>37</sup>

In *Holmes v. Laird*,<sup>38</sup> an American serviceman sought an injunction to restrain Army officials from surrendering him to German authorities for the execution of a sentence imposed by the German court for a crime committed while he was stationed in that country. He contended that various procedural and substantive deficiencies had rendered the trial unfair by American standards and under the applicable SOFA.<sup>39</sup> The court, however, adopted the traditional view of *Neely v. Henkel*<sup>40</sup> that the Constitution does not apply to crimes committed outside the jurisdiction of this country.<sup>41</sup> While the guaranty of a "fair and impartial trial" may be demanded as a condition of surrender,<sup>42</sup> and while the NATO SOFA provided that the accused would be entitled to certain procedural safeguards,<sup>43</sup> the court refused to examine the

36. *Wilson v. Girard*, 354 U.S. 524, 529 (1957): "A sovereign nation has exclusive jurisdiction to punish offenses committed within its borders, unless it expressly or impliedly surrenders its jurisdiction." See also, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 20 (1965).

The SOFA for Americans stationed in Korea (Status of Forces Agreement, July 9, 1966, United States-Republic of Korea, 17 U.S.T. 1677, T.I.A.S. No. 6127) gives exclusive jurisdiction to the U.S. with respect to offenses committed in Korea by American servicemen punishable by U.S. law, but reserves jurisdiction over offenses punishable by Korean law (art. XXII §§ 1, 2). Where jurisdiction is concurrent, the U.S. is given primary jurisdiction over offenses solely against the property or security of the U.S., or person or property of a U.S. citizen connected with the armed services, and arising out of an act or omission in the course of official duty. Jurisdiction over all other offenses is reserved to Korea (art. XXII § 3).

Jurisdiction under treaties of extradition is conferred over acts usually considered criminal in both countries, but in any event limited to those enumerated in applicable treaties. 31 AM. JUR. 2d *Extradition* § 22 (1967).

37. See *Holmes v. Laird*, 459 F.2d 705 (10th Cir. 1971) (SOFA); *Neely v. Henkel* (No. 1), 180 U.S. 109 (1901) (extradition); *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960) (extradition).

38. 459 F.2d 705 (10th Cir. 1971).

39. Petitioner complained of a lack of speedy trial, ineffective counsel (language barrier), incompetent interpreter, denial of opportunity to confront accusing witnesses, and denial of a full and accurate transcript. 459 F.2d at 1214.

40. 180 U.S. 109 (1901).

41. *Neely v. Henkel* (No. 1), 180 U.S. at 123.

42. The *Neely* Court explained that a fair and impartial trial was "not necessarily a trial according to the mode prescribed in this country for crimes committed against its laws, but a trial according to the modes established in the country where the crime was committed, provided such trial be without discrimination against the accused because of his citizenship." *Id.* at 123.

43. Status of Forces Agreement, June 18, 1951, NATO, 2 U.S.T. 1792, T.I.A.S. No.

conduct of the foreign trial. It expressed some concern over the prospect of foreign judicial unfairness, but concluded that the need for a "single-voiced statement of the Government's views" called for executive, and not judicial, scrutiny.<sup>44</sup>

Judicial disquiet has also surfaced in *Gallina v. Fraser*, a case in which an accused, convicted *in absentia* by an Italian court, sought habeas corpus relief to prevent his extradition by U.S. authorities to Italy.<sup>45</sup> Relief was denied because the court could find no case authorizing judicial inquiry into "the procedures which await the relator upon extradition." Even so, the door was left open for a future reversal of policy. "We can imagine," wrote Judge Waterman for the court, "situations when the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a Federal Court's sense of decency as to require re-examination of the principles set out above."<sup>46</sup>

#### B. Domestic Conviction Obtained Through Foreign Cooperation: A Question of Conduct

Although the *Gallina* court suggested that an offended judicial sense of decency might require the application of U.S. constitutional review to foreign activity, the principal barrier to such review has been a failure by the courts in this country to find sufficiently significant American governmental involvement in the foreign activity. This has been true of attempts by American defendants standing trial in the courts of this country to block the introduction of evidence obtained by foreign agents in a "constitutionally offensive" manner.<sup>47</sup> The answer has generally been that the fourth amendment does not, by itself, call for the exclusion of

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2846. Article VII § 9 guarantees a prompt and speedy trial, advance notice of specific charges, confrontation of prosecution witnesses, compulsory process for obtaining witnesses, counsel of choice or free legal assistance, interpreter (if necessary), and a representative of the United States present at trial.

44. *Holmes v. Laird*, 459 F.2d at 1215, quoting from *Baker v. Carr*, 369 U.S. 186, 211-12 (1962). It is interesting that the court relied so heavily on *Neely* for its policy of non-review. The treaty in that case was one of extradition to countries *occupied and under the control of the United States* (in that case the Philippines). Perhaps the *Neely* Court had greater reason thereby to hope for successful diplomatic pressure in securing fair treatment than in countries such as Germany (or Mexico), where U.S. presence is more a matter of native choice.

45. 278 F.2d 77 (2d Cir. 1960).

46. *Id.* at 79.

47. *See*, *Stonehill v. U.S.*, 405 F.2d 738, 740 (9th Cir. 1968); *Brulay v. U.S.*, 383 F.2d 345, 347 (9th Cir. 1967); *Birdsell v. U.S.*, 346 F.2d 775, 782 (5th Cir. 1965). In *Birdsell*, the defendant argued that his arrest in Mexico by Mexican police was without probable cause, that the immediately ensuing search was illegal, and that a later search was illegal for lack of a search warrant (346 F.2d at 782). *Brulay* contended that his arrest in Mexico was without probable cause (*Brulay*, 383 F.2d at 347-48). *Stonehill* was the admitted victim of an illegal Philippine raid and seizure (*Stonehill*, 405 F.2d at 740-42).

unlawfully obtained evidence; that the Supreme Court, in *Weeks v. U.S.*,<sup>48</sup> created the exclusionary rule to dissuade law enforcement officers from disregarding individual rights guaranteed by the fourth amendment; and that an American court can do nothing to force foreign officials to abide by the U.S. Constitution.<sup>49</sup> The exclusionary rule will not be invoked and the actions of foreign officials will not be examined unless a certain degree of agency or cooperation can be found.<sup>50</sup>

That degree of cooperation which will permit judicial scrutiny in this country is a question of fact to be resolved in each case.<sup>51</sup>

48. 232 U.S. 383 (1914). See discussion of the exclusionary rule and the "silver platter" doctrine, *supra* note 22.

49. *Stonehill v. U.S.*, 405 F.2d at 743. In *Brulay* the court found that the applicability of fifth amendment protection against self-incrimination to foreign officials required a different analysis. Citing *Bram v. U.S.*, 168 U.S. 532 (1897), in which statements taken by Canadian officers were excluded without consideration of the issue of extraterritoriality of application, the court distinguished violations of the fourth and fifth amendments in terms of the moment of completion. The fourth amendment is violated at the moment the search or seizure takes place; exclusion at trial is not expressly required by the Constitution. The fifth amendment, however, is not fully violated until a confession is introduced at trial. The accused has not been forced to testify against himself until his statement is read in court. Therefore, the circumstances surrounding a confession to foreign officers can be examined by American courts. *Brulay v. U.S.*, 383 F.2d at 349 n.5.

50. *Stonehill v. U.S.*, 405 F.2d at 743-745. *But see*, Note, 90 HARV. L. REV., *supra* note 5, at 1506-08, analyzing the exclusionary rule in terms of two broad categories of interests protected by the fourth, fifth and sixth amendments: the reliability of the criminal process and the integrity of the individual. It is argued that while the exclusionary rule would have no effect on the "integrity" violations committed by foreign officials, concern over the reliability of the conviction process could cause domestic courts to overturn a foreign conviction.

51. *U.S. v. Toscanino*, 500 F.2d at 280 n.9 (2d Cir. 1974).

An extensive review of federal "involvement" cases before 1968 appears in *Stonehill*, 405 F.2d at 743-45. Most are from the days before *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Elkins v. U.S.*, 364 U.S. 206 (1960), which made the fourth amendment applicable to the states through the fourteenth amendment. A principal issue in those cases was whether federal officers had participated in state raids to the extent that a joint venture was created. *Stonehill*, 405 F.2d at 743. By way of measuring the facts in *Stonehill* against the "principal factors" in previous participation cases, the court found significant:

(1) that the raids were carried out to obtain evidence for foreign proceedings and were not instigated by American officials;

(2) that all activities of U.S. agents in connection with the raids took place before the raids began and after they ended;

(3) that only after the raids were over and the evidence was catalogued was the U.S. permitted to copy such documents in which it might have an interest;

(4) that there was no evidence that U.S. agents were trying to circumvent the fourth amendment; and

(5) that information which eventually led to the raids was given by U.S. agents without any request for action to the foreign authorities. 405 F.2d at 746.

Those cases that have examined the matter in the context of admissibility questions have not applied a consistent test.<sup>52</sup> One circuit court of appeals has held that only such participation by federal agents which is so substantial that it “converts” the action into a “joint venture between the U.S. and foreign officials” will raise a fourth amendment question.<sup>53</sup> Another court has required more than “some degree” of cooperation implying that no test at all, or an *ad hoc* decision in each case, is best.<sup>54</sup>

It does, however, seem clear that the requisite degree of American involvement bears an inverse relation to the degree of shock administered to the judicial conscience. The Fifth Circuit Court of Appeals in *Birdsell v. U.S.*<sup>55</sup> failed to find sufficient involvement in the provision by American to Mexican officers of information leading to the petitioner’s arrest to exclude certain evidence. Once again, however, as in *Gallina*, the court refused to foreclose application of the Constitution in those cases of minimal U.S. involvement in which particularly atrocious foreign conduct occurred.

We do not mean to say that in a case where federal officials had induced foreign police to engage in conduct that shocked the conscience, a federal court, in the exercise of its supervisory powers over the administration of federal justice, might not refuse to allow the prosecution to enjoy the fruits of such action.<sup>56</sup>

A search or seizure which shocks the conscience of the court does not violate the fourth amendment, but rather a very broad notion of due process, the fullest expression of which appeared in *Rochin v. California*.<sup>57</sup> Justice Frankfurter, writing for the Court, found in the due process clause an expression of the country’s sense of “fair play and decency.” To sanction brutal conduct, which in this case culminated in an involuntary stomach pumping, would discredit the American legal system.<sup>58</sup> Unlike the search and seizure safeguards of the fourth amendment at issue in the silver platter cases, due process was expressly required of

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52. They have, however, as noted in *U.S. v. Morrow*, 537 F.2d at 140, consistently rejected claims of “undue participation.”

53. *Stonehill v. U.S.*, 405 F.2d at 743.

54. *Birdsell v. U.S.*, 346 F.2d at 782. *See*, *U.S. v. Morrow*, 537 F.2d at 140, which decides not to decide on which approach is better.

55. 346 F.2d 775 (5th Cir. 1965).

56. *Id.* at 782 n.10.

57. 342 U.S. 165 (1952). Three Los Angeles county deputy sheriffs burst into the petitioner’s bedroom on information that he was selling narcotics. The resourceful Rochin swallowed what evidence there was on the premises. Brute force unavailing to extract two capsules from his mouth, the deputies took him to a hospital where, at their request, a doctor “forced an emetic solution through a tube into Rochin’s stomach against his will.” The process was successful and the vomited capsules were introduced in evidence at Rochin’s trial. *Id.* at 166.

58. *Id.* at 173.

the states in the fourteenth amendment; hence, agency and joint venture were not at issue in *Rochin*. Still, Frankfurter's concern for the taint created when brutal conduct is sanctioned by the court gives rise to the implication that *any* action which leads to conviction is open to judicial scrutiny.

Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon *the whole course of the proceedings*[resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses."<sup>59</sup>

If judicial concern extends to the entire course of the proceedings, it does not seem unreasonable that to eradicate any taint of unfairness even the acts of foreign officials may be subject to investigation in the courts.

Such was the reaction of the Second Circuit Court of Appeals in *U.S. v. Toscanino*<sup>60</sup> to the abduction and torture of a suspected narcotics dealer in Uruguay. Toscanino alleged that foreign police, paid by U.S. officials, tortured him for seventeen days by means of electric shock, starvation, deprivation of sleep, pinching his fingers with pliers, and flushing his eyes and nose with alcohol, before drugging him and sending him on a plane to waiting officers in the United States.<sup>61</sup> An outraged court was squarely confronted with *Ker v. Illinois*<sup>62</sup> and *Frisbee v. Collins*,<sup>63</sup> in which jurisdiction obtained by illegal abduction was held not to violate due process. The prosecution argued that these cases rendered irrelevant the means by which jurisdiction over the defendant was obtained.

The court, however, found that *Rochin* and other cases<sup>64</sup>

59. *Id.* at 169. Frankfurter quotes from *Malinski v. New York*, 324 U.S. 401, 416-17 (1944). (Emphasis added.)

60. 500 F.2d 267 (2d Cir. 1974).

61. *Id.* at 270.

62. 119 U.S. 436 (1888). Here, the President of the United States had issued to a Pinkerton agent a warrant for the arrest of Ker, then in Peru. The agent, however, failed to present the warrant to the proper Peruvian authorities and made no demand for the surrender of the suspect, instead forcibly arresting and abducting him to the U.S.

63. 342 U.S. 519 (1952). In this case Collins was living in Chicago when Michigan police entered Illinois and "forcibly seized, handcuffed, blackjacked" and returned him to Michigan.

64. The court placed particular reliance on *Mapp v. Ohio*, 367 U.S. 643 (1961), which had overruled *Wolf v. Colorado*, 338 U.S. 25 (1949), by extending the exclusionary rule of *Weeks v. U.S.*, 232 U.S. 383 (1914), to the illegal searches and seizures of state officers. The court stated: "To allow the government to benefit il-

marked a gradual erosion of the *Ker-Frisbee* rule of non-inquiry. Where federal agents were involved in atrocities against the accused to the extent present in *Toscanino*, the court "could not tolerate such an abuse without debasing the process of justice."<sup>65</sup> In a paper prepared for Senate hearings on the Penal Sentences Treaty, Professor Alan Swan characterized the court's perception of the shocking conduct in *Toscanino* as lying on a *continuum*. Discovering a *linkage* between the American and foreign systems, the court refused to draw a line between the illegal acts of foreign and American officials.<sup>66</sup>

Again, it would appear that the willingness of the court to find a linkage and create a continuum is dependent upon not only the degree of American involvement but also the degree of shock to judicial sensibilities.<sup>67</sup> The courts in *Ker* and *Frisbee* made only perfunctory mention of the force used to accomplish the illegal abductions of the defendants. Whatever physical abuse there was appears to have occurred in connection with the act of bringing the defendants into the jurisdiction.<sup>68</sup> By contrast, *Toscanino* was extensively tortured by foreign officers before removal to America. The court apparently felt that the diminished degree of American involvement was more than offset by the greater atrocity of the conduct. The same court, distinguishing the decision from *Ker* and *Frisbee*, placed *Toscanino* with *Rochin* as a case

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legally from seized evidence, 'reduces the fourth amendment to a form of words.'"  
*Toscanino v. U.S.*, 500 F.2d at 273, 275, quoting from *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392 (1920).

65. *Id.* at 276. The *Toscanino* exception to the *Ker-Frisbee* rule has been limited by *U.S. v. Lira*, 515 F.2d 68, 70 (2d Cir. 1975), to instances of "gross mistreatment leading to forcible abduction of the defendant by representatives of the United States Government." See also, *U.S. v. Marzano*, 537 F.2d 257, 271-72 (7th Cir. 1976). The Second Circuit Court of Appeals reasoned, "The DEA can hardly be expected to monitor the conduct of representatives of each foreign government to assure that a request for extradition or expulsion is carried out in accordance with American constitutional standards." 515 F.2d at 71. The defendant had argued that even without direct American involvement, the American government was "vicariously responsible" by setting the matter in motion. In rejecting this contention, the court chose to emphasize *Toscanino's* foundation in the exclusionary policy of *Mapp v. Ohio*, 367 U.S. 643 (1961), and thus arrived at the conclusion that invalidation of the court's jurisdiction would do nothing to deter offensive foreign police conduct. *Toscanino's* debt to *Rochin v. California*, 342 U.S. 165 (1952), and the policy of avoiding debasement of the American judicial system was not mentioned. In any event, the added element of a foreign trial, defective by its own standards, resulting in incarceration in this country must force the courts to re-examine the rationale of *Toscanino*.

66. *Senate Treaty Hearings*, *supra* note 5, at 106-07.

67. See, *Gallina v. Fraser*, 278 F.2d at 78, 79, in which the same court, in a habeas corpus proceeding to prevent the petitioner's extradition to serve an Italian sentence, suggested that it might investigate the conduct of foreign proceedings "too antipathetic to a federal court's sense of decency." In such a case the only American involvement would be the *enforcement* of a foreign conviction.

68. See notes 62 & 63 *supra*.

where "cruel, inhuman and outrageous treatment triggers a broad due process analysis."

The relevance of the *Rochin* principle is not that it provides a test which may easily be applied [citations], but that it embodies a perception which remains viable—a court which would ordinarily stay its hand will intervene when government conduct becomes so outrageous that conscience and justice demand a remedy.<sup>69</sup>

*C. Domestic Execution of Foreign Convictions Obtained Through Domestic Cooperation: A New Silver Platter*

The Penal Sentences Treaty presents a unique problem: whether execution of a foreign conviction constitutes such a degree of American involvement that alleged potential constitutional violations will be reviewed by the courts. As has been discussed, *recognition* and *enforcement* of foreign criminal judgments are regularly practiced by the American judicial system without review, in part, at least, because the involvement of the American system is thought to be minimal. When an American conviction is in question, the admissibility of evidence or recognition of jurisdiction obtained by foreign officials is determined by a consideration of both American involvement and shocking conduct. However, where trial is abroad, and the sentence is to be served in this country, another form of American involvement is at issue.

Execution of a foreign judgment has been described as

... a specific process whereby the executing state uses its power processes as if it were acting either on behalf of the rendering state (as an agent thereof) or on its own behalf as if the foreign penal judgment had been domesticated by the executing state (which is thereby executing the sentence *as if it were its own national judgment*).<sup>70</sup>

The adoption of a foreign judgment, the validity of which is questionable because of alleged unfairness, as the basis for imprisonment in this country could place the American legal process in disrepute.<sup>71</sup> More is involved, however, than simple execution. Although a certain amount of federal involvement in activities

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69. U.S. *ex rel.* Lujan v. Gengler, 510 F.2d at 65, 66.

70. *Senate Treaty Hearings*, *supra* note 5, at 262 (statement of M. Cherif Bassiouni before the Senate Foreign Relations Committee). Mr. Bassiouni attempts to distinguish the Penal Sentences Treaty from strict *execution* by calling it a "custodial compact for the neutral administrative benefit of the parties." He is unable, however, to find a satisfactory analogy in American history.

71. Professor Swan, echoing Justice Frankfurter's concern in *Rochin*, told the Senate Committee on Foreign Relations:

I worry about the prospect, over time, of increasing numbers of Ameri-



leading to the arrest and seizure of American citizens and their property in other countries has been tolerated by the courts, those trials have proceeded in American courts.<sup>72</sup> Thus, even though jurisdiction or evidence may have been obtained by questionable means, all other aspects of the conviction process were supervised by the courts of this country. Trials in foreign courts pursuant to extradition treaties and SOFAs are subject to some manner of preliminary hearing<sup>73</sup> or American observation abroad.<sup>74</sup> At some point in the process, the accused has his day in an American court. Here, however, despite significant American involvement at both *ends* of the arrest-conviction-execution process, the only possible American review, by a writ of habeas corpus,<sup>75</sup> is precluded by the terms of the treaty.<sup>76</sup>

The arrest and prosecution of the majority of American citizens subject to transfer under the treaty occurred, to a large extent, thanks to DEA encouragement of and cooperation with Mexican authorities.<sup>77</sup> Before 1970, when the first large-scale cooperative effort between U.S. and Mexican agents to halt the narcotics flow

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cans being held in American prisons under these doubtful circumstances without having had their "day in court."

. . . In time, the bitterness of the prisoners, the travesty of justice that their imprisonment represents and the suspicion that they remain in prison only because the American government does not wish to offend a foreign power, may come to dominate our own and the world's perception of this otherwise humane enterprise. *Id.* at 128-29.

72. *U.S. ex rel. Lujan v. Gengler*; *U.S. v. Lira*; *Stonehill v. U.S.*; *Birdsell v. U.S.*, notes 23 & 47 *supra*.

73. 31 AM. JUR. 2d *Extradition* § 55 (1967). 18 U.S.C. § 3184 (1969) provides for a hearing to determine if there is evidence sufficient to sustain the criminal charge before a justice, judge or magistrate of the federal system, or a judge of the state court of general jurisdiction.

74. *See*, note 43 *supra*.

75. The United States Constitution provides: "The privilege of the writ of Habeas Corpus shall not be suspended, unless in cases of rebellion or invasion the public safety may require it." U.S. CONST. art I, § 9, cl. 2. While the original writ was used only to attack the jurisdiction of the court, today it is regarded as the proper remedy to obtain release from any detention "contrary to the Constitution or fundamental law," whether or not jurisdiction is in issue. *Preiser v. Rodrigues*, 411 U.S. 475, 485 (1973). The Supreme Court has stated that the writ should be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

76. The treaty provides that no prisoner will be transferred until the time for leave to appeal has expired. *Treaty, supra* note 2 art. II § 6. Direct and indirect challenges to the conviction may proceed only in the courts of the transferring state. *Treaty, supra* note 2 art. VI.

77. In 1969 the Nixon administration instituted "Operation Intercept," a police action within the U.S. to stop the flow of narcotics from Mexico. For ten days all cars crossing the border were subjected to a thorough search. Huge traffic jams developed, and as a result, the tourist trade upon which Mexican border cities thrive was severely curtailed. The Mexican government of Luis Echeverria reacted by agreeing to institute "Operation Cooperation," a program of joint U.S.-Mexican drug enforcement activities in Mexico. By 1974 the federal government

into this country began, few Americans were imprisoned in Mexico on drug charges.<sup>78</sup> In view of the dramatic increase in the number of American drug offenders imprisoned in Mexico since that time, it seems logical to conclude that Mexican officials would not have prosecuted in most of these cases without American encouragement.

The effect of the treaty is to provide an alternative system of justice, a new kind of *silver platter*, through which Americans are convicted in courts where, perhaps, individual rights are not guarded as zealously as in this country. The result could well be regarded by American courts as a unitary process with sufficient linkage between American and Mexican systems to apply constitutional due process considerations to convictions obtained by that method. Confronted also with the alleged instances of shocking treatment afforded many Americans at the hands of Mexican officers,<sup>79</sup> the courts might feel compelled, as they were in *Rochin* and *Toscanino*, to deny "brutality the cloak of law," by overturning foreign convictions despite the express prohibition in the treaty.

#### IV. ATTEMPTED WAIVER OF CONSTITUTIONAL RECOURSE TO HABEAS CORPUS

In an attempt to cure the potential constitutional defects present in Article VI of the treaty (permitting a review of the judgment only in a court of the transferring state), the Senate Foreign Relations Committee recommended that provision be made to secure a valid waiver of the transferred prisoner's right to seek a

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had spent fourteen million dollars on equipping and training Mexican customs agents and police for the project. *1976 Hearings, supra* note 8, at 89.

*DEA Functions and Guidelines Relating to Operation in Foreign Countries*, June 4, 1976, reprinted in *U.S. Citizens Imprisoned in Mexico, supra* note 7 Part III, at 68-70, set out the extent of official U.S. cooperation: (1) assistance in developing sources of information and interviewing witnesses; (2) direct assistance in undercover capacity; (3) assistance in conducting surveillance of the activities of major drug traffickers; (4) turning over appropriate information obtained by the DEA to foreign government agents; (5) investigation; (6) sending drug samples to U.S. labs for testing; and (7) coordination of matters regarding extraditions, expulsions, joint prosecutorial efforts and requests for judicial assistance.

78. Note 12 *supra*.

79. The individual accounts, some in the form of letters smuggled from Mexican prisons, some the direct testimony of former prisoners or the family of those still incarcerated, must be read to appreciate their force. Many are reprinted in Senate and House hearings. See, e.g., *supra* note 12, at 23 and *Transfer of Offenders, supra* note 7, at 253.

writ of habeas corpus.<sup>80</sup> In view of the circumstances in which such a waiver is made, its validity is doubtful at best.

The waiver of certain constitutional rights in criminal cases has always been recognized.<sup>81</sup> The principal requirement of a valid waiver is that it be an "intentional relinquishment or abandonment of a known right or privilege."<sup>82</sup> Wishing to take no chances, the Foreign Relations Committee suggested that the instant waiver be made only after consulting with counsel and in the presence of an officer of the court.<sup>83</sup> Nonetheless, at least one member of the Committee was unimpressed by these precautions, stating: "If consent or waiver is deemed inherently involuntary, then it is invalid no matter what procedures are employed."<sup>84</sup>

The Supreme Court has found that under certain circumstances a valid waiver is impossible. In the case of *Fay v. Noia*,<sup>85</sup> the Court decided that the choice of a convicted murderer, sentenced to life imprisonment, to forego an appeal in the state courts which could well have ended in the imposition of the death penalty was no choice at all. Because he had only a "grisly alternative," he was deemed not to have waived his right to petition for habeas corpus in the federal courts.<sup>86</sup>

If reports revealed to the Senate committee studying alleged abuse of Americans in Mexican jails approximate the truth, the alternative to transfer under the treaty may be no less grisly than the choice confronting Noia. With health facilities minimal, adequate food and shelter available only for a high price, and prison riots a constant threat, death might be more than a remote possibility, and perhaps a more desirable alternative than some others.<sup>87</sup>

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80. S. EXEC. REP. NO. 10, 95th Cong., 1st Sess. 10 (1977).

81. See, *Murch v. Mottram*, 409 U.S. 41 (1972) (waiver of post-conviction remedy); *Adams v. U.S. ex rel. McCann*, 317 U.S. 269 (1942) (waiver of right to counsel); *Shick v. U.S.*, 195 U.S. 65 (1904) (waiver of jury trial); *U.S. ex rel. Soloman v. Mancusi*, 412 F.2d 88 (2d Cir. 1969) (waiver of right to speedy trial); *U.S. v. Crutcher*, 405 F.2d 239 (2d Cir. 1968) (waiver of presence of accused at trial); *Duffy v. Currier*, 291 F. Supp. 810 (D. Minn. 1968) (waiver of privilege against self-incrimination).

82. *Fay v. Noia*, 372 U.S. 391, 439, quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

83. *Supra* note 80, at 10.

84. *Id.* at 21 (views of Senator Robert P. Griffen).

85. 372 U.S. 391 (1963).

86. *Id.* at 440.

87. See, letters and accounts note 7 *supra*. One letter, dated April 29, 1977 from an American inmate (whose name was withheld for his own protection), describes one night of riot.

Then about 12:00 Monday night (I was sleeping in George's room cause of my fever—103) George comes rushing in "Federal search" There were

Professor Swan, who argues forcefully for the *continuum* theory of foreign police cooperation, does not believe that *Fay v. Noia* poses a real threat to the validity of the proposed waiver.<sup>88</sup> He contends that *Noia* and other cases like it that abrogate waivers can be factually distinguished from the situation of a prisoner preparing for transfer. Unlike *Noia*, who had committed a crime against American laws within American jurisdiction and was thereby entitled to U.S. constitutional protections, an American prisoner in Mexico has no such rights. Having violated Mexican law within Mexican jurisdiction, he may have the benefit of Mexican constitutional protection, but he clearly has no claim to American constitutional safeguards. *Noia*, by choosing not to appeal, waived one real benefit (his right to petition for habeas corpus relief) in exchange for another (his life). The hypothetical prisoner, as Swan's argument goes, waives no *real* right: unprotected by the Constitution of our country while he is imprisoned in Mexico, he gives nothing in exchange for the "benefit" of imprisonment in the United States.

Is the American who has been imprisoned through the operation of the fused, transnational system actually bereft of his American rights? Put another way, do not American constitu-

at least 200 soldiers and Blues lining up in front of the processados getting ready for a heavy search. The people over there throw milk bottles and coke bottles at the pigs. They move back. The mexicans in processados tore up those little restaurants, put the wood in front of the door, dowsed it with kerosene and torched it. Now there is no way for the pigs to get into there. But of course the mexicans in Sentincados followed suite.

So now both departments are burning. Just unreal. About 5 A.M. Tuesday morning the fire truck comes and puts out the blaze. So now the pigs go in and search. Our department where all the americans live was the last department to be searched and boy they tore it apart. The pigs stole all Fred's silverware and the little boat parts you got him.

So the pigs split but like they say, you ain't "heard nothing yet" Well when they searched Sentenciados they locked all of the mexican prisoners in the new corral. Well the little angels broke down the doors then went to let out all the deranged killers from the old corral. Now all the heavy psychos are loose and things are looking bad, real bad. (Oh, forgot to say Monday night they killed seven people).

Now we have a full fledged riot. They completely looted and burned the store and a few shops. I'd say at least thirty critically wounded. The fire truck came and put out the blaze at the store. I saw all this and lots more, people getting carved up left and right. They shot my friend Jose three times and stabbed him a few . . . don't know if he's alive or what—God its so insane, prisoners running around with 22—38 and 45 blowing people away and stabbing them.

(*Transfer of Offenders*, *supra* note 7, at 284.)

88. *Senate Treaty Hearings*, *supra* note 5, at 126-27.

tional safeguards attach sometime before the prisoner is transferred over the border, when the actions of each state are seen as part of one continuum? If the system established by the Penal Sentences Treaty is effectively monolithic, the right to petition for habeas corpus relief must attach retroactively. If the object of recognizing the connection between the two judicial systems is to purge the American system of any debasing unfairness by confession and penance, and if the function of habeas corpus is to "insure that miscarriages of justice within its reach are surfaced and corrected," then there would seem no more appropriate circumstance for the application of the "Great Writ."<sup>89</sup>

#### V. THE POLITICAL QUESTION DOCTRINE: AN OUT FOR THE COURTS AND AN INVITATION TO EXECUTIVE ACTION

While there appears to be a high potential for the abuse of U.S. constitutional rights in a system which executes sentences handed down by foreign courts, it is, in the end, doubtful that American courts will choose to overturn a foreign conviction. Such an action would be a clear violation of the treaty and, as a sharp affront to the foreign judicial system, would undoubtedly mean the end of further transfers.<sup>90</sup> The likely judicial response will be to invoke the *political question* doctrine, relied on by courts in the SOFA and extradition cases.

Surely, in situations such as this, "the controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when [a court] is adjudicating issues inevitably entangled in the conduct of our international relations." And undeniably, matters "vitaly and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference". It is not surprising, then, that many questions arising in connection with our treaties with other governments have been held to be non-justiciable. For "not only does resolution of issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature, but many such questions uniquely demand single-voiced statement of the Government's views."<sup>91</sup>

The necessity of a "single-voiced statement of the Government's views"<sup>92</sup> in the transfer of imprisoned nationals dictates a

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89. See note 73 *supra*.

90. Professor Swan notes:

There is something rather anomalous, perhaps even foolish, about the idea that we stand to defend the rights of prisoners and won't let the government relinquish those rights when the total consequence of that is to leave the prisoners bereft of the very rights we are trying to secure them.

*Id.* at 97.

91. *Holmes v. Laird*, 459 F.2d at 1215 (footnotes omitted).

92. *Baker v. Carr*, 395 U.S. 186, 211 (1962).

non-judicial solution to the potential dangers to individual rights and public trust in the courts. Existing statutory provisions appear inadequate to handle the special problems surrounding the execution of foreign judgments. The President is currently authorized, and required, to do everything in his power, short of armed conflict, to obtain the release of American citizens wrongfully imprisoned "by or under the authority of" foreign countries.<sup>93</sup> While it is certainly arguable that imprisonment in the United States pursuant to a foreign conviction is "under the authority of" that foreign country, amendment to the codes should be made to more clearly establish the President's authorization and duty to obtain the release of Americans imprisoned in this country under the execution of suspect foreign judgments.

To be effective, the executive must be informed of the particular abuses that occurred in each case. Provision is presently made in SOFAs for the presence, at trials of American servicemen under the agreements, of a *trial observer* whose duty it is to submit a *résumé* to his commanding officer setting out (1) whether there was "any failure to comply with the procedural safeguards secured by the pertinent SOFA," and (2) whether there was a "fair trial under all the circumstances."<sup>94</sup> The commanding officer is, in turn, to request that the Department of

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93. 22 U.S.C. § 1732 (1964):

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

94. Stewart, *Fair Trial? Trial Observer's Report*, 12 A.F. JAG L. REV. 276 (1970), discussing the trial observer's role in preparing a *résumé* of the trial. The article reprints a Department of Defense Directive listing procedural safeguards which are to be considered by the commanding officer in making his final determination as to the "fairness" of the trial.

The enforcement of such procedural safeguards as exist in SOFAs is largely a result of a Senate resolution made pursuant to its powers of advice and consent on the NATO-SOFA of 1953 (note 42 *supra*), July 15, 1953, 2 U.S.T. 1828, T.I.A.S. No. 2846, discussed at length in Williams, *An American's Trial in a Foreign Court: The Role of the Military's Trial Observer*, 34 MIL. L. REV. 10 (1966). "The Senate resolution is *not* a reservation under the treaty, rather it is an 'understanding', which makes it a domestic matter entirely." *Id.* at 8 n.27.

State take appropriate action to protect the rights of the accused.<sup>95</sup> Similar provision for observers should be made in connection with the Penal Sentences Treaty. Observers should operate under the Departments of State or Justice to provide the President with information necessary to make appeals through diplomatic channels for the reconsideration of disputed cases.

## VI. CONCLUSION

The interface of foreign and domestic systems of criminal justice is necessarily dynamic. American judicial review of foreign legal activity has been justifiably influenced by a pervasive concern for diplomatic realities, and has approached such matters on a case by case basis. Two areas of inquiry are, however, recurring: the degree of American involvement in the allegedly offensive foreign conduct and the degree of the offensiveness itself. Confronted with a system containing an uncomfortable amount of American involvement both before and after the foreign conviction, a system which, by the admission of law enforcement personnel, has been allowed to evolve because it affords a far greater certainty of conviction and punishment by recourse to foreign tribunals,<sup>96</sup> the American courts will have a strong foundation for intervention.

Against the desire to purge the American judicial system of any possible taint arising out of so close a connection with offensive foreign conduct, the benefit to hundreds of American citizens imprisoned under frequently intolerable conditions in Mexico must be measured. Judicial intermeddling would almost certainly deny this benefit to future prisoners. One means of balancing the constitutional interests of the wrongfully convicted and the personal welfare of all the American citizens in foreign prisons is through executive action. Armed with the reports of American observers at the foreign trial, the President would be in a better position than the American courts to monitor justice in this fused Mexican-American system.

GARY GRAY

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95. The executive branch is in turn required to notify the Armed Services Committees of the House and Senate. Senate Resolution, Paragraph 4, *reprinted in Williams, supra* at 10.

96. See notes 8-10 *supra* and accompanying text.