A Constitutional Analysis of the Prohibition Against Collateral Attack in the Mexican-American Prisoner Exchange Treaty

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A CONSTITUTIONAL ANALYSIS OF THE PROHIBITION AGAINST COLLATERAL ATTACK IN THE MEXICAN-AMERICAN PRISONER EXCHANGE TREATY†

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INTRODUCTION

On November 25, 1976, the United States and Mexico concluded a bilateral treaty providing for reciprocal prisoner exchange, so that a national of one party to the agreement could complete his sentence in his home country. The objectives of the agreement essentially were twofold: first, there was a need to ameliorate relations with Mexico on the delicate matter of the abuse of American citizens confined in Mexican prisons; second, there was

† In this Article, the author, though recognizing that the feminine gender is equally appropriate, uses the masculine gender for personal pronouns. This convention is adopted for the purposes of style and consistency.

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2. For an enumeration of human rights violations alleged to have taken place in the Mexican prison system, see, e.g., 123 Cong. Rec. H11,459 (daily ed. Oct. 25, 1977) (remarks of Rep. Stark); note 205 infra. In late 1977, there were more than 2,300 Americans in foreign jails; approximately 600 were confined in Mexico alone. See, e.g., Implementation of Treaties for the Transfer of Offenders to or from Foreign Countries: Hearings on H.R. 7148 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 1 (1977) [hereinafter cited as House Judiciary Hearings]; U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations (pt. III), 94th Cong., 2d Sess. 22 (1975-1976); N.Y. Times, June 14, 1976, at 11, col. 1. This concern for the manner of treat-
a strong desire to alleviate special hardships, such as those respecting living conditions and prospects for rehabilitation, resulting from imprisonment in a foreign country.\(^3\) The Treaty was ratified unanimously by the Senate on July 21, 1977,\(^4\) and enabling legislation was approved by Congress and signed into law on October 31, 1977.\(^5\) The Treaty became effective one month later,\(^6\) and in December 1977 the first group of prisoners was transferred.

3. See Letter of Transmittal, Message from the President of the United States to the Senate (Treaty with Mexico on the Execution of Penal Sentences), 95th Cong., 1st Sess., Exec. D, (1977), reprinted in House Judiciary Hearings, supra note 2, at 232; H. R. Rep. No. 720, 95th Cong., 1st Sess. 26 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 3148. On the issue of special hardships, such as being far from one's family and friends, see, e.g., 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. 129 (1977) [hereinafter cited as Senate Judiciary Hearings] (“Imprisonment is never an easy life. Adjustments are more difficult under those conditions being several thousand miles from home as compared to the circumstances where you have support from families closer to home.”) (statement of Sen. Mathias). See also id. at 1, 26, 62, 120, 123, 293; Penal Treaties with Mexico and Canada: Hearings on Exec. D and Exec. H Before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 5 (1977) [hereinafter cited as Senate Foreign Relations Hearings]; House Judiciary Hearings, supra note 2, at 3, 180. On the related rehabilitation issue, see, e.g., Senate Judiciary Hearings, supra at 62, 120, 130 (“Many of the young Americans I talked to were much embittered and felt very frustrated and deserted. I think that their outlook was that the chances for return to some kind of normal life would be greater if they had been able to serve out their terms in American prisons.”) (statement of Sen. Mathias), 133, 254-55 (hardships in Mexican prisons caused “debilitation”) (statement of Dwight Worker, former prisoner in Mexico), 258, 262, 293, 302 (“How can one hope to rehabilitate a person when he cannot understand the language, the customs, or the traditions?”) (statement of Michael Griffith, attorney), 310-12; House Judiciary Hearings, supra note 2, at 126. On “dehabilitation” in American prisons, see, e.g., Battle v. Anderson, 564 F.2d 388, 403 (10th Cir. 1977).

Another concern of the negotiators of the Treaty was to enhance international cooperation in penal matters. See, e.g., Treaty, supra note 1, at preamble; Letter of Submittal from the Secretary of State to the President of the United States, Jan. 17, 1977, reprinted in House Judiciary Hearings, supra note 2, at 233-34; cf. N.Y. Times, July 19, 1978, at 3, col. 1 (discussing U.S.-Mexican negotiations for a treaty for cooperation in the administration of justice). See also note 208 & accompanying text infra.


6. See Treaty, supra note 1, at art. X, para. 2. The Treaty remains in force for three years, subject to automatic renewal in three-year periods should neither contracting party have notified the other of its intention to let the Treaty terminate ninety days before the period expires. Id. at para. 3.
from Mexico to the United States.\textsuperscript{7}

In terms of its operation, the transfer to the United States is made subject to the following conditions regarding the status of both the offender and the offense: (1) the offense must be one that is generally punishable in the United States\textsuperscript{8} and is not a political or immigration offense;\textsuperscript{9} (2) the offender must be both a national of the United States and not a domiciliary of Mexico;\textsuperscript{10} and (3) there must be at least six months remaining on the sentence, with no appeal or collateral attack proceeding pending and the time for appeal expired.\textsuperscript{11} There also is a requirement of consent—by Mexico, as the transferring state,\textsuperscript{12} by the United States, as the

\textsuperscript{7} See, e.g., Time, Dec. 19, 1977, at 25. The Treaty is entirely reciprocal, allowing eligible Mexicans incarcerated in the United States the opportunity to transfer to Mexico. Reference is made in this Article, however, only to eligible Americans confined in Mexico who choose to return to the United States. For a brief discussion of the reasons for some eligible prisoners not wishing to be transferred, see note 144 infra.

\textsuperscript{8} Although most of the Americans confined in Mexican prisons had been convicted of or were awaiting trial on charges of drug offenses, many had been involved in non-drug-related crimes. See generally Senate Judiciary Hearings, supra note 3, at 70-119, 132. Moreover, not all of the prisoners were nominal or first offenders. See, e.g., House Judiciary Hearings, supra note 2, at 27.

\textsuperscript{9} Treaty, supra note 1, at art. II, para. 4; cf. N.Y. Times, July 27, 1978, at 2, col. 3 (discussing arrests of political dissidents in Mexico). The basic reason for this provision was that the Mexicans do not regard it to be a criminal offense for a person to seek their [sic] economic improvement by coming to the United States—by crossing the border and coming to the United States. It would not be a crime in Mexico to do so . . . and, therefore, they have taken a position that they will not keep . . . in a Mexican jail, someone who has been convicted in the United States of an immigration offense. House Judiciary Hearings, supra note 2, at 29 (statement of Mike Abbell, U.S. Dep’t of Justice, Criminal Division). But because this is an ongoing Treaty, see note 6 supra, a change in the legal interpretation by one country could enable transfers at a later date of prisoners who initially were ineligible. See id.

\textsuperscript{10} Treaty, supra note 1, at art. II, paras. 2, 3. “A ‘domiciliary’ means a person who has been present in the territory of one of the parties for at least five years with an intent to remain permanently therein.” Id. at art. IX, para. 4.

\textsuperscript{11} Id. at para. 1. There is some question whether Mexico has complete discretion to grant or deny permission to transfer. A memorandum of law submitted by the State Department suggested that consent was discretionary. See Senate Judiciary Hearings, supra note 3, at 207 (memorandum of Detlev F. Vagts). However, the literal language of the Treaty states that the transferring state determines whether the transfer is appropriate and, if so, then that state must submit a request for transfer. Treaty, supra note 1, at art. IV, para. 2. In this context, “appropriate” could be read to mean that all the mechanical conditions for transfer are met. It could also refer to a more subjective standard according to which one must weigh the “probability that the transfer will contribute to the social rehabilitation of the offender . . . .” Id. at para. 4. The latter interpretation was employed by the Senate in its report on the Treaty. S. Exec. Rep. No. 10, 95th Cong., 1st Sess. 3 (1977). This, then, arguably
receiving state, and by the prisoner. Although ordinarily Mexico would initiate the transfer procedures, a prisoner could submit a request for transfer to the authorities.

Once a prisoner has been transferred, adjudicative and custodial powers over him are divided between the two countries. Mexico retains the power to alter the original conviction and length of sentence and to pardon or grant amnesty to the offender, and it has exclusive jurisdiction over any form of collateral attack on the original sentence; the United States supervises the completion of the prison term, applies its laws on parole and conditional release, and takes jurisdiction over challenges to conditions of confinement and the constitutionality of the Treaty. The agreement, which protects the transferred offender gives Mexico some discretion to refuse to transfer a prisoner and could be utilized by Mexican officials to keep in that country a prisoner who otherwise would be eligible for transfer.

13. Treaty, supra note 1, at art. IV, para. 3. The decision by the receiving state is subject to the requirement that it bear in mind all factors bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender, including the nature and severity of his offense and his previous criminal record, if any, his medical condition, the strength of his connections by residence, presence in the territory, family relations and otherwise to the social life of the Transferring State and the Receiving State. See S. Exec. Rep. No. 10, 95th Cong., 1st Sess. 11 (1977). There was an indication in the congressional hearings, however, that paragraph 4 could be used by the United States to prevent the return of a major drug dealer or some other unsavory criminal that the United States would prefer to keep incarcerated for a longer time. See, e.g., House Judiciary Hearings, supra note 2, at 161-65 (testimony of Warren Christopher, Deputy Secretary of State). Such an occurrence might raise equal protection and other legal problems.

14. Treaty, supra note 1, at art. IV, para. 2. This consent must be express rather than implied. Id.

15. Treaty, supra note 1, at art. IV, para. 1.

16. Id. at art. V, para. 2. The receiving state is bound to honor these determinations. Id.

17. Id. at art. VI. See also id. at art. V, para. 2.

18. Id. at art. V, para. 2. Theoretically, the signatories' national penal authorities could grant parole to transferred prisoners deemed to have been unjustly tried and convicted without adequate procedural safeguards by the transferor forum. In practice, however, such action undoubtedly would be constrained by diplomatic considerations. See note 168 infra.

from being subjected to double jeopardy in the United States for the crime for which he was convicted in Mexico,20 governs, in addition to adult offenders, those confined as mentally ill or youthful offenders,21 and it guarantees all transferred prisoners treatment that conforms to the procedural safeguards of their home country.22

Although the Treaty met with little opposition in the Senate,23 substantial concern was expressed on several points—most prominently that the Treaty might violate the Constitution because it precluded a transferred prisoner from collaterally attacking the Mexican conviction in the United States courts.24 One

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20. Treaty, supra note 1, at art. VII.
21. Id. at art. VIII.
22. See id. at art. V, para. 2. Other provisions of the Treaty require that a prisoner's civil rights in the receiving state not be prejudiced more than they would have been in the transferor forum. Id. at para. 6.

A bilateral prisoner exchange treaty also has been entered into with Canada. Treaty on the Execution of Penal Sentences, Mar. 2, 1977, United States–Canada, reprinted in Treaty with Canada on the Execution of Penal Sentences, S. Exec. Doc. H, 95th Cong., 1st Sess. (1977) [hereinafter cited as Treaty with Canada]. The Senate ratified the Treaty with Canada on July 19, 1977, 123 Cong. Rec. S12,268 (daily ed. July 19, 1977), and implementing legislation was signed into law on October 31, 1977. See note 5 supra. Unlike the Treaty with Mexico, this Treaty “did not come about as a result of drug enforcement efforts, adverse prison conditions or publicity. The Canadian authorities originated the idea in order to promote rehabilitation of parolees.” S. Exec. Rep. No. 10, 95th Cong., 1st Sess. 3 (1977). See also Treaty with Canada, supra at art. III, para. 6; Senate Foreign Relations Hearings, supra note 3, at 18, 55-56. Therefore, this Article does not address the Treaty with Canada, for the circumstances in which the eligible prisoners must make their decisions to transfer vel non are wholly dissimilar.

In any event, the two treaties with the United States are virtually identical, with two significant exceptions. First, transfers under the Canadian agreement must be requested by an application of the offender to the authority designated by the appropriate party to supervise the functions of the Treaty. Treaty with Canada, supra at art. III, para. 1; see Treaty, supra note 1, at art. III. See also Treaty with Canada, supra at art. III, para. 3. Second, each signatory must inform all potential applicants of the Treaty’s provisions regarding exchange. Treaty with Canada, supra at art. III, para. 2. Under the Mexican Treaty, however, transfers are initiated by the penal authority of the transferring state and require the consent of the offender to effect the transfer. Treaty, supra note 1, at art. IV, paras. 1, 2. Thus, while the consent of the incarcerated offender and the approval of both signatory nations to the exchange are required by both agreements, the procedures for initiation of the transfer differ markedly. See also S. Exec. Rep. No. 10, 95th Cong., 1st Sess. 4 (1977).

The other major distinction between the two treaties is that the Treaty with Canada makes specific provision for the transfer of parolees and those persons receiving suspended sentences. See Treaty with Canada, supra at preamble; S. Exec. Rep. No. 10, 95th Cong., 1st Sess. 4 (1977).


24. For concern that this provision was a major constitutional obstacle, see, e.g., Senate Judiciary Hearings, supra note 3, at 2, 62, 124, 130, 177; House Judiciary Hearings, supra note 2, at 2, 177, 179, 227. Although precluded from directly attacking the Mexican conviction, a prisoner still could bring a habeas corpus action in the United
The reason that this problem arises is that the reciprocal prisoner exchange concept is novel to domestic law. The closest analogue is the law of international extradition, but that situation is significantly distinguishable. Further, although there is a significant body of analogous precedent available, it is incomplete, uncertain, and often inconsistent. This Article addresses the constitutional muddle through which the courts must wade in adjudicating challenges.

States challenging the transfer procedures, the manner of execution of the Treaty, conditions of confinement, or the constitutionality of the Treaty or the enabling legislation. A transferred prisoner also is not precluded from seeking relief from violations by United States officials who were unlawfully involved in the foreign conviction proceedings. See H.R. Rep. No. 720, 95th Cong., 1st Sess. 42-43 (1977), reprinted in [1977] U.S. Code Cong. & Ad. News 3164-66. See also note 19 & accompanying text supra; notes 28-44 & accompanying text infra.

25. But see note 272 infra. Prior to the agreement with Mexico, the United States had never entered into a bilateral pact that sanctioned the reciprocal exchange of prisoners in order to allow them to serve the remainder of their sentences in the home country. The closest direct analogy is Article XXII(7)(b) of the Facilities and Areas and the Status of Forces in Korea Agreement (SOFA), June 9, 1966, United States-Korea, 17 U.S.T. 1677, 1697-98, T.I.A.S. No. 6127, which provides that South Korea is to give “sympathetic consideration” to any United States request to take custody of United States citizens sentenced by Korean courts under the terms of the Agreement. However, this provision has never been implemented. But such reciprocal prisoner agreements are not without international precedent. The multilateral European Convention on the International Validity of Criminal Judgments, May 28, 1970, Europ. T.S. No. 70, reprinted in 9 Int'l Legal Mats. 445 (1970), resembles the recent Mexican and Canadian treaties with the United States, although its more comprehensive provisions encompass the treatment of offenders who remain at large, id. at pt. II, § 1, art. 2(a), and extends the concept of reciprocity to the payment of fines in addition to the completion of prison terms. Id. at art. 2(b). Similarly, the Scandinavian nations have provided for the exchange of prisoners, within the framework of a multilateral agreement, since 1948. See Convention Regarding the Recognition and Enforcement of Judgments in Criminal Matters, Mar. 8, 1948, Denmark-Norway-Sweden, 27 U.N.T.S. 117. See also Scandinavian Act of Enforcement of May 22, 1963, cited in Oehler, Recognition of Foreign Penal Judgments and their Enforcement, in 2 A Treatise on International Criminal Law 263 n.3 (M. Bassiouni & V. Nanda eds. 1973); Swiss Federal Act of Jan. 22, 1892, quoted in 2 A Treatise on International Criminal Law 261-62 (M. Bassiouni & V. Nanda eds. 1973). See generally De Schutter, International Criminal Cooperation—The Benelux Example, in 2 A Treatise on International Criminal Law 249, 254-58 (M. Bassiouni & V. Nanda eds. 1973); Hulsman, The Role of Sentences Passed in the Absence of the Accused in Arrangements for the Enforcement of Foreign Criminal Sentences, in Aspects of the International Validity of Criminal Judgments 29 (European Comm. on Crime Problems, Council of Europe, Strasbourg, 1968); Shearer, Recognition and Enforcement of Foreign Criminal Judgments, 47 Austl. L.J. 585 (1973).

Of course, reciprocal prisoner exchange on an individual basis is not a novel idea, see, e.g., TIME, July 10, 1978, at 25, col. 1; TIME, May 15, 1978, at 46, col. 1, but that is not the subject of this Article. In fact, such exchanges normally involve political criminals, who are expressly ineligible under the Treaty with Mexico. Treaty, supra note 1, at art. II, para. 4. (There is no similar provision in the Treaty with Canada.) See generally A. Dolgun & P. Watson, Alexander Dolgun's Story: An American in the Gulag (1975); N.Y. Times, Apr. 12, 1978, at B28, col. 1.

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To the prohibition against collateral attack, which in the United States ordinarily is effectuated by a writ of habeas corpus.

THE CONSTITUTIONAL ISSUE: NO ACCESS TO HABEAUS CORPUS

A. Constitutional Right to Challenge the Mexican Conviction

In analyzing the relationship of habeas corpus to the Treaty, the initial issue to consider is whether the transferred prisoner has any right at all to institute a collateral challenge. On this point, it is at least clear that no American rights could be claimed successfully before the transfer of a United States citizen convicted of a crime and imprisoned in Mexico.

In an early United States Supreme Court case in which an American prisoner had contested extradition to a foreign country on due process grounds, the Court plainly stated that a citizen of the United States who commits a crime in a foreign country was subject to that country's laws and could make no claim to the protection of the Constitution or laws of the United States: "[T]hose provisions [of the Constitution concerning fundamental guarantees, such as the writ of habeas corpus] have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."

Recent judicial opinions have supported this conclusion. In United States v. Toscanino, for example, in which the defendant's major contention on appeal was that his presence within the jurisdiction of the United States had been obtained illegally as the result of his seizure by Uruguayan authorities, the United States

27. See note 47 infra. For a list of other potential constitutional deficiencies in the Treaty, see note 276 infra. See also note 162 infra.

28. On the nature and extent of Mexican due process and sentences, see, e.g., Senate Judiciary Hearings, supra note 3, at 64, 126, 288, 304. See generally Constitucion Política de los Estados Unidos Mexicanos art. 20, §§ I-X. (For a translation, see 9 Constituciones of the Countries of the World, Mexico art. 20, §§ I-X (A. Blaustein & G. Flanz eds. 1973).)

29. Neely v. Henkel, 180 U.S. 109, 122 (1901). See also Holmes v. Laird, 459 F.2d 1211, 1219 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972). "What we learn from Neely is that a surrender of an American citizen required by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguards in all respects equivalent to those constitutionally enjoined upon American trials." Id. The sensitivity of states to acts that have the effect of impugning the sovereign power is well known. See First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (act of state doctrine). See also United States v. Belmont, 301 U.S. 324 (1937) (emphasizing the exclusive competence of the executive branch in the field of foreign affairs); Senate Judiciary Hearings, supra note 3, at 128 (remarks of Barbara M. Watson, Administrator, Bureau of Security and Consular Affairs, referring to the "sensitive problems" that might arise).

30. 500 F.2d 267 (2d Cir. 1974).

31. More particularly, Toscanino contended that he was lured from his home in Montevideo, Uruguay, at the direction of a Montevideo policeman acting as a paid agent of the United States. He alleged that, while accompanied by his pregnant wife, he met the agent, was knocked unconscious with a gun, thrown into the back seat of a
Court of Appeals for the Second Circuit declared, "The Constitution . . . applies only to the conduct abroad of agents acting in behalf of the United States. It does not govern the independent conduct of foreign officials in their own country." 32 A clear problem arises, however, when the United States becomes associated with the foreign conviction by imprisoning the offender in this country. More specifically, the question is whether this act of imprisonment sufficiently implicates the United States in the conviction to invoke the constitutional requisites of due process for the trial and conviction. 33 In a statement before the House Commit-

car, blindfolded, and driven to Brazil. There, he claimed, he was interrogated incessantly for 17 days, denied nourishment and sleep, and subjected to torture and brutality, such as the pinching of his fingers with metal pliers, the flushing of alcohol and other fluids into his eyes, nose, and anal passage, and the passing of jarring jolts of electricity through his body by means of electrodes attached to his earlobes, toes, and genitals. 34 Following this alleged period of torture, he was drugged by Brazilian-American agents and placed on a Pan American flight "destined for the waiting arms of the United States government." 35 He further claimed that the United States Attorney for the Eastern District of New York was informed regularly of the progress of the interrogation, 36 and that during the interrogation a member of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, was present at one or more intervals as an active participant. The United States Attorney would not confirm or deny Toscanino's version of the facts, contending that the mode of Toscanino's apprehension was immaterial. 37 See generally Ker v. Illinois, 119 U.S. 436, 440 (1886):

"[D]ue process of law" . . . is complied with when the party is regularly indicted by the proper grand jury in the [proper] court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled.

See also Gerstein v. Pugh, 420 U.S. 103 (1975); Frisbie v. Collins, 342 U.S. 519, 522 (1952): "This Court has never departed from the rule announced in Ker v. Illinois . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'"

32. 500 F.2d at 280 n.9 (citing Birdsell v. United States, 346 F.2d 775, 782 (5th Cir.), cert. denied, 382 U.S. 963 (1965)). See also Reid v. Covert, 354 U.S. 1 (1957); Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972); Wentz v. United States, 244 F.2d 172 (9th Cir.), cert. denied, 355 U.S. 806 (1957); House Judiciary Hearings, supra note 2, at 125.

33. "Whether or not United States officials are substantially involved, or foreigners are acting as their agents or employees, is a question of fact to be resolved in each case." United States v. Toscanino, 500 F.2d 267, 280 n.9 (2d Cir. 1974) (citing Stonehill v. United States, 405 F.2d 738, 743-45 (9th Cir.), cert. denied, 395 U.S. 960 (1968)). See also United States v. Lira, 515 F.2d 68 (2d Cir. 1974), cert. denied, 423 U.S. 847 (1975) (Merely asking the Chilean Government for the arrest and expulsion of defendant is not sufficient to make the U.S. Government responsible for the torture of defendant by the Chilean officials, so that defendant may take advantage of the Toscanino principle that the government may not take advantage of its own denial of defendant's constitutional rights); United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir.), cert. denied, 421 U.S. 1001 (1975); note 88 infra. On remand in Toscanino, the district court held that the defendant had failed to prove his allegations, and consequently the court would not divest itself of jurisdiction. 398 F. Supp. 916 (E.D.N.Y. 1975).
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tee on the Judiciary, a federal official argued in the negative, reasoning:

If the 'Great Writ' may not be invoked to prevent extradition to a country which may not follow procedures compatible with American notions of constitutional fairness, it would seem logical to conclude that habeas corpus would not be available to a U.S. citizen returned to this country after his foreign conviction.34

After examining other situations in which the United States becomes involved with foreign judgments or procedures, including extradition, procurement of evidence abroad, and enforcement of foreign judgments, the State Department concurred, in a memorandum of law submitted to the Senate Committee on the Judiciary.35 The memorandum concluded that because the rule of non-inquiry into foreign process is followed, with the narrow exception carved out in Toscanino,36 the transfer of prisoners, which “involves much less of an inroad into the rights of an American,”37 can also be consummated without concern for due process in the conviction proceedings.38

35. See Senate Judiciary Hearings, supra note 3, at 209-14 (memorandum of Detlev F. Vagts); cf. Senate Foreign Relations Hearings, supra note 3, at 114-18 (statement of Alan C. Swan concluding that the foreign entanglement cases are unclear). See also note 41 infra.
36. See notes 32, 33 & accompanying text supra.
37. Senate Judiciary Hearings, supra note 3, at 214 (memorandum of Detlev F. Vagts). Professor Vagts continued:

It would obviously be unconstitutional for an American trial abroad to take place under foreign procedures not known to our Constitution. Similarly, it would be intolerable to have American trial safeguards circumvented by collusion between American and foreign law enforcement agencies. The transfer arrangement does not affect the quality of any American trial. A transfer by American authorities to a foreign government prior to trial ensures that the accused will have neither an American trial nor American imprisonment. A transfer of a convicted prisoner back to the United States assures him that he will at least be confined subject to the protections of the Eighth Amendment. It might have been preferable in theory to obtain an arrangement providing for both trial and confinement to be under the auspices of the United States. However, it is plain that neither country could have accepted a treaty that made such inroads into its territorial sovereignty. The Treaty should not be invalidated because, having achieved much for the prisoners in Mexico, it could not go on to reach their other problems.

Id. (footnote omitted).

38. See id. On the nature and scope of involvement of the U.S. Drug Enforcement Administration, see, e.g., Senate Foreign Relations Hearings, supra note 3, at 61-81; U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations (pt. I, 94th Cong., 2d Sess. 5 (1975-1976) (statement of Rep. Stark alleging that American Drug Enforcement Administration officers were present while American prisoners
But these situations may be sufficiently distinguishable. In extradition cases, for example, the only involvement of the United States is in removing a person from its jurisdiction to that of another country, so that that country's criminal justice system may function. Under the Prisoner Exchange Treaty, however, the United States is in fact executing the punishment of a crime based solely on a foreign conviction, absent an intervening trial or hearing in the United States to determine probable guilt or innocence, or even to determine whether the foreign trial comported with rudimentary principles of due process. It might be argued, of course, that confining the foreign offender is akin to enforcing a foreign judgment. But an obvious distinction can be made between civil and criminal judgments, for if enforcement of the latter type envisions physical custody of the offender, then that seems to ignore the historic fundamental principle—embodied in the fifth amendment's guarantee of due process of law—that before an accused may be imprisoned in this country he must be were being tortured). An analogous doctrine of complicity in improper proceedings has developed in the context of the fourth amendment. See generally Robbins & Sanders, Judicial Integrity, the Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two-Thirds (or More) with One Stone, 15 AM. CRIM. L. REV. 63, 76-80 (1977).

To my mind the Government in the laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of [the supervisory power of the courts under McNabb v. United States, 318 U.S. 332, 340 (1942), and Mallory v. United States, 354 U.S. 449 (1957), to bar jurisdiction] in the interests of the greater good of preserving respect for law.


39. "Extradition is the process by which persons charged with or convicted of a crime against the law of a state and found in a foreign state are returned by the latter to the former for trial or punishment." 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727 (1968). For discussions of the analogy between reciprocal prisoner exchange and the law of extradition, see, e.g., Senate Judiciary Hearings, supra note 3, at 140-45, 151-54, 173-74 (statements of M. Cherif Bassiouni); House Judiciary Hearings, supra note 2, at 122, 125, 133-34, 146-47.


afforded a trial that comports with basic fairness.\footnote{42}

Even with domestic cases, states usually will not enforce the criminal judgments of sister states.\footnote{43} Moreover, because the American court normally has the choice whether to continue the transferred offender's imprisonment or to free him (based upon due process violations), one commentator has argued that the decision to follow instead the dictates of the Treaty "is a deliberate decision by American authority to deprive that prisoner of his liberty."\footnote{44}

In summary, the law on the question whether the United States becomes so inextricably involved in the foreign conviction as to invoke due process protections is not definitive, making pertinent the next inquiry, to wit: whether, if there is a colorable due process challenge to the Mexican conviction, the Treaty constitutionally can prevent the transferees from asserting the claim in courts of the United States.

B. Suspension of the Privilege of the Writ of Habeas Corpus

Article I of the United States Constitution reads in part: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."\footnote{45} If the Treaty does act as a suspension of habeas corpus, then it plainly violates the Constitution.\footnote{46} What is less evident is whether article VI of the Treaty\footnote{47} operates as a sus-

\footnote{42. See 123 CONG. REC. S12,549 (daily ed. July 21, 1977) (individual views of Sen. Griffin).}

\footnote{43. This is precisely one reason for having extradition. See U.S. CONST. art. IV, § 2; cf. Huntington v. Attrill, 146 U.S. 657 (1892); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918) (dealing with enforcement of foreign laws, rather than execution of foreign judgments).

\footnote{44. Senate Foreign Relations Hearings, supra note 3, at 102 (statement of Alan C. Swan). Professor Swan continued: "The consequences that flow from freeing a prisoner may merit his continued imprisonment. But the court cannot deny that the imprisonment is an act of the American government merely because a foreign government precipitated the necessity of the choice [to continue the deprivation of liberty]." Id. (footnote omitted). Furthermore, "if our system imprisons people wholly on the strength of a foreign proceeding without any intervening trial according to constitutional standards, it would be anomalous indeed if 'fairness and decency' in those proceedings was a matter to which our constitution was indifferent." Id. at 107.}

\footnote{45. U.S. CONST. art. I, § 9, cl. 2.}

\footnote{46. No congressional witness argued that the problem of drug possession, distribution, and smuggling was a matter concerning "public safety" in the sense connoted by the suspension clause, though presumably such an argument might be received by the judiciary with other than deaf ears. See note 86 infra. See generally Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1263-74 (1970) [hereinafter cited as Developments]. For a discussion of the kinds of clauses present in state constitutions, see Oaks, Habeas Corpus in the States—1776-1865, 32 U. CHI. L. REV. 243, 249-55 (1965).

\footnote{47. The Treaty provides in pertinent part: "The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to chal-
One of the difficulties encountered in debating aspects of the writ of habeas corpus is that the intent of the framers is unclear. Although mentioned in the Constitution, habeas corpus is not enumerated, except by negative inference, as a constitutional guarantee. It is true that the suspension clause gives rise to the assumption that the framers recognized the importance of the writ, but nowhere does the Constitution define or compel its use.

This ambiguity is further complicated by the fact that the negative form of the clause was no accident of wording. Positive affirmations of a right to habeas corpus were proposed at the Constitutional Convention, in subsequent ratifying conventions, and in contemporary commentary. Yet all such proposals were rejected, reflecting perhaps an intent to leave habeas review entirely to the states, or, alternatively, an intent to support a consti-


cengage, modify or set aside sentences handed down by its courts.” Treaty, supra note 1, at art. VI.

48. ”The suspension clause, so simple in appearance, is fraught with confusion. Those few cases which have dealt with it provide little interpretive guidance; commentators have largely ignored it. Consequently, conclusions in this area must be tentative.” Developments, supra note 46, at 1263.

49. There has been surprisingly little attention given to this aspect of the study of the writ. See R. Sokol, Federal Habeas Corpus 196 (2d ed. 1969). Further, the exact origin of the habeas writ is open to dispute. See, e.g., Jenks, The Story of the Habeas Corpus, 18 Law Q. Rev. 64 (1902); Note, The Freedom Writ—The Expanding Use of Federal Habeas Corpus, 61 Harv. L. Rev. 657 (1948). For extended treatment tracing its development from the Magna Carta, see Cohen, Habeas Corpus Cum Causa—The Emergence of the Modern Writ, 18 Can. B. Rev. (pts. 1-2) 10, 172 (1940); Cohen, Some Considerations on the Origins of Habeas Corpus, 16 Can. B. Rev. 92 (1938).

50. The limiting nature of the clause is suggested both by its wording and by its location in article I, section 9, which otherwise consists of an enumeration of limitations.


52. See, e.g., 1 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 328 (New York), 334 (Rhode Island) (2d ed. 1836).

53. See, e.g., 4 Writings of Thomas Jefferson 476 (Ford ed. 1892). In England, suspension was by Parliament:

Suspension in England meant an act of Parliament which had the effect of making the Act of 1679 [31 Car. II, c. 2] temporarily inoperative, usually as to a limited class of persons such as those suspected of treason against the King. Persons in the suspect class could be held without any formal charge and without any right to habeas corpus. Collings, Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?, 40 Calif. L. Rev. 335, 339 (1952).

54. The absence of affirmative protection for habeas corpus, combined with the power of Congress to choose or refuse to create lower federal courts and to determine their jurisdiction, U.S. Const. art. III, §§ 1, 2; see Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868) (Congress can at least partially abolish the Supreme Court’s appellate jurisdiction on habeas corpus); Ex parte Bollman, 8 U.S. (4 Cranch) 75, 94-95
tutional requirement that there be some court with habeas jurisdiction over federal prisoners. An early indication by the Supreme Court of the importance of the writ was Chief Justice Marshall's characterization of habeas corpus as a "great constitutional privilege"; and more recently the Court has declared that "at all events it would appear that the Constitution invites, if it does not compel, a generous construction of the power of the federal courts to dispense the writ conformably with the common-law practice," with which the framers were certainly familiar. It is not clear, however, whether their reference was to the remedy as it existed in the eighteenth century, or whether the prohibition against suspension envisioned a broader concept.


56. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 95 (1807). But again, Marshall did not term it a "right." However, the debate in the Constitutional Convention that resulted in the suspension clause indicates that the interest was in making special provision for the protection of the "Great Writ," id., rather than in granting a special power for eliminating it. See 2 M. FARRAND, supra note 51, at 438.


58. See 3 M. FARRAND, supra note 51, at 297-98; The Federalist No. 84 (A. Hamilton), at 578-79 (J. Cooke ed. 1961).

59. The growth of habeas corpus from 1789, see Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, to the last decade has generally proceeded not as an interpretation of constitutional rights, but rather as interpretations of the habeas corpus statutes. See, e.g., Jones v. Cunningham, 371 U.S. 236 (1963); Brown v. Allen, 344 U.S. 443 (1953). Thus, it might be supposed that, in the absence of constitutional compulsion, what Congress has given it may take away. See, e.g., Marchese v. United States, 304 F.2d 154, 156 (9th Cir. 1962), vacated, 374 U.S. 101, cert. denied, 382 U.S. 817 (1965) (suspension clause protects only rights of habeas as of 1789) (quoting Jones v. Squier, 195 F.2d 179, 181 (9th Cir. 1952) (proper test for suspension is scope of writ in 1789)). It appears that this view was taken by the Senate Committee on the Judiciary in support of its unsuccessful attempt to curtail federal habeas corpus review of state convictions, as part of the Omnibus Crime Control and Safe Streets Act of 1968. See S. Rep. No. 1097, 90th Cong., 2d Sess. 65-66, reprinted in [1968] U.S. Code Cong. & Ad. News 2112, 2152-53. On the other hand, it would be misleading to attribute all the expansion of habeas jurisdiction to congressional impetus. See, e.g., Townsend v. Sain, 372 U.S. 293 (1963); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 500-01 (1963); cf. McNally v. Hill, 293 U.S. 131, 135-36 (1934), overruled on other grounds, Peyton v. Rowe, 391 U.S. 54 (1968) (habeas corpus to be interpreted according to common law principles); Frank v. Mangum, 237 U.S. 309, 331 (1915) (Congress has power to liberalize common law habeas corpus). See also S. Rep. No. 1097, 90th Cong., 2d Sess. 158 (1968), reprinted in [1968] U.S. Code Cong. & Ad. News 2220 (minority report). This line of argument would permit the conclusion that it is the nature of the writ that it grow and adapt to new conditions. See, e.g., Brief for Respondent at 35-39, United States v. Hayman, 342
In an extensive examination of the history of the writ, the Supreme Court in *Fay v. Noia* concluded that at the time the suspension clause was inserted into the Constitution, habeas corpus was available at common law to remedy any type of governmental restraint in contradiction of fundamental rights. The Court further suggested that the drafters of the Constitution did not intend to imply that, if the judiciary did not give habeas its full common law embodiment, the suspension clause would be violated. If the drafters had intended to protect only a specific form of the remedy, they could have included a definition for habeas corpus had long been recognized in the Anglo-American tradition as the one final and most important protection of individual liberty against arbitrary governmental action: “Over the centuries [habeas corpus] has been the common law world’s ‘freedom writ’ by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free.”

U.S. 205 (1952). See also R. Hurd, supra note 55, at 144 (“Employed to vindicate the right of personal liberty by whatever power infringed, [the writ of habeas corpus] became inseparably associated with that right; and in proportion as the right was valued, so was the writ by which it was defended.”). For a case recognizing a right to petition for habeas relief, see Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967), discussed in notes 196-99 & accompanying text infra.

61. Id. at 404-06.
64. Smith v. Bennett, 365 U.S. 708, 712-13 (1961). “Habeas corpus is one of the precious heritages of Anglo-American civilization.” Fay v. Noia, 372 U.S. 391, 441 (1963). It is a writ of “the largest liberty.” Cong. Globe, 39th Cong., 1st Sess. 4151 (1866) (statement of Rep. Lawrence). “It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty, and there is no higher duty than to maintain it unimpaired.” Bowen v. Johnston, 306 U.S. 19, 26 (1939). “Habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.” Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). See also notes 196-99 & accompanying text infra. Speaking on the effect on habeas corpus of the Prisoner Exchange Treaty, one senator referred to the writ as “a cornerstone of our jurisprudence.” Senate Judiciary Hearings, supra note 3, at 130 (statement of Sen. Mathias). Another called it “a basic right which is the most fundamental right in our Constitution.” Id. at 305 (statement of Sen. Biden). See generally Black, *The Bill of Rights and the Federal Government*, in *The Great Rights*, 41, 43-44 (E. Cahn ed. 1963); Chafee, *The Most Important Human Right in the
Arguably, then, the framers' purpose was to assure the continuing availability of a forum to consider questions of illegal detention. Yet the suspension clause has been one of the least litigated provisions of the Constitution. Only two circumstances have joined the issue: war waged on United States territory and the Federal Habeas Corpus Act. The former cases provide minimal guidance for defining jurisdiction, for they were direct suspensions and were held to be valid cases of suspension because of war, or to be invalid for other reasons. The more difficult

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It would be improper, however, to overlook the fact that the Supreme Court recently has narrowed the scope of the writ, although it has asserted the contrary. See, e.g., Stone v. Powell, 428 U.S. 465, 494-95 n.37 (1976) (a state prisoner may not be granted federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search and seizure was introduced at his trial where the state has provided an opportunity for full and fair litigation of a fourth amendment claim). See generally Boyte, Federal Habeas Corpus After Stone v. Powell: A Remedy Only for the Arguably Innocent?, 11 U. RICH. L. REV. 291 (1977); Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 YALE L.J. 1035 (1977); McFeeley, Habeas Corpus and Due Process: From Warren to Burger, 28 BAYLOR L. REV. 533 (1976); Robbins & Sanders, note 38 supra. This direction had been foreshadowed for several years, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 258 (1973) (Powell, J., concurring); Kaufman v. United States, 394 U.S. 217, 234, 237 (1969) (Black, J., dissenting); Bator, note 59 supra;Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. CHI. L. REV. 142 (1970), and recently has been manifested in several cases, e.g., Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501, 513 (1976) (Powell, J., concurring); Davis v. United States, 411 U.S. 233 (1973), culminating with Wainwright v. Sykes, 433 U.S. 72 (1977) (rule barring federal habeas review absent a showing of "cause" and "prejudice" applied to failure to object contemporaneously to the admission of a confession). In Wainwright the Court said:

We leave open for resolution in future decisions the precise definition of the "cause"-and-"prejudice" standard, and note here only that it is narrower than the standard set forth in dicta in *Fay v. Noia...*, which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention. It is the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject.

*433 U.S. at 87-88 (footnote omitted).*

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*65. For divergent discussion of the historic role of federal habeas corpus, see Bator, supra note 59, at 468; Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 UTAH L. REV. 423 (1961); Friendly, supra note 64, at 170-71; Hart, The Supreme Court 1958 Term—Foreward: The Time Chart of the Justices, 73 HARV. L. REV. 84 (1959); Oaks, Legal History in the High Court—Habeas Corpus, 64 MICH. L. REV. 451 (1966); Reit, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 HARV. L. REV. 1315 (1961).*

*66. 28 U.S.C. §§ 2241-2255 (1976).*

*67. See, e.g., Duncan v. Kahanamoku, 327 U.S. 304 (1946); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).*

cases involve laws that are suspensive only in effect, such as the cases dealing with the Federal Habeas Corpus Act.

Section 2255 of the Act, which creates a federal post-conviction remedy for federal prisoners substantially the same as the federal habeas corpus remedy for state prisoners,69 prohibits a litigant from successfully applying for habeas relief70 unless he has applied for section 2255 relief and it appears that the remedy by motion "is inadequate or ineffective to test the legality of his detention."71 The Supreme Court has never explicitly considered the constitutionality of this provision,72 but neither has it disturbed lower court rulings that have upheld its constitutionality. In *St. Clair v. Hiatt*,73 for example, the federal district court applied a strict scrutiny test to a section 2255 case, because habeas corpus was being restricted.74 The court held, however, that the exhaustion restrictions were merely procedural requirements that, for justifiable reasons, only temporarily delayed the use of habeas; therefore, they did not constitute a suspension.75

In *United States v. Anselmi*,76 the United States Court of Appeals for the Third Circuit also concluded that section 2255 was


70. Such an application would be made pursuant to 28 U.S.C. § 2241 (1976).


72. But see Swain v. Pressley, 430 U.S. 372, 379-84 (1977) (the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus); United States v. Hayman, 342 U.S. 205, 210-19, 223 (1952).


74. The Court has mandated the utilization of the "strict scrutiny" test, rather than a "rational basis" test, when fundamental rights are restricted. The principal source of such rights as against the federal government is the Bill of Rights. The Court also has found fundamental constitutional rights lying in the "penumbras" of the Bill of Rights. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965); Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (Constitution includes rights that are "necessary to make the express guarantees fully meaningful"). The principal source of fundamental rights as against the states is the fourteenth amendment. At first, the Court found that amendment's due process clause to protect only those rights "implicit in the concept of ordered liberty," e.g., Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled, Benton v. Maryland, 395 U.S. 784, 793-94 (1969), which "inhere in the very idea of free government." E.g., Twining v. New Jersey, 211 U.S. 78, 106 (1908). But the Court has not stopped there, finding additional fundamental rights in the history and traditions of Anglo-American jurisprudence. See, e.g., Roe v. Wade, 410 U.S. 113, 152-53 (1973); Loving v. Virginia, 388 U.S. 1, 12 (1967); Pierce v. Society of Sisters, 268 U.S. 510, 518-19 (1925). See generally Note, Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance, 57 B.U.L. REV. 462, 470 (1977).


76. 207 F.2d 312 (3d Cir. 1953), cert. denied, 347 U.S. 902 (1954).
constitutional, but it based the decision on the fact that the remedy by motion was substantially the equivalent of habeas corpus: “So long as there is open to the prisoner an adequate and effective remedy in one court, . . . it is not a suspension of the writ to withhold jurisdiction from other federal courts.”

Another federal statute, 8 U.S.C. § 1105(a), which provides that habeas cannot successfully be raised to challenge a deportation order unless the judicial proceedings were inadequate or ineffective to test the validity of the order, has also been contested as an invalid suspension of the writ. Although in deportation cases there is no procedure being substituted for habeas corpus, as there is with section 2255 proceedings, the United States Court of Appeals for the Second Circuit, in United States ex rel. Tanfara v. Esperdy, held against suspension on the grounds that the procedure merely limited and did not eliminate access to habeas corpus and that Congress had sound reasons for such a limitation.

These cases apparently do not require full access to the remedy of habeas corpus as long as some remedy or means of relief is available to the prisoner. As the Supreme Court signalled in the context of restricting habeas corpus for state prisoners when available state judicial remedies had not yet been exhausted:

[Where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the State affords no remedy . . . . or because in the particular case the remedy afforded by State law proves in practice

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77. *Id.* at 314. See also Barrett v. Hunter, 180 F.2d 510 (10th Cir.), *cert. denied*, 340 U.S. 897 (1950); Martin v. Hiatt, 174 F.2d 350 (5th Cir. 1949). Ironically, the court added that, in any event, the petitioner had not been prejudiced by the action of the district court in denying him the writ, for he had a full opportunity to raise all of his claims on his prior section 2255 motion. *Cf.* note 64 *supra* (discussing the broad sweep of the writ). For a criticism of the section 2255 cases, see, e.g., Note, *Section 2255 of the Judicial Code: The Threatened Demise of Habeas Corpus*, 59 *Yale L.J.* 1183 (1950).

78. Section 1105a(c) reads in part:

No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.


79. 347 F.2d 149 (2d Cir. 1965).

80. “The limitation of the writ to cases where the statutory exceptions do not apply and the administrative decision has not been judicially reviewed serves to conserve institutional resources by preventing repetitious litigation and securing the finality so necessary in a workable judicial system.” *Id.* at 152. *Cf.* Sanders v. United States, 373 U.S. 1 (1963) (indicating that the number of applications for relief is unlimited as long as prior applications were not adjudicated on the merits or new applications are based on new grounds and the petitioner has not otherwise abused the remedy).
unavailable or seriously inadequate. . . a federal court should entertain his petition for habeas corpus, else he would be remediless.\textsuperscript{81}

Nevertheless, the suspension clause cases leave the issue somewhat in a state of suspension.\textsuperscript{82} A statute that \textit{de facto} or \textit{de jure} forbids anyone access to the writ of habeas corpus undoubtedly would be suspensive. The above-noted provision of 2255 is suspensive \textit{de jure}, but it is viewed merely as a procedural limitation. The deportation statute even further diminishes the prohibition against suspension, because no equivalent of habeas corpus is provided. Finally, the exhaustion-of-remedy cases suggest that the finding of some alternative form of remedy is sufficient to prevent a limitation from constituting a suspension. But, in all of these cases, there is one distinguishing factor, a safety valve: access to habeas corpus is restricted unless the remedy provided is inadequate or ineffective.

The Prisoner Exchange Treaty in pertinent part provides that "[t]he Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts."\textsuperscript{83} Although this section obviously precludes American habeas actions contesting the conviction, it does leave open to the prisoner Mexican collateral challenges, most notably that of \textit{amparo}.\textsuperscript{84} Keeping to

\begin{quote}
\textsuperscript{81} Ex parte Hawk, 321 U.S. 114, 118 (1944). Although its emphasis may be different, this statement is not dissimilar to much of the language of Stone v. Powell, 428 U.S. 465 (1976). \textit{See note 64 supra.} For example, the Court held that because the state courts had "provided an opportunity for full and fair litigation of [the] Fourth Amendment claim," 428 U.S. at 481-82, 494, federal habeas corpus relief may not be granted. \textit{See id.} at 482, 494 & n.37. \textit{See also} Robbins & Sanders, \textit{supra} note 38, at 74-76. It should be noted that the Constitution requires that states have a post-conviction remedy by which prisoners may raise claims of denial of federal rights. Case v. Nebraska, 381 U.S. 336 (1965); Young v. Ragen, 337 U.S. 235 (1949). For recent expositions on the nature of the requirement of exhaustion of such remedies, see, \textit{e.g.}, Smith v. Digmon, 98 S. Ct. 597 (1978); Pitchess v. Davis, 421 U.S. 482 (1975); Francisco v. Gathright, 419 U.S. 59 (1974); Picard v. Connor, 404 U.S. 270 (1971).


\textsuperscript{83} Treaty, \textit{supra} note 1, at art. VI.

\textsuperscript{84} \textit{See generally} J. HERGET & J. CAMIL, \textit{AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM} (1978); Clagett, \textit{The Mexican Suit of "Amparo"}, 33 GEO. L.J. 418 (1945); Rosenn, \textit{Judicial Review in Latin America}, 35 OHIO ST. L.J. 785 (1974); Schwarz, \textit{Rights and Remedies in the Federal District Courts of Mexico and the United States}, 4 HASTINGS CONST. L.Q. 67 (1977); Robbins, \textit{A Study of the Mexican Amparo Suit as a Post-Conviction Remedy} (1978) (unpublished manuscript, to be published in book entitled \textit{COMPARATIVE POST-CONVICTION REMEDIES}). Challenges can also be brought in Mexico by way of necessary \textit{indulto}, see \textit{House Judiciary Hearings, supra} note 2, at 40, but that remedy is applicable only to claims of inno-
one side for the moment the practical difficulties involved for an American prisoner in a United States prison contesting a Mexican conviction with a Mexican procedure in Mexico, the prisoner clearly is afforded some form of relief. On the other hand, it is

85. For such material, see, e.g., Senate Judiciary Hearings, supra note 3, at 124, 273 ("I am so confused as to the Mexican procedures. We have gone through four different attorneys. We have received no legal documents about our son's case. . . . So I am completely in the dark.") (statement of Lynell F. Marshall, mother of prisoner); House Judiciary Hearings, supra note 2, at 151. See generally Constitutional Problems, supra note 82, at 1518-20 (listing such problems as "nearly insuperable" evidentiary obstacles, difficulty of obtaining foreign judicial assistance, the relief for a successful petition being a new trial in Mexico, international conflict of laws principles, and general noncooperation).

86. Further support for the Treaty provisions against a challenge that it suspends the privilege might also derive from Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807), and Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). In Bollman, Chief Justice Marshall stated that the power to issue the writ must be legislatively provided, and in McCardle, Chief Justice Chase recognized the authority of Congress to restrict direct appellate jurisdiction of the Supreme Court over habeas cases. However, Chief Justice Marshall noted that:

It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.

Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.

8 U.S. (4 Cranch) at 95. Soon after McCardle, the Court decided Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868), in which it affirmed its authority to review habeas questions on certiorari. It is questionable whether the courts would read these cases to permit suspension of the type called for in the Treaty, which involves withdrawal of jurisdiction without any approximately equivalent relief available.

It might also be thought that the clause should be interpreted only as a restriction of executive suspension of the privilege of the writ. This is accurate in part, but the circumstances under which Congress may suspend are constitutionally provided—i.e., "when in cases of rebellion or invasion the public safety may require it." Neither the Executive, nor Congress, nor the Judiciary may otherwise suspend the privilege. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 125 (1866); Ex parte Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487). Congress has not declared—and it is difficult to believe that it would declare—suspension of the privilege by the Treaty required by public safety in the case of rebellion or invasion. See note 46 supra.

Thus, it would seem that the Treaty may not bar relief through issuance of a writ of habeas corpus in any case where such relief would otherwise be appropriate. The question of whether Article VI of the Treaty would otherwise operate as an unconstitutional withdrawal of jurisdiction from the federal courts is a more difficult one. While there is substantial data to support the proposition that Congress has plenary authority over the original jurisdiction of the inferior federal courts and the appellate jurisdiction of all federal courts, e.g., United States v. Hudson & Goodwin, 11 U.S. (7
arguable that the fatal flaw is the lack of a safety valve, for the Treaty prohibits all collateral attacks on the Mexican conviction in the United States—not just those in which it can be shown that the remedies afforded in Mexico are adequate. 87

C. Waiver of Habeas Corpus

One provision may avoid the problem of suspension altogether—the consent requirement of the Treaty. 88


88. The position of the Justice Department is that even if United States involvement in the foreign conviction triggers a due process right to test the fairness of the
in the United States to a certain extent is voluntary, because the prisoner must give his consent before being transferred. 89 Professor Herbert Wechsler testified before the Senate Foreign Relations Committee on the relationship between consent and suspension: "This is not a suspension of the privilege of the writ of habeas corpus. The writ remains available; it simply is a good return that the offender is imprisoned in accordance with the treaty and its implementing legislation." 90 Another witness before the Committee commented: "[I]t is important to make a distinction between a waiver of habeas corpus by a prisoner who would otherwise have the right, and suspension of the privilege of the writ by the Government." 91 Thus, although on its face the Treaty prohibits access to habeas corpus for a certain class of people, it arguably offers prisoners a beneficial exchange: imprisonment in the United States rather than in Mexico, in return for a waiver of habeas corpus challenges to the Mexican conviction. 92 The exacting query concerns the extent to which the waiver can be said to be voluntary. 93

In order to ascertain whether the prisoner's express "consent to the transfer is given voluntarily and with full knowledge of the

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89. "If the Authority of the Transferring State finds the transfer of an offender appropriate, and if the offender gives his express consent for his transfer, said Authority shall transmit a request for transfer, through diplomatic channels, to the Authority of the Receiving State." Treaty, supra note 1, at art. IV, para. 2.

90. Senate Foreign Relations Hearings, supra note 3, at 93-94 (statement of Herbert Wechsler). Professor Wechsler continued:

> We may, perhaps, regret that a judicial review of the conviction for denial of justice in the international sense ... is not permitted by the [Treaty]. It is, however, wholly understandable that this may not have been attainable in the negotiations with ... Mexico or that we ourselves, indeed, would not be willing to subject our judgments to such an assessment by a Mexican ... tribunal.

Id. at 94.

91. Id. at 170 (statement of Michael Chertoff); see notes 236-39 & accompanying text infra.

92. This is by no means to imply that imprisonment in the United States in itself is desirable. See, e.g., Wolfish v. Levi, 573 F.2d 118, 120 (2d Cir. 1978) ("When the history of our criminal justice system is chronicled, no doubt one of its most sobering pages will describe the sad state of this nation's prisons and jails"); See generally Robbins & Buser, Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment, 29 STAN. L. REV. 893 (1977). See also Task Force on Corrections, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 4 (1967).

93. Of course, an American court on habeas corpus could still entertain allegations that the consent was not actually voluntary or informed, that there was no consent, or that the Treaty otherwise had not been complied with in the procedures followed. 18 U.S.C.A. § 4108(b)(3) (West Supp. 1978).
consequences thereof,'"94 the consent may be verified by the receiving state prior to the transfer.95 The enabling legislation enacted by Congress96 is more specific, requiring that the offender understand particular consequences of the transfer, including the fact that he will not be able to challenge the conviction in a court of the United States.97 Although never explicitly labelled as such in the Treaty or legislation, this consent apparently serves as a waiver of habeas corpus.98 Hence, in determining the validity of this provision, three issues must be addressed: (1) whether habeas corpus can be waived; (2) if so, whether the procedures provided by the Treaty constitute a valid waiver; and (3) whether the transfer is an unconstitutional condition on the habeas corpus right.

1. The permissibility of a waiver

The general proposition that one can waive a right to which he is otherwise entitled is uncontroverted.99 When fundamental

95. Id.
96. See note 5 supra.
98. See House Judiciary Hearings, supra note 2, at 267; Constitutional Problems, supra note 82, at 1523. One congressional witness testified that the waiver situation was not a proper analogy, citing Wilson v. Girard, 354 U.S. 524 (1957) (per curiam), which stated that "[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders unless it expressly or impliedly consents to surrender its jurisdiction." 354 U.S. at 529. Thus, an argument can be made that it surrenders only the custody of the offender, because Mexico has not waived its jurisdiction over the offense. See House Judiciary Hearings, supra note 2, at 216, 218 (statement of John L. Hill, Attorney General of Texas). This is an overly simplistic view, however, for part of the problem is whether due process rights are triggered by the United States accepting custody. See notes 28-44 & accompanying text supra.
Another commentator has read the consent provision to invoke not a waiver of habeas corpus but rather of the right to a constitutional trial, concluding that it was impermissible on the ground that a right cannot be waived after it has been violated. Comment, Execution of Foreign Sentences in the United States: A Treaty with Mexico, 9 ST. MARY'S L.J. 118, 132 (1977). Certainly this can be true only in the narrow sense that a right has not been violated until a court so states. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"), quoted with approval in United States v. Nixon, 418 U.S. 683, 703-05 (1974); Speech of Chief Justice Hughes before the Elmira Chamber of Commerce, Elmira, N.Y., May 3, 1907, in C. HUGHES, ADDRESSES OF CHARLES EVANS HUGHES 1906-1916, at 179, 185 (2d ed. 1916) ("[T]he Constitution is what the judges say it is . . ."). Even a casual knowledge of the law of guilty pleas, according to which all nonjurisdictional defects are waived, defeats the argument that a right cannot be waived after it has been violated. See, e.g., Blackledge v. Perry, 417 U.S. 21, 30-31 (1974); Tollett v. Henderson, 411 U.S. 258 (1973); Boykin v. Alabama, 395 U.S. 238 (1969). But cf. Lefkowitz v. Newsome, 420 U.S. 283 (1975) (no waiver of non-jurisdictional claims on federal habeas corpus if under special state practice a state appeal lies after a valid plea of guilty). On the relationship between "consent" and "waiver," see, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973) (search and seizure).
99. See, e.g., Pierce v. Somerset Ry., 171 U.S. 641 (1898); Phillips v. Payne, 92
rights are concerned, however, there has always been an attitude of great caution regarding waiver. A principle of law often repeated by the Supreme Court is that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. This concern is based not on any doubt that a person has the capacity to waive rights, but instead on a realization that many pressures can be brought to bear, particularly on a criminal defendant or prisoner, that might lessen his ability to waive. A waiver under such pressure would give the appearance of a waiver when in reality the consent given was coerced rather than voluntary.

There are many cases in which specific constitutional rights have been held to be waivable—including the right to counsel, right to confrontation, right to be free from double jeopardy, and right to trial by jury. In fact, all constitutional and statutory claims have been held waivable except attacks on the jurisdiction of the court and a review of the voluntariness of the waiver itself. There also are cases dealing with the waiver of habeas corpus: those cases, however, are less readily susceptible of analysis, for habeas is a purely procedural right and, therefore, rarely is openly abandoned.

With the exhaustion-of-state-judicial process, the Supreme Court has held that the federal court must review the voluntariness of the waiver itself. The Court has held that "the fact that a line has to be drawn somewhere does not justify its being drawn anywhere. The line must follow some direction of policy, whether rooted in logic or experience. Lines should not be drawn simply for the sake of drawing lines." See note 98 supra. See also Mitchell v. Maurer, 293 U.S. 237, 244 (1934); United States v. Spada, 331 F.2d 995, 996 (2d Cir.), cert. denied, 379 U.S. 865 (1964).

Professor Dix presents an interesting analysis of waiver, distinguishing three issues that commonly are applied to potential waivers: (1) whether a procedural right should be available in the given situation; (2) whether the defendant utilized the appropriate means of implementing a right; and (3) whether the defendant articulated a
cial remedies doctrine,\textsuperscript{110} for example, the prisoner indirectly waives the right to habeas corpus by failing to exhaust available and effective state procedures.\textsuperscript{111}

In the landmark case of \textit{Fay v. Noia},\textsuperscript{112} it was held, \textit{inter alia}, that if a petitioner deliberately bypasses the state procedure, the federal remedy is deemed to be waived.\textsuperscript{113} More recently, in \textit{Wainwright v. Sykes},\textsuperscript{114} it was held that a failure to comply with state contemporaneous objection rules is deemed to be a waiver of federal habeas corpus absent a showing of cause for the noncompliance and prejudice resulting therefrom.\textsuperscript{115} Under the Prisoner Exchange Treaty, however, the waiver of collateral attack in American courts is an express one. Although it is difficult to draw a functional analogy to the foregoing habeas waiver cases, there is general agreement that habeas corpus, like other rights, can be waived. The more critical inquiry is whether the procedures provided by the Treaty constitute a valid waiver.

2. Requisites of a valid waiver of habeas corpus

If the prisoner’s express consent, required by article IV, section 2 of the Treaty,\textsuperscript{116} is to operate as a valid waiver of the right to habeas corpus relief, it must meet the United States Supreme Court’s test for a legitimate waiver. The oft-cited standard was first set forth in \textit{Johnson v. Zerbst}:\textsuperscript{117}

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the [one who is to be charged with the waiver].\textsuperscript{118}
Motivated by a concern that the Treaty withstand constitutional challenge,\textsuperscript{119} Congress interpreted this standard strictly: before a prisoner can be transferred, his consent must be verified to be "voluntary and with full knowledge of the consequences thereof."\textsuperscript{120}

\begin{itemize}
  \item[a.] Knowledge. It is well-settled law that a right cannot be waived if the criminal defendant has no knowledge that the right exists.\textsuperscript{121} The more troublesome issue concerns the extent of knowledge required. At its base, there must be an awareness of a choice between asserting and waiving a right.\textsuperscript{122} For the more important waivers, such as those involved in a plea of guilty,\textsuperscript{123} an awareness of the formal legal impact of the options may also be required.\textsuperscript{124} The Treaty's implementing legislation requires only some specific degree of awareness regarding the consequences;\textsuperscript{125}
\end{itemize}

\textsuperscript{119} See, e.g., Senate Judiciary Hearings, supra note 3, at 62-63, 124-25, 274-75, 324. "Other agencies that will be testifying today, the State Department for one, discusses [sic] the constitutionality and indicates [sic] that one of the reasons they are so sure it is constitutional is because the Justice Department is so sure of that." \textit{Id.} at 62 (remarks of Sen. Biden).

\textsuperscript{120} 18 U.S.C.A. § 4108(a) (West Supp. 1978).

\textsuperscript{121} E.g., Uveges v. Pennsylvania, 335 U.S. 437 (1948); Smith v. O'Grady, 312 U.S. 329 (1941).


\textsuperscript{124} One example is the requirement that the defendant be aware of the possibility of receiving a special parole term, pursuant to either section 841(b)(1)(A) or section 960(b)(2) of title 21. 21 U.S.C. §§ 841(b)(1)(A), 960(b)(2) (1976). See, e.g., United States v. Hamilton, 553 F.2d 63 (10th Cir. 1977), cert. denied, 434 U.S. 834 (1978); United States v. Journet, 544 F.2d 633 (2d Cir. 1976). In one recent Supreme Court case, the defendant was required to have knowledge that intent was an element of second degree murder, but not of manslaughter, in order for a plea of guilty to the former to be held valid. Henderson v. Morgan, 426 U.S. 637, 639, 644-47 (1976).

\textsuperscript{125} 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 a United States court should determine upon a proceeding initiated by him or on his behalf that his transfer was not accomplished in accordance with the treaty or laws of the United States, he may be returned to the country which im-
in practice, a detailed inquiry is to be made of each prisoner.\(^\text{126}\)

b. \textit{Voluntariness.} Although the law with respect to the knowledge requirement for an effective waiver is relatively clear, the law relating to the voluntariness standard is quite amorphous. The confusion derives from the perplexity involved in determining the degree of certain types of "influence" that can be tolerated before a decision leans to the latter end of the voluntariness-coercion spectrum.\(^\text{127}\) In essence, two types of influences come into play: those that include improper or illegal actions by officials, such as physical beating in order to obtain a confession,\(^\text{128}\) and those in which the lack of voluntariness is a result of the individual having no meaningful choice to make. Because of its subtlety, the latter type of influence unquestionably is more difficult to perceive; only to the extent that the alternative to waiver is not viable can the choice be said to be less meaningful and, therefore, less

\textit{posed the sentence for the purpose of completing the sentence if that country requests his return; and}

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


126. \textit{See Senate Judiciary Hearings, supra} note 3, at 26-27. Further, each prisoner was given a Department of Justice information booklet regarding the operation of the Treaty. \textit{See House Judiciary Hearings, supra} note 2, at 32-116. If the government erred, it was on the cautious and conservative side. \textit{See, e.g., id.} at 36, Question 4. But faced with the possibility of returning to the United States within a few days of the verification proceedings, \textit{see id.} at 54, Question 65, a meaningful choice may be absent.

127. \textit{See note 102 supra; notes 201-03 & accompanying text infra.} The classic statement of the standard of voluntariness, made in the context of its application to out-of-court confessions, is that enunciated by Justice Frankfurter in \textit{Culombe v. Connecticut:}

\begin{quote}
Each of [the] factors, in company with all of the surrounding circumstances . . . is relevant. The ultimate test remains . . . the test of voluntariness. Is the [decision] the product of an essentially free and unconstrained choice by its maker? . . . If . . . his will has been overborne and his capacity for self-determination critically impaired, the [decision is invalid]. . . . The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the [decision].
\end{quote}

367 U.S. 568, 602 (1961) (footnote omitted). Chief Justice Warren, who recognized that Justice Frankfurter was attempting to consolidate and clarify the standard of voluntariness in the context of confessions, commented insightfully upon the likely impact of this effort:

\begin{quote}
[W]hile three members of the Court agree to the general principles enunciated by the opinion [of Justice Frankfurter], they construe those principles as requiring a result in this case exactly the opposite from that reached by the author of the opinion. This being true, it cannot be assumed that the lower courts . . . will receive better guidance from the treatise for which this case seems to have provided a vehicle.
\end{quote}

\textit{Id.} at 636 (Warren, C.J., concurring).

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voluntary.\textsuperscript{129} In these circumstances, although there is in theory an available alternative, it is so objectionable and undesirable that in practice a real choice is absent. The Supreme Court early recognized this inferred form of compulsion: "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."\textsuperscript{130}

The problem, therefore, is to determine the circumstances in which a determination is so dilemmatic as to constitute, in effect, no choice at all. Unfortunately, the judiciary has been unable to set any clear guidelines.\textsuperscript{131} As synthesized by Professor Dix:

[T]he [Supreme] Court has not established a framework for determining the extent to which a state may impose disadvantages upon a person who declines to waive an important right. Rather, the vague nature of waiver doctrine has enabled the Court to shift back and forth between two approaches even in the context of a single area such as the fifth amendment privilege against self-incrimination. One, an absolutist approach, condemns any disadvantage placed upon a defendant who fails to waive the right. The other, a more flexible approach, balances the degree of infringement upon protected interests against the gains obtained by placing the burden upon the exercise of the privilege.\textsuperscript{132}

A good example of the Court's fluctuation is found in the guilty plea cases.\textsuperscript{133} The Court held in United States v. Jackson\textsuperscript{134} that a statute that allowed for capital punishment only in a jury trial\textsuperscript{135} placed too great a burden on the right to trial by jury. Justice Stewart explained that "the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be in-

\textsuperscript{129} See, e.g., Garrity v. New Jersey, 385 U.S. 493 (1967) (no waiver when police officers given choice between self-incrimination and retaining employment; choice "between the rock and the whirlpool," at 498); Green v. United States, 355 U.S. 184 (1957) (no waiver when criminal defendant given choice between appealing conviction and retaining right to be free from double jeopardy); cf. United States v. Dinitz, 424 U.S. 600 (1976) (waiver found when choice was between declaring mistrial and right to be free from double jeopardy).

\textsuperscript{130} Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67, 70 (1918) (citing The Eliza Lines, 199 U.S. 119, 130, 131 (1905)).

\textsuperscript{131} This "fault" lies more with the nature of our legal system than with the judiciary. See generally Robbins, Federalism, State Prison Reform, and Evolving Standards of Human Decency: On Guessing, Stressing, and Redressing Constitutional Rights, 26 Kan. L. Rev. 551, 566-69 (1978).

\textsuperscript{132} Dix, supra note 109, at 248-49. The latter approach is addressed at notes 174-240 & accompanying text infra.

\textsuperscript{133} See generally Senate Judiciary Hearings, supra note 3, at 278-79.

\textsuperscript{134} 390 U.S. 570 (1968).

herently coercive in order that it be held to impose an impermissi-
ble burden upon the assertion of a constitutional right." 136 Yet
just two years later, in *Brady v. United States*, 137 the Court held
that *Jackson* did not require the invalidation of every guilty plea
encouraged by fear of the death penalty. The Court commented
that there are many reasons for a defendant pleading guilty and
for the state encouraging defendants to do so, but that these influ-
ences do not necessarily rob the defendant of a choice, or compel
him. 138

The meaningful choice issue is well illustrated by *Fay v. Noia*, 139 in which "[h]is [the defendant's] was the grisly choice
whether to sit content with life imprisonment or to travel the un-
certain avenue of appeal which, if successful, might well have led
to a retrial and death sentence." 140 But to focus on the grisliness
of the choice is merely to restate the question, for there is little
direction in the opinion on how to distinguish grisly choices from

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136. 390 U.S. at 583 (emphasis in original). The Court continued:

Thus the fact that the Federal Kidnapping Act tends to discourage de-
fendants from insisting upon their innocence and demanding trial by
jury hardly implies that every defendant who enters a guilty plea to a
charge under the Act does so involuntarily. The power to reject co-
erced guilty pleas and involuntary jury waivers might alleviate, but it
cannot totally eliminate, the constitutional infirmity in the capital pun-
ishment provision of the Federal Kidnapping Act.

*Id.* (footnote omitted). *See also* notes 186-89, 264-65 & accompanying text *infra.*

Without analysis, Justice White, joined by Justice Black, dissented, stating in pertinent part:

The Court itself says that not every plea of guilty or waiver of jury trial
would be influenced by the power of the jury to impose the death pen-
alty. If this is so, I would not hold the provision unconstitutional but
would reverse the judgment, making it clear that pleas of guilty and
waivers of jury trial should be carefully examined before they are ac-
cepted, in order to make sure that they have been neither coerced nor
couraged by the death penalty power in the jury.

390 U.S. at 592 (White, J., dissenting). This statement certainly oversimplifies the
problem and perhaps only restates it. *See* notes 139-42 & accompanying text *infra;*
note 163 *infra.*

137. 397 U.S. 742 (1970) (White, J.) (defendant pleaded guilty after learning that
codefendant, who had confessed to the authorities, would plead guilty and be avail-
able to testify against him).

138. *See id.* at 749-55. "[W]e cannot hold that it is unconstitutional for the State
to extend a benefit to a defendant who in turn extends a substantial benefit to the State . . . ." *Id.* at 753. *Cf.* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (not viola-
tive of due process for prosecutor to carry out threat made during plea negotiations to
have defendant reindicted on more serious charges and invoke Habitual Criminal
Act, if defendant refused to plead guilty to lesser charges). In *Bordenkircher*, Justice
Stevens expressed concern at oral argument that a great disparity in punishment for
the two charges might intimidate even an innocent defendant into pleading guilty.
*See* 22 CRIM. L. REP. 4077 (Nov. 16, 1977). For a critical view of *Brady*, see Dix,
*supra* note 109, at 244-46.


140. *Id.* at 440.
strategic waivers. It has been suggested that the possibility of gain from a bypassing of state procedures should be evidence of a tactical decision not to raise the claim.141 However, the grisly choice, too, is characterized by a possibility of benefit; thus the choice may also be a tactical one.142

The circumstances of the Prisoner Exchange Treaty arguably can be distinguished from other waiver situations, in that the Treaty does not involve improper or illegal government coercion, in part because the American government has no strongly adverse interest. It may have an indefinite interest in encouraging the return of prisoners, in order to improve relations with Mexico,143 but this interest probably would not extend to influencing in any way those prisoners who do not wish to return.144 The preeminent objective of the Treaty—to ameliorate the conditions of Americans serving sentences in Mexican prisons145—is the same interest as the prisoners themselves have. Another reason for the lack of governmental influence is that strict procedural safeguards were established for verification of consent.146 Congress has attempted to predetermine, as far as is legislatively and administratively possible, that the prisoner's consent will in actuality be


142. See Developments, supra note 46, at 1107-09. "The distinction between a waiver and a grisly choice, then, rests on the nature of the harm which threatens the petitioner . . . ." Id. at 1108; see id. at 1108 n.85. See also note 162 infra.

143. See note 2 supra.

144. The absence of forced labor and opportunities for conjugal visits and commercial activities within the Mexican prison system may have persuaded some American prisoners not to seek transfer. A decision not to be transferred also may be affected by considerations related to eligibility for parole in the United States. See, e.g., U.S. Citizens Imprisoned in Mexico: Hearing Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations (pt. III), 94th Cong., 2d Sess. 20-21 (1976); note 18 supra; note 168 infra. In addition, there are such considerations as the problems of being denied a job because of the American prison record, see, e.g., Senate Judiciary Hearings, supra note 3, at 260, 275, the inability to purchase better living conditions, see, e.g., id. at 270, 297, and bad conditions in many American prisons, see note 92 supra. See also House Judiciary Hearings, supra note 2, at 49-50 (fingerprinting), 219 (conjugal visits). In short, "[i]t may not be all positive." Senate Judiciary Hearings, supra note 3, at 131 (remarks of Sen. Biden). See also S. REP. No. 435, 95th Cong., 1st Sess. 11-12 (1977). An informal survey indicated that of 75 Mexican nationals jailed in Texas, only 21 desired to avail themselves of the benefits of the Treaty. See House Judiciary Hearings, supra note 2, at 219-20. See also id. at 121 (remarks of Mike Abbell) (as many as 20% of the Americans in Mexican prisons are going to stay). Not surprisingly, the percentage of Canadian nationals who wished to return to Canada was greater. See id. at 220. See also note 22 supra.


146. Because this is a pre-planned waiver, many of the problems of determining at a later date whether it was knowing and voluntary are avoided.
The procedure under the Treaty for the verification of consent, enumerated in section 4108 of the implementing legislation, incorporates those safeguards that the courts have required for the protection against improper waivers in the guilty plea setting. For example, a magistrate or specially appointed citizen must officiate at the verification hearing. This officer must advise the prisoner that he has a right to consult with counsel, that an opportunity to consult with counsel will be allowed before the proceeding continues, and that counsel will be provided if the prisoner financially is unable to obtain it. The officer also must verify that the offender understands and agrees to the conditions of the transfer, including, inter alia, that only Mexico can modify or set aside the conviction, that if the United States determines that the transfer violates the treaties or laws of the United States, the prisoner may be returned to Mexico, and that consent once given is irrevocable. Further, the officer must determine that the prisoner's consent is voluntary, and "not the result of any promises, threats, or other improper inducements." Finally, the consent must be noted on an appropriate form, and the entire proceedings must be recorded.

These procedures afford all the ingredients that courts have found lacking in other waiver situations: that the determination of a waiver must be made personally by a judge, that the waiver may be made with advice of counsel, that there must be an affirmative showing that the waiver is knowing and voluntary, and that the record must reflect that a knowing and voluntary

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149. See also notes 249-63 & accompanying text infra.


151. Id. § 4108(c). See note 162 infra.


153. Id. § 4109.

154. Id. § 4108(b); see note 125 supra.


156. Id. § 4108(d), (e).


waiver was made. Therefore, with these procedures put into practice, there should be little problem in deciding whether a waiver occurred. Nevertheless, the fact that there are formal procedural safeguards does not completely resolve the underlying issue: whether there is an effective choice to be made.

Senator Robert Griffin addressed this point before Congress: [The prisoner's] alternatives are incarceration in this country or continued confinement in Mexico. The alternative of remaining in Mexico is so unattractive to most prisoners that in reality these individuals are left with but one choice—incarceration in this country. To deprive an individual of his right to challenge his Mexican conviction under such circumstances conflicts with fundamental notions of fairness.

On the other hand, if the prisoners refuse to return to the United States because they do not wish to forego their rights, they must remain in the foreign prison wholly bereft of any American rights upon which to insist. Thus, perhaps the offer of benefits on the condition that the prisoners relinquish their rights cannot be said to have induced or coerced that relinquishment, because they had


161. For a valid noncriminal waiver situation, see Jolley v. Immigration & Naturalization Serv., 441 F.2d 1245 (5th Cir.), cert. denied, 404 U.S. 1017 (1971) (waiver of right to citizenship under pressure of threat of being drafted). It is arguable that there is less of a need for procedural safeguards in the Treaty, because the transfer situation is not one that is so inherently intimidating or coercive as, e.g., police interrogation or plea bargaining, where the government has a strongly adverse interest. See notes 143-45 & accompanying text supra.

162. Even if counsel is present, there is some question regarding the nature of counsel's decisions. Compare Fay v. Noia, 372 U.S. 391, 438-39 (1963) with Wainwright v. Sykes, 433 U.S. 72 (1977). See generally Spritzer, note 109 supra; Developments, supra note 46, at 1106, 1109-12. The issue of government-paid attorneys also raised some concern about conflict of interest, see, e.g., Senate Judiciary Hearings, supra note 3, at 63, 137-38, 288-90; House Judiciary Hearings, supra note 2, at 136 n.8, 163, as did the “possible problem in having counsel advising American citizens who are not fully aware of or versed in Mexican law as to whether or not that would impact on the question of consent,” Senate Judiciary Hearings, supra note 3, at 288 (question by Sen. Biden). Professor Arthur Miller also objected to providing government-paid attorneys, but on the ground that the United States should not be “a welfare state for lawyers.” House Judiciary Hearings, supra note 2, at 250 (statement of Arthur S. Miller).


Some commentators contend that this deficiency may be overcome by surrounding the consent or waiver process with various procedural safeguards . . . . It is difficult to perceive, however, how the implementation of these procedures will render the consent or waiver voluntary. In fact, such discussion obscures the crucial issue. If the consent or waiver is deemed inherently involuntary, then it is invalid no matter what procedures are employed.

Id. (emphasis added) (footnote omitted). See also Senate Judiciary Hearings, supra note 3, at 62, 126, 235; House Judiciary Hearings, supra note 2, at 123 (“meaty, interesting, and complicated question”) (remarks of Rep. Eilberg), 125.
no American rights to relinquish in the first place. In the words of one legal commentator, "[a]ll that the prisoners have done is to surrender the right to serve a sentence in a Mexican prison in favor of the option to serve the sentence in an American prison." In addition, it has been argued that not only does the Treaty not deprive the prisoners of any rights, but also it confers rights that the prisoners theretofore did not have. By returning to the United States, the prisoners can utilize various benefits of our legal system, such as challenging local conditions of confinement and attempting to secure release on parole. This view is supported by North Carolina v. Alford, wherein the defendant knowingly and voluntarily desired to plead guilty, while still maintaining his innocence. The Supreme Court declared: "The prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve.

164. See Senate Foreign Relations Hearings, supra note 3, at 127; Senate Judiciary Hearings, supra note 3, at 125, 215; House Judiciary Hearings, supra note 2, at 120, 125.

165. Senate Judiciary Hearings, supra note 3, at 215 (memorandum of Detlev F. Vagts). Professor Vagts continued: "By so doing, they indicate that the American prison is, from their point of view, preferable." Id.

166. See, e.g., 123 Cong. Rec. S12,551 (daily ed. July 21, 1977) (statement of Sen. Sparkman): "This Treaty does not take away a right presently held by an American in a Mexican prison, but it does allow them the greater protection of our laws and an improved chance successfully to re-enter society."

167. See generally Robbins & Buser, note 92 supra. See also Treaty, supra note 1, at art. V, para. 2.

168. Treaty, supra note 1, at art. V, para. 2. See also 18 U.S.C.A. § 4112 (West Supp. 1978); notes 18, 144 supra. Quite significant concern was expressed before Congress, for the eligibility of all transferred prisoners, see Senate Judiciary Hearings, supra note 3, at 26, 62-64, raising the possibility that American authorities could, in effect, be "rewriting the Mexican sentences." Id. at 64. For the record, Senator Mathias made it clear that "the President of Mexico not long ago said that they want to get rid of all of the American prisoners and they don't care what happens after they get out of Mexico." Id. at 126-27. Later testimony indicated that the transferred prisoners would be treated for purposes of parole like their American counterparts who had been convicted of analogous offenses, see House Judiciary Hearings, supra note 2, at 117-20, so that the transferred prisoner would not "have an unfair advantage over one who has been sentenced here . . . ." Id. at 117-18 (remarks of Rep. Eilberg). This position was confirmed by the Acting Chairman of the United States Parole Commission. See id. at 149-50 (letter of Curtis C. Crawford).

There also was some worry that the returning Americans might be treated as "folk heroes." See Senate Judiciary Hearings, supra note 3, at 260-61.


170. Id. at 39. Justice Brennan, in dissent, argued that Alford had been "so gripped by fear of the death penalty," id. at 40 (Brennan, J., dissenting) (quoting Brady v. United States, 397 U.S. 742, 750 (1970)), that his decision to plead guilty had not been voluntary but rather was "the product of duress as much so as choice reflecting physical constraint." 400 U.S. at 40 (Brennan, J., dissenting) (quoting Haley v. Ohio, 332 U.S. 596, 606 (1948) (opinion of Frankfurter, J.).
this argument can cut both ways: the fact that the prisoners themselves clamored for the opportunity to return to the United States¹⁷¹ may be a good indication of the absence of an effective choice.

In conclusion, the question of waiver is not a precise one. In order to delimit the fine distinctions between voluntariness and coercion, more lines will have to be drawn¹⁷² and further determinations will have to be made on a case-by-case basis.¹⁷³

3. The Transfer as an Unconstitutional Condition on the Right to Habeas Corpus

Viewed from a different perspective, the waiver question may be part of the larger issue of placing a potentially unconstitutional condition on a right.¹⁷⁴ The doctrine of unconstitutional conditions, which has vitality apart from the criminal context, applies to benefits granted by the state that are contingent upon the abandonment or relinquishment of a particular right.¹⁷⁵ The major objection to such conditions is that they may place too great a burden on the assertion of those rights. Recognizing that an indirect encumbrance might be so similar in its suppressive effect to a

¹⁷¹. I have to say at this point that I am perhaps more than ever—I hope as much now—I have a real appreciation for the rights granted under our Constitution and the Bill of Rights. These rights I have previously taken for granted. I would like to stress that there are other United States prisoners in Mexico that have learned the hard way. But at least they have learned that the rights granted under the Constitution and the Bill of Rights are precious. I am sure in my correspondence with them and my communications that they do appreciate these rights much more. By far the majority of them would be ever so thankful to be able to return to the United States as prisoners. They understand that.

Senate Judiciary Hearings, supra note 3, at 259 (statement of Dwight Worker, former prisoner, who had escaped by dressing as a woman and walking past five checkpoints). Cf. note 213 infra (discussing desires of some prisoners to be transferred to another forum in order to challenge their convictions). See also id. at 253, 258-59, 275-76; House Judiciary Hearings, supra note 2, at 251.

¹⁷². “Where the line is to be drawn between the important and the trivial cannot be settled by a formula.” Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 243, 129 N.E. 889, 891 (1921) (Cardozo, J.). See also note 102 supra.


¹⁷⁴. See generally Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960); Comment, Another Look at Unconstitutional Conditions, 117 U. Pa. L. Rev. 144 (1968) [hereinafter cited as Another Look].

¹⁷⁵. The unconstitutional condition doctrine does not turn on a distinction between a state benefit that is characterized as a “right” and one that is merely a “privilege.” Sherbert v. Verner, 374 U.S. 398, 404 (1963). See generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).
direct prohibition of rights that both may be violative of the Constitution, the Supreme Court has stated that "[i]n reality, the [individual] is given no choice, except the choice between the rock and the whirlpool—an option to forego a privilege which may be vital . . . or submit to a requirement which may constitute an intolerable burden." 176

Initially, courts had reasoned that if a state had the power to withhold a benefit completely, it also had the power to withhold it partially. 177 In 1926, for example, although acknowledging the state's authority to condition benefits, the Supreme Court held: [T]he power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. 178

Generally, however, the Court has held that the doctrine does not demand the invalidation of every benefit that is conditioned on the foregoing of a constitutional right. 179 Rather, a balancing approach has been utilized, weighing the importance of the state's interest against the degree of infringement. 180 In adjudging the former, the following requirements must be met: the interest must be a legitimate one, 179 and the restriction must be precisely drawn 182 and necessary to accomplish the state's objec-

177. See generally Van Alstyne, supra note 175, at 1495; Another Look, supra note 174, at 145.
180. See generally Another Look, supra note 174, at 163; note 132 & accompanying text supra. But see Van Alstyne, supra note 175, at 1448.
181. An example of an illegitimate interest is an intent to suppress the particular constitutional right. See, e.g., United States v. Jackson, 390 U.S. 570, 581 (1968); Another Look, supra note 174, at 154-55.
182. Hoffa v. Saxbe, 378 F. Supp. 1221, 1235 (D.D.C. 1974). Conditional presidential pardon cases, like Hoffa, e.g., Schick v. Reed, 419 U.S. 256 (1974); Birzon v. King, 469 F.2d 1241 (2d Cir. 1972), have been analogized to the Treaty in discussions of its constitutionality, because in both situations the prisoner is offered a bargain by which he can only improve his lot. See, e.g., Senate Judiciary Hearings, supra note 3, at 125 (statement of Barbara M. Watson): [R]easonable conditions may be attached when a benefit is conferred upon a prisoner. The person accepting the pardon must take the whole package offered to him. Similarly, where the President and the Congress have together obtained a special and unusual benefit for an offender, he should not be able to repudiate his assent to the conditions
In considering the degree of infringement, three factors are evaluated: the importance of the benefit being conferred, the importance of the right, and how directly the right is infringed.

This approach has been applied in a variety of cases. In *United States v. Jackson*, for example, the Supreme Court invalidated a federal kidnapping statute that provided for the imposition of the death penalty only upon a jury verdict. The Court confirmed the valid governmental objective of mitigating the severity of the death penalty; nevertheless, it opined that this objective could be achieved in a manner less burdensome on the right to trial by jury and, therefore, unnecessarily promoted guilty pleas.

A similar result was achieved in *Sherbert v. Verner*, wherein a conflict arose between the state's interest in discouraging fraudulent unemployment compensation claims and the individual's right to religious freedom. The Court held that by obligating the party to select between receiving the unemployment benefits and requiring her to work on Saturday, her day of worship, the state was burdening her first amendment religious right. The rule was declared invalid, because the state proved neither a compelling state interest nor that it had used the least restrictive means to achieve that benefit. Success in such repudiation would . . . destroy this avenue of relief for all later cases.

*Cf. Senate Foreign Relations Hearings, supra* note 3, at 96 (statement of Alan C. Swan):

I don't find those cases terribly persuasive in this context. I would find it difficult, for example, to think of the President giving a pardon on condition that the recipient of that pardon forgo the right by habeas corpus to challenge the validity of the underlying conviction. I would suggest that his acceptance of the pardon might not even warrant upholding that condition.

Professor Swan's argument may be a bit overstated, for it is clear that the Treaty could not have been negotiated successfully absent the waiver provision. *See* note 212 infra. *See also* note 183 infra. In *Hoffa*, the court formulated a three-pronged standard for determining the constitutionality of conditional pardons: (1) the pardon must have been voluntarily accepted by its beneficiary, 378 F. Supp. at 1242 (citing *Ex parte Wells*, 59 U.S. (18 How.) 307, 315 (1856)); (2) the condition must "be directly related to the public interest," 378 F. Supp. at 1236; and (3) the condition must not be more restrictive of constitutional freedoms than is reasonably necessary. *Id.*


184. That is, the less important the benefit, the less coercive pressure is necessary to relinquish the right. *See Another Look, supra* note 174, at 154.


186. 390 U.S. 570 (1968). *See* notes 134-38 & accompanying text *supra*. *See also* notes 264-65 & accompanying text *infra*.

187. 390 U.S. at 582-83.

188. *Id.* at 581-82.

means to achieve that interest.\textsuperscript{190}

In contrast, the Court upheld the validity of a restriction on first amendment rights in \textit{United Public Workers v. Mitchell.}\textsuperscript{191} At issue was a provision of the Hatch Act,\textsuperscript{192} which subjected to dismissal federal employees who were actively engaged in politics. The Supreme Court held that the restriction was rationally related to the legitimate governmental objective of promoting the efficiency and integrity of federal employees.\textsuperscript{193} The Court concluded that the degree of infringement was minimal and that the balance should be struck in favor of the government,\textsuperscript{194} because the workers still could vote and engage in limited partisan activity.\textsuperscript{195}

This weighing approach also was utilized in \textit{Smartt v. Avery},\textsuperscript{196} a Sixth Circuit case that involved the right to habeas corpus. The court of appeals invalidated a state parole board regulation that assessed an additional year of incarceration prior to consideration for parole for prisoners who had unsuccessfully filed habeas corpus petitions.\textsuperscript{197} The court noted the great chilling effect on the right to petition for habeas relief,\textsuperscript{198} observing that "[o]nly a prisoner with an inclination to play Russian roulette with a year of his life would be likely to file a petition for habeas corpus under this regulation."\textsuperscript{199}

These unconstitutional conditions issues are similar to those confronted by the voluntary waiver analysis. The heavier the burden placed on the assertion of a constitutional right, due to the resulting loss of a benefit, the less voluntary is the waiver of that

\textsuperscript{190} \textit{Id.} at 406-09.
\textsuperscript{191} 330 U.S. 75 (1947).
\textsuperscript{192} Hatch Act, ch. 410, \S\S 2, 8, 53 Stat. 1147-48 (1939) (current version at 5 U.S.C. \S\S 7324-7325 (1976) (original version at 18 U.S.C. \S 61(h) (Supp. V. 1937)).
\textsuperscript{193} 330 U.S. at 102.
\textsuperscript{194} \textit{Id.} at 94-104.
\textsuperscript{195} \textit{Id.} at 99-102.
\textsuperscript{196} 370 F.2d 788 (6th Cir. 1967).
\textsuperscript{197} \textit{See id.} at 789.
\textsuperscript{199} 370 F.2d at 790.
right; that is, no meaningful choice is presented. The two inquiries differ, however, in their emphasis. The voluntary waiver inquiry focuses on the individual—i.e., did this person voluntarily waive the right?—while the unconstitutional conditions analysis addresses the statute or regulation—i.e., does the provision on its face too heavily burden the assertion of a constitutional right? The Supreme Court in Jackson was cognizant of this difference, stating that it was unnecessary to decide whether the guilty plea was voluntary, because the evil was in the statute itself. Therefore, even if the waiver of habeas corpus pursuant to the Prisoner Exchange Treaty were determined to be voluntary, it still would be necessary to inquire whether article VI imposes an unconstitutional condition.

Through the Mexican-American Prisoner Exchange Treaty, the government is extending a benefit—imprisonment in this country—conditioned upon the relinquishment of the right to petition for habeas corpus relief. Without more, this might appear to be a classic example of an unconstitutional condition. A solicitous application of the balancing standard, however, produces some support for the Treaty's validation.

The initial consideration is the legitimacy and importance of the governmental objective. The policies advanced by Congress for endorsing the Treaty were twofold: to ease diplomatic relations with Mexico on the sensitive issue of the abuse of the American citizens confined in Mexico, and to alleviate special

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200. See generally Another Look, supra note 174, at 159-60; notes 129-42 & accompanying text supra.
201. See note 127 & accompanying text supra.
202. 390 U.S. at 583. See also note 136 & accompanying text supra. The Court has not consistently recognized this distinction, however. For example, in Garrity v. New Jersey, 385 U.S. 493 (1967), the majority employed the voluntariness analysis, but three dissenting Justices argued that the real question was whether the choice between retaining public employment and self-incrimination imposed an unconstitutional condition. Id. at 506-07 (Harlan, Clark & Stewart, JJ., dissenting).
203. Probably the more difficult question is to determine—even if the unconstitutional conditions doctrine is not violated—whether the waiver was voluntary. See generally notes 241-78 & accompanying text infra. To Justice Black, habeas corpus was immune from a balancing process. See black, The Bill of Rights and the Federal Government, in The Great Rights 41, 57 (E. Cahn ed. 1963).
204. See note 2 supra. The alleged violations of Mexican law and international convention agreement include: torture and physical abuse at the time of arrest, including the use of an electric cattle prod and water tortures; extortion by unscrupulous attorneys and prison officials; coerced confessions made in Spanish, at gunpoint, and without the aid of an interpreter; denial of access to legal counsel and to embassy representatives, despite repeated requests; incommunicado detention, sometimes for weeks; confiscation of personal property, such as cameras, automobiles, passports, and jewelry; extensive pretrial detention in flagrant violation of the Mexican law that requires sentencing within one year of arrest; absence of interpreters during court proceedings; and general prison abuse, including lack of proper health facilities, un-
hardships resulting from imprisonment in a foreign country. Both of these concerns lie within the extensive foreign powers held by the President and Congress and arguably are a valid and laudable exercise of those powers. Easing diplomatic relations with a foreign nation clearly is important, particularly when that nation borders on our own; nor can one doubt the significance to the prisoners and their families of alleviating conditions of American citizens confined in Mexico.

The second point to consider is whether the burden on the habeas corpus right is necessary to further the governmental objectives. In this regard, few circumstances could be more certain than those relating to this Treaty. According to Congress, without the condition of waiver of habeas corpus, the Treaty could not have been negotiated. Absent a provision prohibiting collateral attack on the Mexican conviction in a court of the United States, conceivably many actions would have been insti-


206. See note 3 supra.


208. See, e.g., House Judiciary Hearings, supra note 2, at 151.

209. See generally sources cited in note 205 supra.


211. See notes 182-83 supra.

212. See, e.g., Senate Foreign Relations Hearings, supra note 3, at 94, 96.

[1] In that posture, the legal issue subtly changes. The question is no longer, can the U.S. Government, in granting a benefit, impose limitations on the exercise of constitutional rights. The question becomes, can the U.S. Government agree or acquiesce in the foreign government's demand that these rights be relinquished when that is the price the foreign government demands for its cooperation in assisting Americans abroad.

Id. at 96 (statement of Alan C. Swan). See also House Judiciary Hearings, supra note 2, at 136.
putting our courts in the uneasy posture of having to determine whether Mexican courts had observed Mexican law and constitutional provisions. Not only could this prove to be politically embarrassing to Mexico with respect to the very issue of human rights violations that the Treaty was designed to ameliorate, but it also could affect the Mexican attitude in cases involving American citizens in the future. Further, Americans in Mexico would be little deterred in committing crimes if it were likely that an American court would not uphold the conviction.

The third inquiry concerns the importance of the benefit being conferred. In non-criminal cases, this is usually related to employment or the means of obtaining a livelihood or a substitute therefor, such as unemployment benefits. In criminal cases, the importance typically depends on the potential role of the benefit in freeing a defendant or lessening the duration of his confinement. In *Smartt v. Avery*, for example, a habeas corpus case,

213. "[T]he feeling that most of these prisoners had, at least in the back of their mind [sic], was the idea of challenging their sentences the minute they got into a forum in which they could challenge them. That was in fact one of the motivations for desiring the ratification of the treaty. This gave them a chance to look for an escape valve." *Senate Judiciary Hearings, supra* note 3, at 130 (statement of Sen. Mathias). See note 171 & accompanying text supra.

214. See notes 35, 41 & accompanying text supra.

215. See note 205 supra.

216. See, e.g., *Senate Foreign Relations Hearings, supra* note 3, at 131, 132. "If [the prisoners] are successful, notwithstanding the consent provisions of the treaty, then we run the risk . . . that the Mexican government will feel that this is a breach of faith and this could have unhappy portents for the future." *Senate Judiciary Hearings, supra* note 3, at 130 (statement of Sen. Mathias). See also id. at 66, 68, 127-28, 306. Senator Biden remarked:

> The first person out who gets here in America and has a writ of habeas corpus and challenges the proceeding in Mexico, and if the Supreme Court of the United States finds that their justice system does not meet the minimal standards then that is all over. No one else will get out.


217. See, e.g., *Senate Foreign Relations Hearings, supra* note 3, at 129; * Constitutional Problems, supra* note 82, at 1521.

218. See note 184 supra.

219. See, e.g., notes 184-90 & accompanying text supra.


221. 370 F.2d 788 (6th Cir. 1967).
the court viewed early eligibility for parole as an advantage of vital consequence.\textsuperscript{222} Similarly, because a transferred prisoner is eligible for parole in the United States,\textsuperscript{223} while no provisions for parole are available in Mexico, a very substantial return is obtained. Other possible benefits include better living conditions, at the least in terms of the rudimentary implements for comfort and personal hygiene,\textsuperscript{224} being nearer to one's family and friends, and being in one's culture.\textsuperscript{225} Next, the importance of the constitutional right\textsuperscript{226} must be evaluated. The real problem presented by this factor is not so much the value and importance of habeas corpus, but rather whether it qualifies as a constitutional right. Although it is not an explicit constitutional right, such as those listed in the Bill of Rights, the Constitution does specifically mention habeas corpus and prohibit its suspension.\textsuperscript{227} But it is unclear whether the doctrine of unconstitutional conditions requires the particular right to be one of direct constitutional dimension.\textsuperscript{228} In \textit{United Public Workers v. Mitchell},\textsuperscript{229} for example, the action restricted was the

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\item \textsuperscript{222} Id. at 790; see note 198 supra.
\item \textsuperscript{223} See note 168 supra.
\item \textsuperscript{224} The conditions at certain prisons in Mexico, such as those at Hermosillo and Oriente, are markedly better than the conditions at other prisons, such as those at Guadalajara, Lecumberri, Mazatlan, and Santa Marta. \textit{See}, e.g., \textit{Senate Foreign Relations Hearings, supra} note 3, at 10, 12-13, 15, 228-29; \textit{Senate Judiciary Hearings, supra} note 3, at 129, 131, 262-72. "Mazatlan is called the Mississippi of Mexico." \textit{Id.} at 272 (remarks of Lynell F. Marshall, mother of a prisoner); \textit{see House Judiciary Hearings, supra} note 2, at 123; \textit{TIME}, Dec. 19, 1977, at 25. Certainly conditions also vary among American prisons. \textit{See generally} Robbins & Buser, \textit{supra} note 92. \textit{See also} 64 A.B.A.J. 822 (1978) (col. 4); note 205 supra.
\item \textsuperscript{225} Geographically, one may be closer to his family while remaining incarcerated in Mexico. But in a more metaphysical sense, confinement in Mexico is worlds away from confinement in the United States. As a former Mexican prisoner stated: [Y]ou are operating in a different system and a different culture. The differences between the wealth of Americans and . . . [that of the] Mexicans, is just too great to be ignored in prison. The temptations for extortion are too overwhelming to resist. [Prison transfer] is the sensible way to reduce a lot of this because upon the prisoner transfer treaty, a lot of the extortion and the hardship, extraneous to the actual conviction itself, could be reduced. But until it is it must be remembered that U.S. prisoners overseas are big business. That is the key word. Guilt or innocence has nothing to do with it, once in prison. Bail or a bond or anything like it is precluded. But it is big business. It's a money-making proposition for people involved. \textit{Senate Judiciary Hearings, supra} note 3, at 257-58 (remarks of Dwight Worker). \textit{See also} note 3 supra.
\item \textsuperscript{226} See note 185 & accompanying text supra.
\item \textsuperscript{227} See notes 49-82 & accompanying text supra.
\item \textsuperscript{228} Professor Van Alstyne refers to "a right protected by an explicit provision in the Constitution," Van Alstyne, \textit{supra} note 175, at 1447, but this does not clarify the issue for present purposes. \textit{See} notes 49-65 & accompanying text \textit{supra}.
\item \textsuperscript{229} 330 U.S. 75 (1947).
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organization of political activities; yet the court in Smartt v. Avery clearly applied the same doctrine to habeas corpus, confirming it to be a constitutional right. In any event, it certainly is arguable that not only is habeas corpus being restricted, but so too is the fifth amendment due process right, for the transferred prisoners would be deprived of their liberty by the United States without a United States trial. Moreover, there is support for habeas corpus being considered as an element of the first amendment right "to petition the Government for a redress of grievances."

The final factor to consider is how directly the right is infringed. At first glance, the transfer may appear to be an obvious case of unadulterated infringement, because the prisoners are categorically denied collateral relief in United States courts. But further thought may indicate that at this point in the analysis the doctrine of unconstitutional conditions fails for the transferred prisoners. The American prisoner in Mexico is in a decidedly different position from the American prisoner in the United States. Unlike the latter, the former does not have any right to collaterally attack in this country the judgment of conviction, for the only contact with the United States is the citizenship of the prisoner. If an American prisoner convicted in an American court were offered a benefit conditioned on the relinquishment of habeas corpus, he would have to surrender a vested right to bring a habeas action. The prisoner in Mexico, however, has no habeas right to relinquish. Arguably, he only agrees not to acquire the right to habeas corpus by accepting American imprisonment. In addition, by not receiving the benefit of confinement in the United States, the prisoner is neither gaining nor retaining the habeas corpus right. So, in one sense, the choice presented is to acquire the benefit and not the right, on the one hand, and to acquire neither the benefit nor the right, on the other hand.

230. See notes 191-95 & accompanying text supra.
231. 370 F.2d 788 (6th Cir. 1967).
232. See notes 196-99 & accompanying text supra.
235. See note 185 & accompanying text supra.
236. See notes 17, 97 supra.
237. See note 164 & accompanying text supra.
239. See notes 164-65 & accompanying text supra.
Therefore, perhaps on balance it cannot be said that the condition either discourages or impermissibly burdens a constitutional right, because the relation of the prisoner to the right does not change whether or not the benefit is accepted. In another sense, however, this all may be part of one of the original questions, to wit: whether the United States becomes inextricably involved with the Mexican criminal justice system by imprisoning the convicted offender, thereby completing the criminal process.240

CONCLUSION

If one point is clear from the foregoing analysis, it is that the question of the constitutionality of article VI of the Mexican-American Prisoner Exchange Treaty is a close one, particularly on the issues of waiver and the doctrine of unconstitutional conditions.241 It may well be that the Treaty, if litigated,242 will be held to be violative of the Constitution.243 Certainly stranger things have occurred in the life of the law.244 But such an outcome is unlikely, especially in view of current legal developments. Recent cases of the United States Supreme Court have severely restricted the scope and operation of habeas corpus for American prisoners,245 and generally the judicial climate is waxing in favor of a greater degree of finality of criminal convictions.246 In the area of guilty pleas as well, the examination of which is crucial to deciding the issue of waiver of rights,247 present trends lend support to the constitutionality of the Treaty.

The Court recently had occasion to observe that “[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system. Properly ad-

240. See notes 28-44 & accompanying text supra.
241. While the expert congressional witnesses testified on the many intertwined issues that the Treaty and implementing legislation would be upheld by the courts, perhaps Professor Abernathy was the most realistic: “What I would like to convince the subcommittee of is that no matter how many people you get here to testify, you cannot be assured of either result. . . . [But] there are quite a few ways the [legislation] could be tightened up to induce the court psychologically to approve the waiver . . . .” House Judiciary Hearings, supra note 2, at 225. Senator Mathias’ attitude and perspective also were insightful. See generally Senate Judiciary Hearings, supra note 3, at 129-32.
242. To date, the Treaty has not been challenged in the courts.
243. See notes 19, 24, 168 supra.
244. “[The Constitution is] a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.” Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), reprinted in L. GOLDBERG & E. LEVENSON, LAWLESS JUDGES 11 (1935) (footnote omitted).
245. See note 64 supra.
246. Id. See generally Robbins & Sanders, supra note 38, at 84 n.175.
247. See notes 134-38, 169-70 & accompanying text supra.
ministered, they can benefit all concerned.”

The open acknowledgment of this previously clandestine practice has led the Court to recognize the importance of counsel during plea negotiations, the need for a public record indicating that the plea was knowingly and voluntarily made, and the requirement that a prosecutor’s plea-bargaining promise be kept. On more substantive grounds, the Court has held that due process “requires that vindictiveness against the defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.”

The same principle latterly was applied to prohibit a prosecutor from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy, since in this situation there was also a “realistic likelihood of ‘vindictiveness.’”

In these cases, the Court was dealing with the state’s unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation “very different from the give-and-take negotiation common in plea bargaining between the prosecution and the defense, which arguably possess relatively equal bargaining power.”

The Court has emphasized that the due process violation lay not in the possibility that a defendant might be deterred from the exercise of a constitutional right, but rather in the danger that the state might be retaliating against the accused for lawfully attacking his conviction. To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the government to pursue a course of action whose objective is to penalize a person’s reliance

249. See, e.g., Brady v. United States, 397 U.S. 742, 758 (1970); see notes 151-53, 158 & accompanying text supra.
256. See Blackledge v. Perry, 417 U.S. 21, 26-38 (1974). This certainly is not the case with the Prisoner Exchange Treaty. See note 212 supra.
on his legal rights is "patently unconstitutional." But in the give-and-take of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the government's offer.

There has been no assertion that the purpose of the Treaty's prohibition against collateral attack in the United States is to punish or retaliate against the transferred prisoner. Rather, like the situation of the bargaining defendant, the prisoner exchange may flow from the "mutuality of advantage" to the individual and the government, each with its own reasons for wanting the transfer, with intrinsic procedural protections theoretically to assure an arms-length bargain. Although confronting the defendant with a particular choice may have a "discouraging effect on the . . . assertion of his . . . rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legal system which tolerates and encourages the negotiation of pleas." Perhaps the same holds true for prisoner exchanges. Discussing United States v. Jackson, the Supreme Court has made it clear that "subsequent cases have not diluted its force: if the only objective of a [governmental] practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'" But the Prisoner Exchange Treaty clearly has other purposes.


259. Thus, for example, in Bordenkircher v. Hayes, 434 U.S. 357 (1978) (5 to 4 decision), the Supreme Court held that the due process clause of the fourteenth amendment was not violated when a state prosecutor carried out a threat made during plea negotiations to have the accused reindicted on more serious charges, on which he was plainly subject to prosecution, if he did not plead guilty to the offense with which he originally was charged.


261. See notes 147-56 & accompanying text supra; note 241 supra.

262. Bordenkircher v. Hayes, 434 U.S. 357 (1978) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)). It may follow that—by tolerating and encouraging the negotiation of pleas—the Supreme Court necessarily has accepted as constitutionally legitimate the fact that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.

263. Such exchanges may be as essential to international harmony, at least in certain circumstances, as is the plea bargaining process to the functioning of the criminal justice system. See Blackledge v. Allison, 431 U.S. 63, 71 (1977); note 2 & accompanying text supra. See also Senate Foreign Relations Hearings, supra note 3, at 129.


265. See note 258 supra. Perhaps the Supreme Court will have more to say about the issues posed in Jackson. See Corbitt v. New Jersey, 74 N.J. 379, 378 A.2d 235 (1977), probable jurisdiction noted, 46 U.S.L.W. 3526 (U.S. Feb. 21, 1978) (No. 77-5903) (fifth, sixth, and fourteenth amendments are not violated by a procedure that imposes a mandatory life sentence upon a jury conviction but allows a lesser sentence upon defendants who plead guilty). Corbitt is set for oral argument the first week in October 1978. 46 U.S.L.W. 3165 (Sept. 26, 1978).

266. See note 3 & accompanying text supra.
perhaps the most important of which is to improve the living conditions for confined American citizens. In fact, if the Court is doing anything positive for American prisoners, it is in the area of reforming conditions of confinement, rather than that of reducing or eliminating the duration of confinement. Thus even casual observers of American law of prisoners' rights and remedies would agree that the Treaty conforms well to the contemporary pattern.

Of course, although article VI of the Treaty may be constitutional, it may nevertheless be unwise in its effect on the writ of habeas corpus. But to have terminated all negotiations solely because of a failure to include such a provision might have been at


269. Even if the clauses foreclosing collateral attack are ultimately upheld, the continued imprisonment of some, perhaps many, of the prisoners will remain predicated upon suspected violations of their fundamental rights, a suspicion they have not had an opportunity to test in an American court of law. Yet, if these clauses are upheld, the Executive's otherwise commendable desire to insulate the problem of Americans who get into legal troubles abroad from the larger concerns of our diplomacy, will be a strong incentive to negotiate comparable arrangements with other countries. It is this possibility which causes me some concern.

I worry about the prospect, over time, of increasing numbers of Americans being held in American prisons under these doubtful circumstances without having had their "day in court." Liberal grants of parole will alleviate, but not eliminate, the problem. Such a situation will not, I suggest, enhance our record on human rights. In time, the bitterness of the prisoners, the travesty of justice that their imprisonment represents and the suspicion that they remain in prison only because the American government does not wish to offend a foreign power, may come to dominate our own and the world's perception of this otherwise humane enterprise.

Senate Foreign Relations Hearings, supra note 3, at 128-29 (statement of Alan C. Swan). See also note 64 supra; notes 271-72 & accompanying text infra.
The Mexican-American Prisoner Exchange Treaty is an experiment for this country and may pave the way to other treaties of a similar nature with similar benefits.

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

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

See also id. at 48. Professor Wechsler added:

[W]e... have to live in the world and the world is an international community, and therefore accommodations must be made. They must be made in terms of the spirit, the purpose, and the history, and the assumptions of the framers [of the Constitution] as they were given to us and as our statesmen and courts have dealt with them for over 200 years.


I feel that since this treaty is so unique, and since we have no precedents to fall back upon, that we will be doing a great moral injustice to our fellow Americans imprisoned in Mexico if we let speculative legal arguments block this treaty. [We should] let a judicial rather than a legislative or executive setting provide the forum for the resolution of such fine constitutional disputes.

See also note 274 infra.

271. See, e.g., Senate Foreign Relations Hearings, supra note 3, at 2, 81, 128; Senate Judiciary Hearings, supra note 3, at 2, 25. In fact, the United States has recently concluded a bilateral prisoner exchange treaty with Bolivia, Treaty on the Execution of Penal Sentences, Feb. 10, 1978, United States-Bolivia, reprinted in TREATY WITH BOLIVIA ON THE PENAL SENTENCES, S. EXEC. DOC. G., 95th Cong., 2d Sess. (1978), utilizing the same legislation as that employed for the Treaty with Mexico. See id. at vi (Letter of Submittal from Cyrus Vance, Secretary of State). Although the waiver of collateral attack provision of the Treaty with Bolivia is of slightly different wording than article VI of the Treaty with Mexico, its import and effect are identical. See Treaty with Bolivia, art. VII: "The Transferring State shall retain exclusive jurisdiction regarding the sentences imposed and any procedures that provide for revision, modification, or cancellation of the sentences pronounced by its courts. The Receiving State, upon being informed of any decision in this regard, will put such measures into effect." See also note 47 supra. One source reports that "some seventy-five other countries might eventually be persuaded to give up their 1,600 imprisoned U.S. nationals." HARPER'S, NOV. 1977, at 26, col. 3. Moreover, the United Nations has begun a study of the possibility of a multilateral agreement.
fits for American citizens confined abroad. There is no doubt that the negotiators of the Treaty considered the trade-offs and concluded with what they thought was the best acceptable resolution. Thus, as we anticipate possible judicial review of the Treaty and legislation, we are constrained to be mindful that in law, as in life, not all decisions are simple ones.

273. I am one of the fortunate few to have returned home to a country where human rights and due process of law are more than just words. The hundreds of suffering Americans still imprisoned in Mexican jails, living under the worst conditions imaginable, are desperately in need of the spark of hope that only their Government can provide—the knowledge that their country still cares.

274. "[The Treaty poses] an extraordinarily difficult and unprecedented choice; a choice between vindicating, under quite insistent circumstances, some of the most cherished values of our society or, denying those values, in order that the government may meet a no less [insistent] demand for the alleviation of human suffering." Senate Foreign Relations Hearings, supra note 3, at 103 (statement of Alan C. Swan). See also id. at 131, 171; notes 37, 271 supra.

275. See notes 102, 172, 271 supra.

276. See notes 213, 242 supra. Apart from the major issues addressed in this Article, the Treaty and legislation also have potential problems in other areas, such as equality protection, see, e.g., House Judiciary Hearings, supra note 2, at 117-20, 217, 221-22, 227; notes 13, 168 supra, and cruel and unusual punishment, see, e.g., id. at 241-43, 262. See also note 162 supra. In addition, very substantial concern existed in Congress regarding pre-trial detainees, who were not covered by the Treaty. See, e.g., House Judiciary Hearings, supra note 2, at 184; Senate Foreign Relations Hearings, supra note 3, at 17, 129; Senate Judiciary Hearings, supra note 3, at 129, 174-75 (Bassioni suggesting that entire trial be held in United States), 176 ("They do not have any idea whether or not they are going to get to trial and whether anybody even knows they are there or whether or not they have been forgotten") (remarks of Sen. Biden), 291, 325-26. On the Treaty's potential constitutional problems generally, see id. at 217-52. Of course, the fundamental problems go beyond the American Constitution. Such problems include improper consular services, see, e.g., Senate Foreign Relations Hearings, supra note 3, at 222-23; House Judiciary Hearings, supra note 2, at 153-57, 170-73, 184-85, inadequate process at Mexican trials, see, e.g., Senate Judiciary Hearings, supra note 3, at 126, 258-59, 304, and, perhaps at the root of all other problems, the economic troubles of Mexico, see, e.g., id. at 257-58, 325; notes 2, 225 supra, and the resultant drug traffic. See, e.g., TIME, Letter to the Editor, Jan. 9, 1978, at 4, col. 3: "The 'school's out' exuberance generated by the photographs and text in regard to the release/exchange of the Americans from Mexican prisons . . . hides the fact that many of these individuals were trafficking drugs. Their activities could thus result in degradation of human life far beyond anything they experienced."

277. "[L]aw isn't something that exists as a closed system within itself, but draws its juices from life." F. Frankfurter, in H. PHILLIPS, FELIX FRANKFURTER REMINISCES 168 (1960). "The life of the law has not been logic; it has been experience." O. HOLMES, THE COMMON LAW 1 (1881).