PRISONER TRANSFER TREATIES: NEED FOR THE ELIMINATION OR MODIFICATION OF THE RETENTION PROVISION

Incarceration under any conditions can be a somber experience. For twenty-two United States citizens in Lurigancho Prison near Lima, Peru, the experience can best be described as horrendous. The food provided for inmates at Lurigancho is extremely poor. The fact that there is one toilet for seventy inmates characterizes the sanitary conditions. By any standards, Lurigancho Prison redefines the words grim and foreboding.[1]

Nine Americans incarcerated in Lurigancho Prison began a hunger strike to protest prison conditions and the long delay for trials. One American has been waiting two and one-half years for a trial of his drug charge.[2] Upon seeing his daughter, Michael Coyne, one of the striking Americans, was convinced to increase his diet and "hold on for her." Coyne, charged with possession of two and one-half grams of cocaine, faces a ten-year-to-life sentence.[3] If convicted, Coyne may be transferred to a United States federal penitentiary pursuant to a prisoner transfer treaty.[4] Coyne, however, has been waiting sixteen months for a trial that has yet to be assigned a date.[5]

Prior to 1976, United States citizens convicted in foreign countries had little hope of escaping the often horrible conditions that exist in foreign prisons.[6] The only hope for such Americans was what little aid the United States could offer through diplomatic

1. Freed, *Americans in Grim Prison Just Want a Trial*, L.A. Times, Feb. 16, 1982, at 6, col. 4. The Peruvian Justice minister Enrique Elias acknowledged the horrendous conditions at Lurigancho and the severity of the problems there.

2. *Id.* The hunger striker's initial demands of release have been changed to a trial date and better prison conditions.

3. Paddock, *Sight of Child renews Coyne's Desire to Live*, S.D. Union, Feb. 16, 1972, at 1, col. 3. Peruvian law makes no distinction in possession for sale or for one's own use. *Id.*

4. A prisoner transfer treaty allows a person who is convicted in a foreign country of a criminal offense to be transferred to his home State for execution of the sentence.

5. Paddock, *supra* note 3, at 1, col. 3.

6. 65 DEP'T ST. BULL. 56 (1971). Prison conditions in some countries are primitive. Overcrowding, lack of proper sanitation facilities and poor food prevail in some foreign prisons.

channels.[7] In order to relieve these prisoners of the hardships they encountered, the United States embarked into a novel area of foreign relations.[8] The United States entered into several treaties to effectuate the return of American citizens convicted in foreign countries.[9]

These treaties contain a provision which allows the State sentencing the offender to retain exclusive jurisdiction over the sentence.[10] For example, once Coyne is convicted and transferred, the United States must enforce the Peruvian sentence, even if the maximum penalty of life imprisonment is imposed.[11] The possible length of Coyne's sentence poses a serious dilemma considering the sentence Coyne would have received in one of the fifty states. In New York, for example, possession of cocaine is a Class B felony,[12] with a maximum of twenty-five years imprisonment and the possibility of a much shorter sentence.[13] Thus, two Americans serving sentences in the United States for the same crime may serve significantly different periods of incarceration because one sentence was imposed by a foreign court.

The potential disparity of sentences is a consequence of the

7. *Id.* The United States Government can only seek to insure that an American arrested abroad receives the same treatment as nationals of the foreign country.

8. HOUSE JUDICIARY COMM.—TRANSFER OF OFFENDERS TO OR FROM FOREIGN COUNTRIES, H.R. REP. NO. 720, 95th Cong., lst Sess. 144, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3146 (statement of Mr. Christopher, Deputy Secretary, Department of State) [hereinafter cited as House Report].

9. Prisoner Transfer, Nov. 25, 1976, United States—Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718 [hereinafter cited as Mexican Treaty]; Prisoner Transfer, Mar. 2, 1977, United States—Canada, 30 U.S.T. 6263, T.I.A.S. No. 9522 [hereinafter cited as Canadian Treaty]; Prisoner Transfer, Feb. 10, 1978, United States—Bolivia, 30 U.S.T. 796, T.I.A.S. No. 9219 [hereinafter cited as Bolivian Treaty]; Prisoner Transfer, June 7, 1979, United States—Turkey, — U.S.T. —, T.I.A.S. No. 9898 [hereinafter cited as Turkish Treaty]; Prisoner Transfer, July 6, 1979, United States—Peru, — U.S.T. —, T.I.A.S. No. 9784 [hereinafter cited as Peruvian Treaty]; Prisoner Transfer, Jan. 11, 1979, United States—Panama, — U.T.S. —, T.I.A.S. No. 9897 [hereinafter cited as Panamanian Treaty].

10. Mexican Treaty, *supra* note 9, art. 6; Canadian Treaty, *supra* note 9, art. 5; Bolivian Treaty, *supra* note 9, art. 7; Turkish Treaty, *supra* note 9, art. 9; Peruvian Treaty, *supra* note 9, art. 7; Panamanian Treaty, *supra* note 9, art. 7.

11. Peruvian Treaty, *supra* note 9, art. 7. The provision precludes the receiving State from reviewing transferred sentences.

12. N.Y. PENAL LAW § 220.16 (McKinney 1980). A person is guilty of criminal possession in the third degree when he possesses a narcotic with intent to sell. Criminal possession in the third degree is a class B felony; however, New York law makes a distinction between possession for sale and possession for one's own use. If Coyne were charged with the latter it would only be a misdemeanor. *Id.* § 220.03.

13. *Id.* § 70. The maximum sentence for a class B felony is twenty-five years. The courts may, however, fix a minimum depending upon the defendant's character and the nature of the offense. The minimum is not to exceed one-third of the maximum.

sending State retaining jurisdiction over the sentence. This Comment will challenge the necessity of the retention provision on several grounds. First, an overview will be given of the prisoner transfer treaties to which the United States is a party.[14] This overview will examine the general characteristics of the treaties and, when applicable, similarities will be noted. Constitutional issues raised by the retention provision in the United States will then be considered.[15] These constitutional problems may threaten the treaties' viability because of possible due process and eighth amendment attacks by the prisoner.

The prisoner transfer treaties to which the United States is a party will be compared with similar treaties.[16] This comparison will support the contention made by this Comment that the United States treaties are the strictest on the issue of modification of the sentence by receiving States. This discussion will be followed with an overview of recognition and enforcement in the United States of foreign civil judgments. The treatment foreign civil judgments receive in the United States will be contrasted with that of foreign penal judgments under these treaties.[17] This comparative scrutiny will demonstrate how the legal system of the United States provides greater protection to United States citizens from the enforcement of foreign civil judgments than foreign penal judgments.

This Comment does not suggest that the prisoner transfer treaties be sacrificed because the sending State[18] retains exclusive jurisdiction over the sentence. The benefits to be derived from these treaties[19] far outweigh the detriment suffered as a result of the retention provision. The Comment will conclude, however, that the retention provision should either be eliminated or revised. A model provision which would allow the receiving State to modify a transferred sentence will be suggested. By allowing the receiving

14. *See infra* text accompanying notes 23-80.

15. *See infra* text accompanying notes 81-135.

16. *See infra* text accompanying notes 173-95.

17. *See infra* text accompanying notes 196-246.

18. Sending State denotes the country in which the prisoner was convicted and sentenced. Receiving State denotes the country to which the sending State transfers the prisoner.

19. Three benefits which have been derived from the treaties are: (1) the State may protect its interests in the treatment of its citizens abroad; (2) transferring increases the chances for rehabilitation which is of particular importance to the State the prisoner will eventually return; and, (3) the treaties play a significant factor in the development of close international relations. Bassiouni, *Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada*, 11 VAND. J. TRANSNAT'L L. 249, 251 (1978).

State to modify a prisoners sentence, the model provision would eliminate the dilemma created by the existing retention provision.[20]

I. AN OVERVIEW OF THE PRISONER TRANSFER TREATIES CURRENTLY IN FORCE

The United States is presently a party to six[21] bilateral prisoner transfer treaties.[22] The first prisoner transfer treaty was signed with Mexico[23] in 1976. Within the next three years, the United States entered into similar treaties with Canada, Bolivia, Turkey, Peru and Panama.[24] The similarity of the treaties is illustrated by the fact that the United States enacted only one piece of legislation to implement all of the treaties.[25]

The treaties declare two purposes: First, each recognizes in order to combat crime, mutual cooperation is necessary since the effects of crime extend beyond the borders of each State.[26] Second, in order to serve justice and combat crime more effectively, the prisoner's social rehabilitation requires facilitation.[27] Social rehabilitation may be furthered if the receiving State were allowed to modify the sentence.[28] Thus, these objectives could be advanced if the treaties did not prevent modification by the receiving State.

Most importantly, the treaties provide a method to effectuate the return of American citizens convicted and sentenced in foreign

20. By giving the receiving State the right to modify a transferred sentence, the result may be a lengthened sentence. This possible result would raise legal questions in the United States which are beyond the scope of this Comment. 24B C.J.S. *Criminal Law* § 1946 (1947). There have only been a few cases in which an appellate court has increased sentences when there has been a clerical mistake. *Id.*

21. The United States and Thailand very recently signed a prisoner transfer treaty. N.Y. Times, Oct. 30, 1982, at 4.

22. *See* treaties cited *supra* note 9.

23. House Report, *supra* note 8, at 3147. The Mexican Treaty was seen as an effective means for dealing with the problem of Americans in Mexican jails. In 1975, the State Department received complaints about the treatment Americans jailed in Mexico were receiving. This treaty was to be a precedent for treaties with other countries to alleviate the problem of Americans in foreign jails. *Id.* at 3146-47.

24. *See* treaties cited *supra* note 9.

25. 18 U.S.C. § 4100 (Supp. III 1979).

26. *See* treaties cited *supra* note 9. The preambles of these treaties are essentially identical. *Id.*

27. *Id.*

28. Rehabilitation is viewed as a method to treat a disease—criminal propensity. The objective of rehabilitation is to tailor punishment to a duration sufficient to change the offenders personality and propensities. A. CAMPBELL, LAW OF SENTENCING 19 (1978). If the receiving State could modify the sentence, such tailoring would be better achieved because the United States courts are more familiar with the United States prison rehabilitation programs than the foreign courts.

countries. This humanitarian aspect was illustrated by the House Judiciary Committee report on the implementing legislation.[29] The committee stated that the most fundamental justification for the treaties is human rights.[30] The committee recognized that incarceration in one's own country is "severe enough punishment."[31] To serve a prison term in a foreign jail creates special hardships for prisoners.[32]

A. General Characteristics of the Treaties

The various treaties contain many of the same provisions. All of the treaties allow the sending State to retain exclusive jurisdiction over the sentence.[33] The treaties also provide that a convicted offender may not be tried again for the same offense by the receiving State.[34] All of the treaties mandate that the sentence is to be carried out according to the laws of the receiving State.[35] Finally, under all of the treaties, parole is governed by the laws of the receiving State.[36]

There are, however, differences among the various treaties, such as the manner in which a transfer may be initiated. Two of the treaties call for the transfer process to be initiated by the sending State.[37] Three of the other treaties require the receiving State to initiate the transfer process.[38] The Canadian treaty is unique in that it requires the prisoner to petition the sending State to commence the transfer.[39] Both the Mexican and Turkish treaties allow the prisoner to request the sending State to initiate the transfer process.[40]

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29. House Report, *supra* note 8, at 3149.

30. *Id.*

31. *Id.*

32. *Id.*

33. *See supra* note 10.

34. Mexican Treaty, *supra* note 9, art. 1; Canadian Treaty, *supra* note 9, art. 6; Bolivian Treaty, *supra* note 9, art. 6, § 1; Turkish Treaty, *supra* note 9, art. 6, § 1; Peruvian Treaty, *supra* note 9, art. 6, § 1; Panamanian Treaty, *supra* note 9, art. 6, § 1.

35. Mexican Treaty, *supra* note 9, art. 5, § 2; Canadian Treaty, *supra* note 9, art. 4, § 1; Bolivian Treaty, *supra* note 9, art. 6, § 2; Turkish Treaty, *supra* note 9, art. 20, § 1; Peruvian Treaty, *supra* note 9, art. 6, § 2; Panamanian Treaty, *supra* note 9, art. 6, § 2.

36. Mexican Treaty, *supra* note 9, art. 5, § 2; Canadian Treaty, *supra* note 9, art. 4, § 1; Bolivian Treaty, *supra* note 9, art. 6, § 2; Turkish Treaty, *supra* note 9, art. 20, § 1; Peruvian Treaty, *supra* note 9, art. 6, § 2; Panamanian Treaty, *supra* note 9, art. 6, § 2.

37. Mexican Treaty, *supra* note 9, art. 1; Turkish Treaty, *supra* note 9, art. 12, § 1.

38. Bolivian Treaty, *supra* note 9, art. 5, § 2; Panamanian Treaty, *supra* note 9, art. 5, § 1; Peruvian Treaty, *supra* note 9, art. 5, § 1.

39. Canadian Treaty, *supra* note 9, art. 5, § 3.

40. Mexican Treaty, *supra* note 9, art. 4, § 1; Turkish Treaty, *supra* note 9, art. 12, § 2.

In contrast to the other treaties, the Turkish treaty was modeled after the European Convention on the Validity of Criminal Judgments.[41] This contrast gives rise to three differences between the Turkish treaty and the remaining treaties.[42] First, only the Turkish treaty establishes that the receiving State may refuse to enforce the judgment of the sending State in certain circumstances:[43] If the enforcement is contrary to any fundamental legal principles of the receiving State, or if the receiving State would be precluded from meeting its implementing legislation, the receiving State may refuse enforcement.[44] Second, since Turkish penal judgments may also include confiscation of property, the treaty provides for this sanction.[45] Third, the Turkish treaty states that each party recognizes the validity of the other party's judgment.[46]

Therefore, there is a major conceptual difference between the Turkish treaty and the remaining treaties. The Turkish treaty expressly provides for recognition of foreign penal judgments. Under the other five treaties, recognition is implicit due to the fact that the receiving State is enforcing the penal judgment of the sending State.[47]

B. Preconditions to Transfer

The treaties specify certain conditions which must be fulfilled before a prisoner will be eligible for transfer. The conditions are generally the same throughout the various treaties except for minor differences in drafting. In a few instances, however, the preconditions to transfer are atypical and therefore warrant careful study of six preconditions to transfer.[48]

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41. May 28, 1979, Europ. T.S., *reprinted in* 2 M. BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 292 (1970) [hereinafter cited as Convention].

42. Comment, *The Prisoner Transfer Treaty with Turkey: Last Run for the "Midnight Express,"* 84 DICK. L. REV. 687, 693 (1980).

43. Turkish Treaty, *supra* note 9, art. 5. *See also* Comment, *supra* note 42, at 693.

44. Turkish Treaty, *supra* note 9, arts. 5, 21, 22. The treaty provides that if the sending State has requested the receiving State to provisionally seize property, the receiving State may do so when the laws of the receiving State provide for seizure for similar offenses. Also, such seizure is to be in accordance with the laws of the receiving State and becomes the property of that State.

45. Turkish Treaty, *supra* note 9, arts. 21, 22. *See also* Comment, *supra* note 42, at 693.

46. Turkish Treaty, *supra* note 9, art. 2, § 1. *See also* Comment, *supra* note 42, at 694.

47. Comments, *Execution of Foreign Sentences in the United States: A Treaty with Mexico*, 9 ST. MARY'S L.J. 118, 121 (1977). The remaining five treaties are silent on the issue of recognition, but since the United States does carry out the foreign imposed sentence, the treaties logically have such an effect.

48. *See infra* text accompanying notes 49-82.

First, to be eligible for transfer, there must be "double criminality."[49] The prisoner's offense must be punishable in both the receiving State and the sending State.[50] This condition, however, is qualified since the offense need not be described identically by the laws of both countries. A foreign national, therefore, cannot be transferred to the home State if the offense committed is peculiar to the sending State.[51] There are certain types of offenses which have been excluded from these treaties. Both the Mexican and Canadian treaties exclude immigration offenders from eligibility for transfer.[52] The remaining four treaties are silent on the eligibility of immigration offenders. Five of the treaties exclude from transfer eligibility those persons convicted of purely military offenses.[53] Both the Mexican and Turkish treaties prohibit the transfer of prisoners convicted for political offenses,[54] and three of the treaties prohibit the transfer of prisoners who have been sentenced to death.[55]

Second, all of the transfer treaties require that the prisoner be a national of the receiving State.[56] The Mexican and Turkish treaties also require that the offender not be a domiciliary of the sending State.[57] Thus, United States citizens who have become legally domiciled in Turkey or Mexico are not eligible for transfer.[58]

Third, the prisoner transfer treaties require that the prisoner have at least six months remaining on his sentence.[59] Apparently,

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49. 2 M. BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW, § 8, at 313 (1973).

50. Mexican Treaty, *supra* note 9, art. 2, § 1; Canadian Treaty, *supra* note 9, art. 2, § a; Bolivian Treaty, *supra* note 9, art. 3, § 1; Turkish Treaty, *supra* note 9, art. 3, § 1; Panamanian Treaty, *supra* note 9, art. 3, § 1.

51. In view of the requirement that the offense be punishable by the laws of both States, an offender who committed an offense which is only punishable in the would be sending State is not eligible for transfer.

52. Mexican Treaty, *supra* note 9, art. 2, § 4; Canadian Treaty, *supra* note 9, art. 2, § c.

53. Mexican Treaty, *supra* note 9, art. 2, § 4; Canadian Treaty, *supra* note 9, art. 2, § c; Bolivian Treaty, *supra* note 9, art. 3, § 3; Peruvian Treaty, *supra* note 9, art. 3, § 3; Panamanian Treaty, *supra* note 9, art. 3, § 3.

54. Mexican Treaty, *supra* note 9, art. 2, § 4; Turkish Treaty, *supra* note 9, art. 6, § B. The remaining four treaties are silent on this point. Therefore, it may be assumed that a prisoner convicted of a political offense is eligible for transfer under the remaining four treaties.

55. Bolivian Treaty, *supra* note 9, art. 3, § 2; Peruvian Treaty, *supra* note 9, art. 3, § 3; Panamanian Treaty, *supra* note 9, art. 3, § 3.

56. Mexican Treaty, *supra* note 9, art. 3, § 2; Canadian Treaty, *supra* note 9, art. 2, § B; Bolivian Treaty, *supra* note 9, art. 3, § 2; Turkish Treaty, *supra* note 9, art. 4, § 2; Peruvian Treaty, *supra* note 9, art. 3, § 2; Panamanian Treaty, *supra* note 9, art. 3, § 2.

57. Mexican Treaty, *supra* note 9, art. 3, § 2; Turkish Treaty, *supra* note 9, art. 4, § 8.

58. Mexican Treaty, *supra* note 9, art. 3, § 2; Turkish Treaty, *supra* note 9, art. 4, § 8.

59. Mexican Treaty, *supra* note 9, art. 2, § 5; Canadian Treaty, *supra* note 9, art. 2, § D;

this provision reflects one of the stated purposes of these treaties: the offender's rehabilitation.[60] The rehabilitative benefits to be derived from the transfer must be balanced against the time and expense of the transfer.[61] Since nine government agencies are involved, the transfer process requires a great amount of time.[62] The substantial cost of the transfers is evidenced by the estimated $1 million to implement only two treaties during 1982.[63] It has been suggested that when less than six months remain to be served, the time and expense far outweigh the possible benefits.[64]

Fourth, five of the treaties require that the sentence of the sending State be final; all appeals must have been completed.[65] The definitional section of the Turkish treaty states that "penal judgment means any final decision by criminal courts."[66] Since there is no requirement of finality in the conditions of enforcement,[67] the Turkish treaty may be interpreted as allowing transfers while an appeal is pending; however, no such interpretation has appeared to date.

Fifth, all six treaties require that the offender consent to the transfer.[68] In fact, five of the treaties go so far as to provide the receiving State the right to verify the prisoner's consent.[69] Verification of the prisoner's consent was considered to be of such import that the United States included the procedure for verification in the implementing legislation.[70]

Finally, four of the treaties require an evaluation of the pros-

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Bolivian Treaty, *supra* note 9, art. 3, § 4; Turkish Treaty, *supra* note 9, art. 4, § D; Peruvian Treaty, *supra* note 9, art. 3, § 4; Panamanian Treaty, *supra* note 9, art. 3, § 4.

60. *See* treaties cited *supra* note 9.

61. Abramousky & Eagle, *Critical Analysis of the Mexican-American Transfer of Penal Sanction Treaty*, 64 IOWA L. REV. 275, 283 (1977).

62. House Report, *supra* note 8, at 3172 (statement of Peter F. Flaherty, Deputy Attorney General).

63. House Report, *supra* note 8, at 3179 (Cost Budget Office—Cost Estimate).

64. Abramousky & Eagle, *supra* note 61, at 284.

65. Mexican Treaty, *supra* note 9, art. 2, § 6; Canadian Treaty, *supra* note 9, art. 2, § E; Bolivian Treaty, *supra* note 9, art. 3, § 5; Peruvian Treaty, *supra* note 9, art. 3, § 5; Panamanian Treaty, *supra* note 9, art. 3, § 5.

66. Turkish Treaty, *supra* note 9, art. 1, § C.

67. *Id.* The treaty is silent on this matter.

68. Mexican Treaty, *supra* note 9, art. 4, § 2; Canadian Treaty, *supra* note 9, art. 3, § 10; Bolivian Treaty, *supra* note 9, art. 5, § 3; Turkish Treaty, *supra* note 9, art. 4, § F; Peruvian Treaty, *supra* note 9, art. 5, § 9; Panamanian Treaty, *supra* note 9, art. 3, § 6.

69. Mexican Treaty, *supra* note 9, art. 5, § 1; Canadian Treaty, *supra* note 9, art. 5, § 10; Bolivian Treaty, *supra* note 9, art. 5, § 9; Peruvian Treaty, *supra* note 9, art. 5, § 9; Panamanian Treaty, *supra* note 9, art. 3, § 6.

70. 18 U.S.C. § 4100 (Supp. III 1979); House Report, *supra* note 8, at 3159.

pects for rehabilitation.[71] The Turkish treaty expressly requires that the transfer is likely to improve the prospects for the social rehabilitation of the offender.[72] The three remaining treaties declare that since the objective is rehabilitation, the State should consider certain factors, such as the nature of the offense, the prisoner's criminal record and the prisoner's ties to the sending State.[73]

While there are some differences, the treaties are basically in agreement as to the preconditions to transfer: (1) prisoners will not be transferred unless they consent to the transfer;[74] (2) the prisoner must be a national of the receiving State;[75] (3) the judgment must be final;[76] and, (4) there must be more than six months remaining on the sentence.[77] To determine eligibility for transfer, however, the specific requirements of the applicable treaty must be examined. A prisoner will be eligible for transfer only when all the required conditions exist.

The most troublesome requirement for the United States has been the consent of the prisoner.[78] This dilemma is evidenced by the Department of Justice's anticipation of attacks on the constitutionality of the consent requirement.[79] At the congressional hearings on the implementing legislation, the Department of Justice anticipated that the requirement would be held constitutional,[80] even though the prisoner would be waiving constitutional rights.

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71. Mexican Treaty, *supra* note 9, art. 4, § 4; Turkish Treaty, *supra* note 9, art. 4; Peruvian Treaty, *supra* note 9, art. 5, § 6; Panamanian Treaty, *supra* note 9, art. 5, § 6.

72. Turkish Treaty, *supra* note 9, art. 4.

73. Mexican Treaty, *supra* note 9, art. 4, § 4; Panamanian Treaty, *supra* note 9, art. 5, § 6; Peruvian Treaty, *supra* note 9, art. 5, § 6. In addition to the factors mentioned in the text, the treaties also call for the States to consider the offender's medical condition, strength of his connections by residence, presence in the territory, family relations and otherwise to the social life of the receiving and sending State. These factors are to be considered when deciding upon the transfer of the offender as they bear upon the probability that the transfer will contribute to the social rehabilitation of the offender.

74. *See supra* note 68.

75. *See supra* note 56.

76. *See supra* note 65.

77. *See supra* note 59.

78. *See infra* text accompanying notes 81-104.

79. House Report, *supra* note 8, at 3172 (statement of Peter F. Flaherty, Deputy Attorney General).

80. *Id.*

> If, however, a court were to hold that the fact of transfer to the custody of the Attorney General for the purpose of serving a sentence imposed by a foreign tribunal triggers a constitutional right to test the fairness of the foreign proceeding in either a Federal or State court, we think that the consent procedures established in S. 1682 would be held constitutionally adequate . . ."

Id. at 3173-74.

C. *The Consent Requirement*

To be eligible for transfer, a prisoner must consent that the transfer be subject to certain conditions.[81] One condition is that only the courts of the sending State can hear challenges to the conviction or sentence.[82] This condition raises serious questions since it anticipates a waiver of constitutional rights by United States citizens.[83]

In an effort to stem litigation regarding the constitutionality of the waiver, Congress included the verification procedure in the implementing legislation.[84] The verification procedure requires the verifying officer to inform the prisoner that the conviction or sentence can only be challenged in the sending State.[85] The verifying officer must determine that the prisoner's consent is voluntary and has not been coerced in any way.[86] Also, the prisoner is entitled to counsel[87] and a record is kept to determine the validity of the verification proceeding.[88]

Arguably, at the time of consent to transfer, the prisoner waives two constitutional rights. By agreeing not to challenge the conviction in a United States court, the prisoner is waiving the right to claim a denial of due process at trial. Second, by consenting to the transfer, the prisoner agrees not to seek a constitutionally guaranteed writ of habeas corpus.[89]

It has been suggested that at the time the prisoner consents to transfer, the prisoner does not possess a right of access to United

81. 18 U.S.C. § 4108 (Supp. III 1979).

82. *Id.*

83. Bassiouni, *supra* note 19, at 258.

84. House Report, *supra* note 8, at 3160.

85. 18 U.S.C. § 4108 (Supp. III 1979). The verifying officer shall inquire of the offender whether he understands and agrees that the transfer is subject to the following conditions: only the country in which he was convicted and sentenced can modify or set aside the conviction or sentence, and any proceeding seeking such action may only be brought in that country.

86. *Id.* The verifying officer must make the necessary inquiries to make this determination.

87. 18 U.S.C. § 4109 (Supp. III 1979). The consequences are such that Congress considered it imperative that the prisoner have counsel at the verification proceeding. The government will supply counsel when the prisoner cannot afford one. In the case of an American, the verifying officer will appoint counsel. House Report, *supra* note 8, at 3160.

88. 18 U.S.C. § 4108 (Supp. III 1979). The entire proceeding must be recorded either by a reporter or recording equipment.

89. House Report, *supra* note 8, at 3174 (statement of Mr. Flaherty). For an in-depth analysis of these constitutional issues, see generally Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 HARV. L. REV. 1500 (1977).

States courts.[90] Accordingly, consent which purportedly waives a nonexistent due process right is questionable. To remedy this questionability, Congress required that the prisoner must agree not to challenge his conviction or sentence in United States courts.[91]

Transferred prisoners, however, are not denied all access to United States courts. In *Rosado v. Civiletti*, the Second Circuit Court of Appeals stated that transferred prisoners cannot be denied all access to United States courts. To gain access, however, the prisoner must persuasively show he was denied any process whatsoever.[92] Moreover, the prisoner presumably waives his constitutional right to seek a writ of habeas corpus.[93] The constitutionality of the waiver depends upon its validity.[94] It has been suggested that the treaties provide for a valid waiver of habeas corpus. Since the consent requirement constitutes a knowing, intelligent and voluntary waiver, habeas corpus is constitutionally waived.[95]

Finally, transferred prisoners can raise an additional argument in relation to the consent requirement. When the prisoner consents to transfer, the existing alternative vitiates the voluntariness of the waiver. This argument relies on the premise that conditions in foreign jails are such that the prisoner has only one choice: to consent to the transfer.[96] Therefore, the consent requirement would not be met. On the basis of this analysis, the prisoner could argue he is entitled to a writ of habeas corpus since the treaty requirements were not fulfilled.[97]

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90. Rosado v. Civiletti, 621 F.2d 1179 (2nd Cir. 1980)[hereinafter cited as Rosado].

91. *Id.* at 1198.

92. *Id.*

93. House Report, *supra* note 8, at 3173 (statement of Mr. Flaherty). Mr. Flaherty analyzed the case of a transferred American to that of a prisoner to be extradited in the case of *Neeley v. Henkel*, 180 U.S. 109 (1901). In *Neeley*, the Court held that the *Great Writ* may not be invoked to test the fairness of a foreign proceeding. *Id.*

94. Velez v. Nelson, 475 F. Supp. 865, 872-73 (D. Conn. 1979) [hereinafter cited as Velez].

95. Comment, *supra* note 42, at 710-13.

96. Bassiouni, *supra* note 19, at 259.

97. Velez, 475 F. Supp. 865. The court released the transferred prisoners.

> Petitioners initially were subjected to brutal and sustained physical torture. They remained confined for twenty-five months under barbaric conditions. The Mexican prison authorities and certain powerful inmates demanded exhorbitant payments in return for the basic life necessities under threat of severe physical punishment. Petitioners lived in perpetual fear of bodily harm. Moreover, petitioners' confinement was the result of aborted legal proceedings which lacked any semblance of due process guarantees. At the time their consent was procured, petitioners justifiably believed that if they remained incarcerated any longer in Santa Marta, they would be killed. As a result of these circumstances and in particular the fear of imminent death, it is clear to this Court that petitioners would have signed anything, regard-

In order to be valid, the prisoner's consent must meet the constitutional standards of voluntariness.[98] The *Rosado* court determined these standards to be similar to those governing the voluntariness of guilty pleas.[99] The *Rosado* court specifically stated: "[T]he voluntariness of a given plea is to be judged by whether it was a knowing, intelligent act 'done with sufficient awareness of the relevant circumstances and likely consequences.' "[100] By applying this test, the *Rosado* court reversed the lower court's grant of a writ of habeas corpus to the transferred prisoners.[101] Ironically, these prisoners were certain that they would have been killed had they not consented to the transfer.[102]

In summary, due to the retention of exclusive jurisdiction over the sentence, the treaties may be subject to constitutional attack. In addition to the foregoing arguments, it is possible that the United States is denying United States citizens their eighth amendment rights.[103] By enforcing foreign-imposed sentences with no right of review, the United States might be subjecting its citizens to cruel and unusual punishment.[104]

II. THE PROVISION FOR RETENTION OF EXCLUSIVE JURISDICTION AND THE EIGHTH AMENDMENT

A treaty by its nature is a contract between nations.[105] The United States places treaties on a higher level than mere contracts.[106] By virtue of the supremacy clause, treaties are "the supreme Law of the Land."[107] Treaties are therefore binding upon all United States courts and are of equal force of law to the Consti-

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less of the consequences, to get out of Mexico. Therefore, under the unique facts of this case, petitioners' consents were not truly voluntary, and are therefore, invalid.

Id. at 873-74.

98. *Id.* at 873.

99. Rosado, 621 F.2d at 1190. The court found choices available to an American in a foreign jail to closely resemble the choice of a criminal defendant. Both were faced with the choice of "Whether to plead guilty and accept a set of specified sanctions . . . or to stand trial and face unknown dispositions."

100. *Id.* at 1191.

101. *Rosado* reversed the *Velez* decision, which held that the test for voluntariness of the consent was the same test for voluntariness of allowing searches and seizures by policy.

102. Velez, 475 F. Supp. at 872-73.

103. U.S. CONST. amend. VII.

104. *See infra* text accompanying notes 105-36.

105. 87 C.J.S. *Treaties* § 1 (1904).

106. *Id.* § 2.

107. U.S. CONST. art. VI, § 2.

tution.[108] If this were the only test, treaties would never be subject to attack.

The treaty-making power is, by its terms, unlimited.[109] This power, however, is subject to the restraints which are found in the Constitution.[110] The extent of these restraints has never been precisely defined since no treaty has ever been declared void.[111] The treaty-making power cannot authorize that which the Constitution forbids.[112] Therefore, since the Constitution prohibits cruel and unusual punishment,[113] the United States cannot inflict such punishment under the authority of a treaty.

The prisoner transfer treaties to which the United States is a party provide for the retention by the sending State of jurisdiction over the sentence. Due to this retention, United States courts are precluded from reviewing a transferred prisoner's sentence.[114] The practical effect of this result is that United States citizens may receive and serve longer sentences than they would have if their crimes were committed in the United States. If the prisoner's sentence constitutes cruel and unusual punishment, the United States is bound by the treaty to enforce the sentence.

A. Cruel and Unusual Punishment

Although the argument has not been raised, the United States may be subjecting its citizens to cruel and unusual punishment.[115] To illustrate: two men, Caban and Velez, who met aboard a flight to Acapulco City, were arrested without warrants by men dressed in civilian clothes.[116] Although the initial search revealed no narcotics, Caban and Velez were tortured for eight days before a Mexican prosecutor offered them a confession to sign.[117] The confession stated they were guilty of conspiracy to import cocaine.[118] Caban

108. 15 C.J.S. *Constitutional Law* § 3 (1956).
109. 87 C.J.S. *Treaties* § 1 (1904).
110. 15 C.J.S. *Constitutional Law* § 3 (1956).
111. Missouri v. Holland, 225 U.S. 416 (1920).
112. Geofroy v. Riggs, 133 U.S. 258, 267 (1890) [hereinafter cited as Geofroy]; Asakura v. Seattle, 265 U.S. 332, 341 (1924) [hereinafter cited as Asakura].
113. U.S. CONST. amend. VII.
114. *See supra* note 10. The provision expressly stated that only the sending State may modify the sentence; also, the implementing act requires the verifying officer to inform the prisoner of this. 18 U.S.C. § 4108 (Supp. III 1979).
115. *See infra* text accompanying notes 116-36.
116. Velez, 475 F. Supp. at 867.
117. *Id.* at 869.
118. *Id.*

and Velez refused to sign that confession, but offered their own confession.[119] Subsequently, they were sentenced to a nine-year imprisonment term, and were transferred to the United States pursuant to the Mexican treaty.[120]

In contrast, the maximum sentence Caban and Velez could have received in the United States would have been either imprisonment for five years or a $10,000 fine, or both.[121] Caban and Velez challenged their confinement in the United States on the ground that their consent was not voluntary.[122] Although they did not raise a cruel and unusual punishment argument, it was arguably available.

The power of a court to punish criminals is derived from statutory law. As a general rule, punishment must conform to the applicable statute.[123] When a sentence is within the statutory limit, the punishment cannot be deemed cruel and unusual[124] unless the statute itself calls for cruel and unusual punishment.[125] In the case of Caban and Velez, however, the punishment enforced was not within the limits of the United States conspiracy statute. Therefore, Caban and Velez arguably were subjected to cruel and unusual punishment.

The eighth amendment was intended to limit the types of punishment which legislatures could prescribe.[126] To test the constitutional application of a statute under the eighth amendment, certain factors are to be considered: (1) the nature of the offense to be punished; (2) the legislative purpose behind the punishment; (3) the punishment the defendant would receive in other jurisdictions; and, (4) the punishment meted out in the same jurisdiction for other offenses.[127] If, upon consideration of these factors, the punishment is deemed excessive or greater than any previously prescribed, the penalty may be deemed cruel and unusual.[128]

The case of a transferred prisoner's sentence presents a different situation. The punishment to which the prisoner is subjected is

119. *Id.*

120. *Id.* at 872. While Caban and Velez were sentenced to nine years, the Mexican court reduced the sentence to eight years and nine months. *Id.* at 871 n.16.

121. 18 U.S.C. § 371 (1976).

122. Velez, 475 F. Supp. at 867.

123. 24 C.J.S. *Criminal Law* § 1973 (1971).

124. U.S. v. MacClain, 501 F.2d 1006, 1013 (10th Cir. 1974).

125. 24 C.J.S. *Criminal Law* § 1973 (1971).

126. Gregg v. Georgia, 428 U.S. 153, 170 (1976).

127. Rummell v. Estelle, 445 U.S. 263 (1976) [hereinafter cited as Rummell].

128. 21 AM. JUR. 2D *Criminal Law* § 626 (1981).

not prescribed by a United States penal statute. Unless the implementing legislation is determined to be the operative statute, the foregoing test should not be applicable.

The framers of the eighth amendment were primarily concerned with the prevention of torture and other forms of barbarous punishment.[129] The interpretation of what constitutes cruel and unusual punishment, however, has not remained stagnant. While exact limits as to what constitutes cruel and unusual punishment are difficult to define, the constitutional provision forbidding such punishment is to be liberally construed. The amendment must draw its meaning from the evolving standards of decency in a maturing society.[130] When the eighth amendment is in question, attention should be focused upon the contemporary standards of punishment and present societal values. The ultimate test of a sentence's constitutionality under the eighth amendment is whether the sentence is so disproportionate to the offense as to shock the conscience.[131]

When a United States citizen is transferred pursuant to a prisoner transfer treaty, the United States cannot review the foreign-imposed sentence. The United States must enforce a transferred prisoner's sentence as imposed by the sending State.[132] As a result, the United States may be enforcing a sentence that is so disproportionate so as to shock one's conscience.[133] Therefore, the United States may be inflicting cruel and unusual punishment upon its citizens under such circumstances.

As a consequence to this possible challenge, it may be found that the enforcement of a longer sentence is unconstitutional because it violates the eighth amendment.[134] Since a treaty cannot authorize what the Constitution forbids, the United States may not be able to enforce the treaty legally.[135] This dilemma is increased as a result of principles of customary international law. According to customary international law, a treaty supersedes domestic law.[136]

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129. *Id.*

130. Rummell, 445 U.S. 263.

131. Smith v. Municipal Court, 78 Cal. App. 3d 592, 593, 596, 144 Cal. Rptr. 504, 506 (1970).

132. *See supra* note 10.

133. For example, if Coyne receives the maximum life sentence from a Peruvian Court for possession of two and one-half grams of cocaine, the United States must enforce the sentence.

134. U.S. CONST. amend. VII.

135. Geofroy, 133 U.S. at 267; Asakura, 265 U.S. at 341.

136. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 186 (1943). Treaties create

B. The Necessity of the Retention Provision

In view of the purposes behind prisoner transfer treaties and the rationale for the retention provision, this Comment suggests that the retention provision is not essential. The rationale for the exclusive jurisdiction provided by the provision is the protection of the sending State's sovereignty[137] and the integrity of that State's judgments.[138] The latter rationale is accomplished by preventing the receiving State from interfering with the sending State's judgment.[139] Signatory States could eliminate or modify the provision through mutual consent without endangering the integrity of the judgments.[140] As a result of such action, the enforcement of the sending State's judgments in the United States would be free from possible constitutional attack.[141] The United States would then be able to enforce the treaty legally.

Moreover, the rehabilitation objective would be advanced if the receiving State could modify a transferred sentence. Rehabilitation calls for a tailoring of the sentence to the duration deemed necessary in order to change the offender's personality.[142] Having first hand knowledge of their prison systems and rehabilitation programs, courts of the prisoner's State could more effectively tailor the sentence, thereby preparing the prisoner to re-enter society in his residence State. Such a policy promotes the purpose of the treaties: to facilitate the prisoner's social rehabilitation.[143]

Additionally, the integrity and validity of the sending State's judgments can be preserved. The receiving State can recognize the sending State's judgment while altering the enforcement.[144] Thus,

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binding obligations on States. It is no defense that a treaty is in conflict with domestic law. In the event one party fails to be bound by a treaty because of a conflicting domestic law, the treaty obligation will still exist.

137. House Report, *supra* note 8, at 3165. If the receiving State could modify, the States would deem it to be an infringement upon their territorial sovereignty over crime.

138. Telephone interview with James Williams, Desk Officer for Turkey, United States Department of State (Nov. 19, 1981).

139. *Id.*

140. H. JACOBINI, INTERNATIONAL LAW 170 (rev. ed. 1968). It is an essential principle of international law that no nation may release itself or revise a treaty obligation. Treaties can be revised by mutual consent of the contracting parties by means of an amicable understanding. *Id.* at 170.

141. If the enforcement of the sending State's judgment would constitute cruel and unusual punishment, the United States could review the sentence to make it constitutional.

142. A. CAMPBELL, *supra* note 28, at 34-35.

143. *See* treaties cited *supra* note 9.

144. 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 226 (1971). There is a distinction between recognition and enforcement. Therefore, a modification of the enforcement

a United States court can recognize the sending State's judgment as valid, while enforcing it to such an extent as to preclude the possibility of constitutional attack due to a longer sentence.[145]

All of the existing treaties effect an enforcement of the sending State's judgments. Only the Turkish treaty, however, explicitly declares the judgment of the sending State is to be recognized and enforced.[146] The remaining five treaties implicitly effect recognition of the sending State's criminal judgments since they are enforced by the receiving State.[147] The distinction between recognition and enforcement clearly exists, although the former is a prerequisite for the latter. Therefore, a judgment may be recognized as valid by a foreign country, yet unenforceable therein.[148] Thus, at least in the five remaining treaties, the United States may use the distinction as an argument to gain the right to modify a judgment.

There are several requirements for a foreign judgment to be recognized by a United States court. First, the foreign court must have jurisdiction. Second, there must be a full and fair trial with regular procedures. Third, the foreign system of justice must be likely to treat citizens and aliens alike. Finally, the judgment must not be procured by fraud.[149]

As mentioned above, only the Turkish treaty explicitly mandates that the receiving State must recognize the sending State's judgments.[150] Since the United States enforces sentences imposed by the remaining party States, as with Turkish judgments, all of the treaties have the same effect in practice. Therefore, even though the remaining five treaties do not expressly provide for recognition of the sending State's judgments, the judgment is implicitly recognized by its enforcement.

In view of the fact that the United States implicitly recognizes

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does not alter the fact that the judgment was recognized; the distinction between recognition and enforcement of foreign judgments must be drawn even though the former is a prerequisite for the latter. Borm-Reid, *Recognition and Enforcement of Foreign Judgments*, 3 INT'L & COMP. L.Q. 49, 50 (1954).

145. 6 M. WHITEMAN, *supra* note 144, at 226.

146. Turkish Treaty, *supra* note 9, art. 2. "Each party in cases and under the conditions provided for in this treaty recognizes the validity and shall enforce . . . a penal judgment."

147. Comments, *supra* note 47, at 121. The remaining five treaties are silent on the issue of recognition. But because recognition is a prerequisite of enforcement, and the United States carries out the foreign sentence, the treaties must logically effect an implicit recognition.

148. 6 M. WHITEMAN, *supra* note 144, at 226.

149. *Id.* at 227.

150. *See supra* note 146.

the judgments of five of the sending States,[151] the United States also recognizes the existence of the prerequisites to the recognition of judgments. When these prerequisites are met, even though implicitly, the judgment is valid in United States courts. Therefore, recognition of a judgment as valid should be sufficient to preserve the integrity of the sending State's judgments.

As a result, modification of a sentence by the receiving State should not be considered an affront to the foreign court which imposed the sentence. Recognition of the judgment is a statement that the imposing court was empowered to issue the judgment, and that it was issued according to proceedings not contrary to our sense of justice.[152] Modification of a sentence, when the length imposed would be unconstitutional within the United States, would have no effect upon the recognition of the judgment.[153] United States courts could, by recognizing the validity of the foreign-imposed sentence, justify incarcerating the prisoner while shortening the sentence. Enforcement would still be rendered by the receiving State, even though the sentence may be modified.

To summarize, an effect of the provision has been that United States citizens may serve longer sentences than would be imposed by United States courts. As a result, the sentences may be subject to constitutional attack. Since modification would only affect enforcement and not recognition, the receiving State could modify judgments without affronting the integrity of the sending State's court.[154] One rationale behind the retention provision is preserved: protection of the integrity of a sending State's judgment. Since the rehabilitative objective is furthered and the integrity rationale is preserved, this Comment suggests the modification or elimination of the retention provision.

C. Modification's Effect on Sovereignty

One of the primary objectives of treaties is to create rights and obligations for the signatories.[155] The maximum, *pacta sunt ser-*

151. Comments, *supra* note 47, at 121.

152. 6 M. WHITEMAN, *supra* note 144, at 227.

153. Recognition and enforcement are two different concepts; therefore, altering the enforcement of the sentence should have no direct effect on the concept of recognition. 6 M. WHITEMAN, *supra* note 144, at 226; Borm-Reid, *supra* note 144, at 50.

154. *See supra* note 153.

155. 1 G. SCHWARZENBERGER, INTERNATIONAL LAW 441 (1957). One rule of law governing the effect of treaties *inter partes* provides that unless the parties intend to create obli-

vanda, stipulates that treaty obligations must be honored.[156] Under the current status of prisoner transfer treaties, the United States cannot modify a transferred sentence without breaching the treaty, and thereby violating this fundamental principle of international law. Upon breach, the treaty becomes voidable at the sending State's option.[157]

The United States, however, has always held that treaties are modifiable by procedures agreed upon by the parties.[158] The prisoner transfer treaties, therefore, could be revised to allow a receiving State to modify a transferred sentence. Such a revision would have three results. First, if a receiving State modified a transferred sentence, that State would not be in violation of international law.[159] Second, this revision would act as a waiver by the sending State of the claim that its sovereign rights are infringed upon by modification of the sentence.[160] Third, such revision would eliminate the basis for the extension of the sending State's jurisdiction into the receiving State.[161]

Sovereignty signifies the mutual independence of nations, and respect for this independence is essential to the foundation of international relations. Both the principle of sovereignty in general and territorial sovereignty in particular are fundamental in considering questions concerning international relations.[162]

One of the essential elements of sovereignty is that it must be exercised within a State's territorial limits.[163] State sovereignty and State jurisdiction are coextensive.[164] State jurisdiction, however, may be extended beyond a State's boundaries, whereas sovereignty cannot. A State may exercise jurisdiction beyond its boundaries only according to the principles of customary international law or

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gations under some other legal system, the effect of their consent to the treaty given in accordance with international law is to create rights and duties under international law.

156. H. JACOBINI, *supra* note 140, at 191.

157. *Id.* at 174. When one party violates the terms of a treaty or interprets it in a way that essentially changes the treaty's meaning, the treaty does not automatically become void. The treaty is only voidable.

158. G. HACKWORTH, *supra* note 136, at 298. The United States Ambassador to Japan presented this position in a 1934 statement to the Japanese Minister for Foreign Affairs.

159. *See supra* text accompanying notes 155-57.

160. *See infra* text accompanying notes 167-68.

161. *See infra* text accompanying notes 164-65.

162. 1 G. SCHWARZENBERGER, *supra* note 155, at 184.

163. *Id.* at 187.

164. *Id.* at 185. In the absence of proof to the contrary, the territory is coterminous with the sovereignty.

treaty law.[165] The prisoner transfer treaties, by allowing the sending State to retain jurisdiction, illustrate such an extension of jurisdiction.[166] Therefore, the prisoner transfer treaties do not present an extension of State sovereignty, but of State jurisdiction.

The United States, under the existing prisoner transfer treaties, cannot modify the foreign sentence. Revision of the treaties to allow the receiving State to modify a transferred sentence would not result in an affront to either the sending State's sovereignty or jurisdiction of the sending State. By definition, sovereign States are independent and may dispose of their rights as they choose.[167] A provision within the treaties which would allow the receiving State to modify the sending State's judgments would evidence a waiver of sovereign rights. A revision would also eliminate the sending State's basis for extending jurisdiction into the receiving State.[168]

Essentially, the retention of exclusive jurisdiction by the sending State may create constitutional questions within the United States.[169] The necessity of the retention provision is questionable in view of the rationale behind the provision and the overall objectives of these treaties. A revision of the retention provision, thereby allowing the receiving State to modify a transferred sentence, would not be an affront to the sending State's sovereignty or the integrity of its judgments.[170] Therefore, the United States should seek to revise the existing prisoner transfer treaties and exclude a retention provision from any similar future treaties.[171]

In addition to the potential constitutional dilemma, the necessity of the retention provision is suspect on other grounds. There are international precedents for recognition of foreign penal judgments without the sentencing State retaining exclusive jurisdiction over the sentence.[172] Therefore, to allow the receiving States to modify the sentence under the prisoner transfer treaties would not be unprecedented.

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165. *Id.* Without these permissive rules of law, jurisdiction cannot be exercised outside of a State's territory.

166. *See supra* note 10. The provision creates a permissive rule of law which allows the sending State's jurisdiction to operate and have an effect in the receiving State.

167. 1 G. SCHWARZENBERGER, *supra* note 155, at 122.

168. *Id.*

169. *See supra* text accompanying notes 81-133.

170. *See supra* text accompanying notes 155-68.

171. Telephone interview with James Williams, Desk Officer for Turkey, United States Department of State (Nov. 19, 1981). The United States is currently looking into the possibility of drafting and ratifying other prisoner transfer treaties.

172. *See infra* text accompanying notes 173-93.

III. THE INTERNATIONAL PRECEDENTS FOR RECOGNITION OF FOREIGN CRIMINAL JUDGMENTS

The prisoner transfer treaties to which the United States is a party are the first such treaties the United States has entered into; however, they are not without international precedent. An examination of these precedents will show that the prisoner transfer treaties to which the United States is a party are extreme regarding the issue of modification of the transferred judgment.

"No State allows foreign judgments to be enforced by direct execution without the insertion of an authoritative act of the State in which it is to take place."[173] The basis for this principle rests not on the theory of sovereignty, but upon the fact that recognition involves an analysis of complex legal issues.[174] Also, the requirements for enforcing foreign judgments differ from State to State. Foreign judgments are enforced only by the courts of the State in which the judgment is to be enforced.[175]

Although recognition and enforcement involve complex issues, by the nineteenth century, certain States agreed to recognize one another's judgments.[176] In 1868, States bordering the Rhine enacted the "Revised Act of the Shipment of the Rhine." The courts of these States, on the basis of reciprocity, enforced the judgments of the courts of other States. While providing for the enforcement only of foreign-imposed fines, this Act is still in existence and valid today.[177] Even though such early precedent existed, the issue of recognition of foreign penal judgments did not gain much importance until the mid-twentieth century. This delay was due to the development of alternative means to control international criminality, such as extradition.[178]

In March, 1948, the governments of Denmark, Norway and Sweden entered into a convention regarding the recognition and enforcement of criminal judgments.[179] This treaty provides that

173. 6 M. WHITEMAN, *supra* note 144, at 225.

174. *Id.* The requirements for recognition usually deal with the State's procedural matters. Also, there is a jurisdiction issue. There must be a permissible rule of international law to permit an extension of one State's jurisdiction into another. 1 G. SCHWARZENBERGER, *supra* note 155, at 184.

175. 6 M. WHITEMAN, *supra* note 144, at 225.

176. M. BASSIOUNI & V. NANDA, *supra* note 49, at 262.

177. *Id.*

178. *Id.*

179. Conventions Between the Governments of Norway, Denmark and Sweden Regarding the Recognition and Enforcement of Judgments in Criminal Matters, Mar. 8, 1949 Norway—Denmark—Sweden U.N.T.S. 117.

valid judgments imposed by one of the States in criminal matters shall be enforceable in the other party States, insofar as the judgments impose a fine, confiscation or legal costs.[180] Most importantly, the judgment was to be enforced by the laws of the receiving State,[181] with no retention of jurisdiction over modification of the judgment by the sending State.[182]

The European Convention on the Validity of Criminal Judgments,[183] which is the latest and most comprehensive precedent to date,[184] provides that the sentencing State alone has the right to review a sentence.[185] This convention is one of the most extensive international agreements addressing criminal matters: it provides for criminals not yet in custody,[186] transfer of prisoners and enforcement of fines.[187] This treaty also provides for arrest of a person at the request of another State[188] and enforcement of judgments *in absentia*.[189] Most importantly, the convention provides that either State may grant pardon or amnesty to the transferred offender.[190] Therefore, there is some provision for modification of the sentence by the receiving State. Although a pardon or grant of amnesty goes far beyond mere reduction of the sentence by modification, these acts essentially provide a mechanism to effect a modification.

In summary, based on the analysis of the above precedents, the six prisoner transfer treaties to which the United States is a party[191] are extreme on the issue of modification: these treaties explicitly mandate that the sending State alone may review the sentence.[192] These international precedents, however, either contain no such reservation,[193] provide for review by the receiving State,[194] or es-

180. *Id.* art. 1.

181. *Id.* art. 5.

182. *Id.* The treaty contains no provision for the retention of any jurisdiction by the sending State. Also, it is silent on the issue of modification of the sentence.

183. Convention, *supra* note 41, at 292.

184. Comment, *supra* note 42, at 692.

185. Convention, *supra* note 41, art. 10.

186. *Id.* art. 2. *See also* Comment, *supra* note 42, at 692.

187. Convention, *supra* note 41, art. 2. *See also* Comment, *supra* note 42, at 692.

188. Convention, *supra* note 41, art. 10.

189. Convention, *supra* note 41, § 3.

190. *Id.* art. 10. *See also* Comment, *supra* note 42, at 692.

191. *See* treaties cited *supra* note 9.

192. *See supra* note 10.

193. M. BASSIOUNI & V. NANDA, *supra* note 49, at 262.

194. Convention, *supra* note 41, art. 44, § 3. The Convention states that in the case of a judgment in absentia, the sentence may be reviewed in the enforcing State.

sentially provide a mechanism to modify the sentence.[195]

Furthermore, the retention of exclusive jurisdiction causes another important result. Retention by the sending State of jurisdiction over the sentence leads to unequal treatment of foreign civil versus foreign penal judgments by United States courts. A possible explanation for this difference in treatment may arise from the different methods through which the governing laws were created: Foreign penal judgments are recognized and enforced under statutory law. Common law, however, governs the enforcement and recognition of foreign civil judgments.

IV. PROTECTION OF LIBERTY AND PROPERTY RIGHTS IN THE UNITED STATES FROM FOREIGN JUDGMENTS

Both liberty and property are fundamental rights to which United States citizens are guaranteed due process by the fifth amendment of the Constitution.[196] The origins of due process antedate the Magna Carta.[197] The importance of the principle of due process is evidenced by its role in the development of Anglo-American law.[198]

The fundamental rights of liberty and property were not always deemed equivalent: the framers of the United States Constitution placed a higher value on the right to property than on the right to liberty.[199] Currently, however, the constitutional emphasis is on life and liberty. These two rights are deemed as the "basic" rights which the Constitution was designed to safeguard.[200] Of the many liberties United States citizens enjoy, the sanctity of the person—or the right to be free from imprisonment—is predominant. Liberties such as speech and religion are without substance if a per-

195. Convention, *supra* note 41, art. 10.

196. U.S. CONST. amend. V.

197. SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 428 (L. Perry ed. 1972).

198. *Id.* The principle of due process furnished the basis for such famous documents as the Petition of Right in 1628, and the Act for the Abolition of the Star Chamber in 1641. This principle of individual liberty was included in most colonial charters or statutes. Also, the due process principle is found in all State declarations of rights adopted prior to the Constitution of the United States.

199. 3 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES § 349, at 8 (1977). It is certainly true that there is no hierarchy of rights in the Constitution, but as far as the framers themselves were concerned, property was preeminent.

200. *Id.* § 347, at 4. The shift in contemporary constitutional emphasis from property to personal rights has been the result of the social transformation of the twentieth century.

son is imprisoned.[201] The preeminent status of the sanctity of the person is further evidenced by the Supreme Court's expansion of constitutional protection for persons accused of crimes. In other words, the Court added procedural safeguards for criminal defendants.[202]

In view of the predominance of personal liberty, the prisoner transfer treaties create a significant dilemma. The treaties produce a substantial delinquency in the procedural protections granted United States citizens under the Constitution. The United States accords its citizens far more protection against enforcement of foreign civil judgments than against foreign penal judgments. Due process is essentially sacrificed when the United States enforces a foreign penal judgment against one of its citizens. United States citizens are not, however, deprived of all due process rights when confronted with possible enforcement of foreign civil judgments.[203]

A. United States Treatment of Foreign Civil Judgments

While no nation is required to recognize and enforce the judgments of another nation, the principle of comity allows courts of one nation to give effect to foreign judgments.[204] Comity, according to the United States view, is neither an absolute obligation nor mere courtesy.[205] "[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation having due regard to both international duty and convenience and the rights of its own citizens or of other persons who are under the protection of its laws."[206] Under the doctrine of comity, the United States recognizes and enforces civil judgments of foreign courts.

Whereas federal law governs recognition and enforcement of foreign criminal judgments pursuant to prisoner transfer treaties,[207] state law governs the recognition and enforcement of foreign civil

201. The inviolability of the person is universally put first among the demands made by an individual. 3 R. POUND, JURISPRUDENCE 33 (1959); *see also* 3 B. SCHWARTZ, *supra* note 199, at 11. Unless the physical person is secure from improper restraints by the government, all other rights are devoid of substance. *Id.*

202. THE SUPREME COURT AND THE RIGHTS OF THE ACCUSED 2 (J. Galloway ed. 1973).

203. *See infra* text accompanying notes 204-40.

204. Mehren & Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 LAW & POL'Y INT'L BUS. 37, 45 (1974).

205. *Id.*

206. *Id.*

207. 18 U.S.C. § 4100 (Supp. III 1979).

judgments.[208] The Federal Government may usurp state control in this area either by act of Congress or by treaty; but to date, the Federal Government has not engaged in such usurpation.[209] The Supreme Court has determined that federal law governs when United States courts are determining the effect of an act of a foreign sovereign. This rule, however, is limited to the Act of State doctrine.[210] The Supreme Court has not yet determined that federal law governs recognition of foreign civil judgments. Therefore, recognition of these judgments depends upon various State laws.

Due to State control, the law governing the recognition and enforcement of foreign civil judgments has developed according to common law. For example, the landmark case of *Hilton v. Guyot*,[211] decided in 1855, still serves as the basis for the rules governing recognition of foreign judgments.[212] Basically, *Hilton* requires that a foreign judgment sought to be enforced must have been issued by a court of competent jurisdiction, conducted in regular proceedings, and the defendants must have voluntarily appeared. The legal system must provide an impartial administration of justice for both its own citizens and aliens.[213] The only departure in the application of *Hilton* has been the elimination of reciprocity as a requirement for recognition.[214]

Another result of State control in this area is that the procedure for enforcing foreign civil judgments will vary among the fifty United States.[215] There are, however, two general rules. First, the foreign judgment must be converted to a judgment of the enforcing American court.[216] In view of this rule, only those remedies which are available within that jurisdiction are available to the individual seeking enforcement of a foreign judgment.[217]

Therefore, the legal system of the United States treats foreign

208. Mehren & Patterson, *supra* note 204, at 40.

209. *Id.*

210. Banco National de Cuba v. Sabbatino, Receiver, 376 U.S. 398 (1964).

211. Hilton v. Guyot, 159 U.S. 113 (1895) [hereinafter cited as Hilton].

212. Mehren & Patterson, *supra* note 204, at 45. With the exception of the requirement of reciprocity, the Supreme Court's decision in *Hilton* still serves as a reasonably accurate statement of the law in the United States with respect to the recognition of foreign-country judgments.

213. Hilton, 159 U.S. 113.

214. Mehren & Patterson, *supra* note 204, at 45.

215. Mehren, *Enforcement of Foreign Judgments in the United States*, 17 VA. J. INT'L L. 401, 404-06 (1977). A consideration of the procedures and remedies available is complicated by the fact that each State has developed its own rules governing this matter.

216. *Id.*

217. *Id.* at 404.

civil judgments differently than foreign penal judgments. Unless the required verification of a prisoner's consent by the United States is equivalent to a conversion to a United States judgment, no such conversion is required. Additionally, since they are precluded from reviewing a transferred sentence, the courts of the United States may be enforcing sentences that are not available under United States law.

Thus, the United States affords greater protection to its citizens in the enforcement of foreign civil judgments than foreign penal judgments: Foreign civil judgments can only be enforced through an American court, and only through such remedies as are available in that jurisdiction.[218] However, sentences are the State's remedies for offenses against it, and are enforced against Americans, even if the extent of that remedy would not be available in the United States. In contrast, those seeking enforcement of foreign civil judgments are limited to the remedies available in that jurisdiction. The prisoner transfer treaties place no such limitation on the government enforcing foreign penal judgments.

B. The Effect of Foreign Money Judgments in the United States

Common law has developed three views regarding the effect of foreign civil judgments in the United States.[219] In addition, seven states have adopted the Uniform Foreign-Money Judgments Recognition Act.[220] This act does not create new principles of law, but rather codifies common law.[221] The act states: (1) United States courts will give full faith and credit and comity to judgments of foreign courts;[222] (2) United States courts will not enforce a foreign judgment if it is contrary to the public policy of the forum;[223] and, (3) foreign judgments are *prima facie* evidence of a claim, and a

218. *See supra* text accompanying notes 204-17.

219. *See generally* Mehren & Patterson, *supra* note 204.

220. *Id.* at 42.

221. *Id.*

222. Atlantic Ship Supply, Inc. v. M/V Lucy, 392 F. Supp. 179 (D. Fla. 1975) [hereinafter cited as Atlantic Ship Supply]; Velsicol Chemical Corp. v. Hooker Chemical Corp., 230 F. Supp. 998 (D. Ill. 1964) [hereinafter cited as Velsicol].

223. Sangiovanni Hernandez v. Dominican de Aviacion, 566 F.2d 611 (C.A. Puerto Rico 1977); *see also* UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT. The act has been adopted by seven States: California, Illinois, Maryland, Massachusetts, Michigan, New York and Oklahoma. The act provides that a foreign judgment need not be recognized if the claim for relief on which the judgment is based is repugnant to the public policy of the State. *Id.* § 4(3).

defendant can raise any and all possible defenses.[224]

The United States is comprised of multiple sovereign[225] jurisdictions, and therefore faces inevitable problems in recognition of foreign judgments.[226] Article IV of the United States Constitution resolved this problem by declaring that courts of one state shall give full faith and credit to judgments of another state.[227] Although article IV does not include foreign judgments, by analogy courts have given full faith and credit to foreign imposed judgments.[228]

Within the United States, a civil judgment of a sister state which is enforced is still subject to collateral attack on several grounds in the enforcing State.[229] Although an American court may accord full faith and credit to a foreign civil judgment, that judgment may still be attacked. United States citizens transferred pursuant to the prisoner transfer treaties, however, may not attack their sentence[230] if they were afforded "*any* process whatsoever."[231]

The implementing legislation requires the prisoner's consent to subject the transfer to the conditions of the applicable treaty.[232] Since one of the conditions is that the sending State retain exclusive jurisdiction over the sentence, the prisoner is denied the opportunity to collaterally attack the sentence.[233] Therefore, United States citizens have greater protection against enforcement of foreign civil judgments than penal judgments in that the former may be collaterally attacked in a jurisdiction expounding the view that foreign judgments are given full faith and credit.

Moreover, under the second view, an American court could refuse to enforce a foreign civil judgment if it would prove contrary to the public policy of the forum.[234] The Uniform Recognition Act

224. Svenska Handelsbanker v. Carlson, 258 F. Supp. 448 (D. Mass. 1966) [hereinafter cited as Carlson].

225. Sovereign is not used here in its international law sense.

226. Mehren, *supra* note 215, at 401.

227. U.S. CONST. art IV.

228. *See* cases cited *supra* note 222. In *Atlantic Ship Supply*, the court held that a Costa Rican judgment was entitled to full faith and credit. Atlantic Ship Supply, 392 F. Supp. at 183. In *Velsicol*, the court stated that "generally as a matter of comity, the judgment of a foreign court is given conclusive effect and full faith and credit in United States courts." Velsicol, 230 F. Supp. at 1018.

229. 49 C.J.S. *Judgments* § 416 (1947). As a general rule, a judgment may be collaterally attacked where it is void because of fraud or lack of jurisdiction.

230. 18 U.S.C. § 4100 (Supp. III 1979).

231. Rosado, 621 F.2d at 1179 (emphasis added).

232. 18 U.S.C. § 4100 (Supp. III 1979).

233. *See supra* note 10.

234. Mehren, *supra* note 215, at 61.

also incorporates this view as one of the grounds for denying enforcement of foreign civil judgments.[235] The public policy standard considers whether the foreign proceeding was conducted in a manner significantly offensive to the State's notions of fairness or policy.[236] Therefore, American courts may deny enforcement to foreign civil judgments if the foreign procedure denies an American certain procedural rights, a denial of which could be deemed unfair.

On the basis of this analysis, American citizens are afforded more protection against foreign civil judgments than foreign penal judgments. An American judge cannot refuse to enforce a foreign sentence against an American prisoner. Essentially, public policy determines the length of sentences imposed for specific offenses,[237] but the United States cannot review or modify exhorbitantly long foreign-imposed sentences. Sentences must be enforced even if contrary to the domestic policy of the receiving State.

Furthermore, the third view provides considerably more protection to United States citizens from enforcement of foreign civil judgments than foreign penal judgments. Under this view, foreign civil judgments are only *prima facie* evidence of a claim, and a defendant may raise any defense in his behalf.[238] Under prisoner transfer treaties, the foreign conviction is conclusive. Further, it may be determined that the prisoner has waived even the most basic constitutional right to due process.[239]

To summarize, each of the three views affords United States citizens more protection from the enforcement of foreign civil judgments than foreign penal judgments.[240] When an American is transferred, his conviction is conclusive.[241] United States courts, however, can question a foreign civil judgment on several grounds. Due process is not sacrificed for civil judgments, whereas it is sacrificed for penal judgments. Also, those seeking to enforce a foreign

235. *Id.*

236. *Id.*

237. Depending on the State, the determination of the sentence is to some extent discretionary with the trial judge. Some of the relevant criteria relate to criminal law objectives such as rehabilitation and community protection. Closely related to these criteria are concern for the community attitude and the likelihood that certain decisions may alienate the community, causing a loss of support for the correctional system. R. DAWSON, SENTENCING 171-72 (1969).

238. Carlson, 258 F. Supp. at 448.

239. Rosada, 621 F.2d at 1179.

240. *See supra* text accompanying notes 222-40.

241. *See supra* note 10.

civil judgment are limited to the remedies available in the forum. No such limitation is imposed on penal judgments.[242]

The resulting imbalance between the amount of protection afforded to a defendant from foreign civil judgments and foreign penal judgments presents a strange anomaly. Personal liberty is viewed today as the most important of constitutional rights.[243] The United States, however, protects Americans' property rights from foreign judgments to a greater extent than Americans' personal liberty. In view of the predominance of personal liberties among fundamental rights, the resulting disparity is extremely suspect. Therefore, an American's right to personal liberty should at least receive protection equivalent to the protection accorded to an American's property rights.

Equivalent protection of these rights is impossible in view of the current status of the prisoner transfer treaties. The courts of the United States cannot review a transferred sentence or conviction.[244] United States courts, however, can question a foreign civil judgment on several grounds.[245] A revision of the treaties to allow United States courts to review and modify the sentence would eliminate the existing imbalance.

V. CONCLUSION

There are four viable arguments against the retention of exclusive jurisdiction by the sending State. First, the retention provision creates constitutional problems in the United States. Second, there are no transfer treaties between other nations which serve as precedent for transfer of penal judgments without the retention of jurisdiction by the sending State. Finally, the retention provision causes a delinquency in the protection which United States citizens receive from the enforcement of foreign penal judgments as opposed to civil judgments. Therefore, the retention provision should be eliminated or modified.

The retention provision precludes courts of the United States from hearing due process claims unless the prisoner is denied "any process whatsoever." Thus, if the foreign proceeding provides even a minimal amount of process, a United States court will not hear an attack of the transferred sentence. Even if the process the prisoner

242. *See supra* text accompanying notes 204-40.
243. Commentary, *supra* note 199, at 4.
244. *See supra* note 10.
245. *See supra* text accompanying notes 228-29.

received falls far below our standards of due process, his sentence is conclusive.[246]

Additionally, there are transfer treaties which do not include the retention of jurisdiction by the sending State. The prisoner transfer treaties to which the United States is a party are more stringent on this issue than other transfer treaties. Therefore, the retention of exclusive jurisdiction must not be essential to a prisoner transfer treaty.[247]

Most importantly, the retention provision causes significantly different treatment of foreign civil judgment and foreign penal judgments in the United States. Prisoners transferred pursuant to the treaties waive any due process claims. United States citizens, however, can attack a foreign civil judgment if they are denied due process. This delinquency in due process rights is suspect in view of the preeminence of liberty in the United States.[248]

It is not suggested that the treaties be sacrificed due to the fact that the receiving State cannot modify the sentence. For the first time, these treaties provide a way for American citizens to escape the hardship of serving foreign prison sentences. The treaties work to facilitate the offender's possibility for rehabilitation. Also, the treaties present a framework for greater international assistance in judicial matters. Thus, the treaties are extremely beneficial to both the States involved and the offender himself. Rather, it is the retention of jurisdiction over the modification of sentences that presents an obstacle to a more effective means to achieve the same ends desired.

Therefore, should the United States enter into or negotiate any future prisoner transfer treaties, the provision in question should not be included. In the alternative, the suggested modification could be substituted. This Comment proposes the following modification which would allow the receiving State to modify the sentence imposed by the foreign court. The offender would then only serve the length of time that would have been imposed by a United States judge.

The proposed modification should read as follows: The sending State, by transferring the prisoner, relinquishes any claim to jurisdiction over the transferred prisoner's sentence. The receiving State may unilaterally, when the interests of justice and the rehabil-

246. *See supra* text accompanying notes 81-141.
247. *See supra* text accompanying notes 173.
248. *See supra* text accompanying notes 196-247.

itation process would be better served, modify the sentence in accord with sentences issued for similar crimes by the courts of that State.

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