95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 95-720

PROVIDING IMPLEMENTATION OF TREATIES FOR TRANSFER OF OFFENDERS TO OR FROM FOREIGN COUNTRIES

OCTOBER 19, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. EILBERG, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1682]

The Committee on the Judiciary, to whom was referred the bill (S. 1682) to provide for the implementation of treaties for the transfer of offenders to or from foreign countries, having considered the same, report favorably thereon without amendment and recommend the bill do pass.

PURPOSE OF BILL

The purpose of the act is to provide the implementation procedures for offender transfer treaties with Mexico and Canada as well as for similar future treaties.

BACKGROUND

In the beginning of 1975, a series of complaints were forwarded to the State Department about the treatment of Americans jailed in Mexican and other prisons. These complaints, issued by the families of these prisoners, stated that Americans were being arrested, interrogated, and imprisoned for relatively minor offenses, especially drug offenses. While incarcerated, they were being mistreated. Many parents complained that they believed that the conditions in these prisons depended on how much money the prisoner was willing to give jail officials. As a result of these complaints, the Department of State sought to improve the conditions for these Americans in foreign jails.

Of particular concern were conditions of Americans, particularly younger Americans, in Mexican jails, serving relatively long terms for some drug offenses.

State Department action was believed to be inadequate—due in part to the fact that in many instances where Americans were arrested,

97-576 O

particularly in Mexico, great delay ensued before our consular offices were notified.

In response to these complaints, hearings were held before the Subcommittee on International Political and Military Affairs of the Committee on International Relations of the House of Representatives on April 29, 30; June 29; October 22, 1975, and January 27, 1976. At those hearings, various representatives of the Departments of State and Justice and Members of Congress gave testimony which, for the most part, substantiated the complaints which had been theretofore made, especially as to the situation in Mexico.

Testimony was taken from the Honorable Peter B. Bensinger, the Chief Administrator for the Drug Enforcement Administration of the Department of Justice. Mr. Bensinger described the drug problem in Mexico and the U.S. program to aid in the curtailment of drug traffic coming from Mexico. Representatives of the State Department described the conditions prevailing in the prisons in Mexico and outlined the Mexican criminal justice system and its procedures.

Following comprehensive hearings by the House Committee on International Relations, a variety of options were considered to respond to the aforementioned problems. It was determined that a treaty between the United States and Mexico and later with other nations would be an effective way to deal with some of the problems.

Such a treaty was prepared and forwarded to Congress in November of 1976. The treaty provided that any Mexican prisoner in the U.S. jail could, with his consent, be sent to Mexico to serve his prison time in Mexican jails; and any American in a Mexican jail could be sent to American jails to serve his time there. This treaty was considered to be a precedent for other treaties with other countries so as to allow Americans in foreign jails to serve their time in American prisons. Thus, for example, although there have not been any complaints about the treatment of Americans in Canadian jails, a treaty with Canada for the transfer of prisoners has also been signed. Treaties with other countries are expected to be prepared and signed in the future.

Copies of the ratified treaties with Mexico and Canada follow:

95TH CONGRESS
1st Session

SENATE

EXECUTIVE
H

TREATY WITH CANADA ON THE EXECUTION OF PENAL SENTENCES

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND CANADA ON THE EXECUTION OF PENAL SENTENCES WHICH WAS SIGNED AT WASHINGTON ON MARCH 2, 1977

APRIL 18, 1977.—Treaty was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE
89-118 WASHINGTON : 1977

★(Star Print)

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *April 18, 1977.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty between the United States of America and Canada on the Execution of Penal Sentences which was signed at Washington on March 2, 1977.

I transmit also, for the information of the Senate, the report of the Department of State with respect to the Treaty.

The Treaty would permit citizens of either nation who had been convicted in the courts of the other country to serve their sentences in their home country; in each case the consent of the offender as well as the approval of the authorities of the two Governments would be required.

This Treaty is significant because it represents an attempt to resolve a situation which has inflicted substantial hardships on a number of citizens of each country and has caused concern to both Governments. I recommend that the Senate give favorable consideration to this Treaty together with the similar treaty with the United Mexican States which I have already transmitted.

JIMMY CARTER.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, D.C., April 8, 1977.

THE PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit a Treaty between the United States of America and Canada on the Execution of Penal Sentences which was signed at Washington on March 2, 1977. I recommend that the Treaty be submitted to the Senate for its advice and consent to ratification.

The Treaty is essentially similar to that with the United Mexican States which was signed on November 25, 1976 and has already been submitted by you to the Senate. It would permit citizens of either nation who had been convicted in the courts of the other country to serve their sentences in their home country; in each case the consent of the offender as well as the approval of the authorities of the two Governments would be required.

The Treaty is intended both to relieve the special hardships which fall upon prisoners incarcerated far from home and to make their rehabilitation more feasible and also to relieve diplomatic and law enforcement relations between the two countries of the strains that arise from the imprisonment of substantial number of each country's nationals in the institutions of the other. It constitutes part of an ongoing effort to improve relations between the two countries. It is also part of various efforts to establish closer international cooperation in law enforcement activities. The Treaty is without a direct analogy in United States practice, except for the Status of Forces Agreement with the Republic of Korea (17 UST 1677; TIAS 6127), but there are multilateral arrangements of this kind among the Nordic countries and in the Council of Europe.

The basic terms of the Treaty are as follows. Each transfer would be contingent upon the consent both of the state which sentenced the prisoner (the Transferring State) and of the state which was to receive and confine him (the Receiving State). The decision to transfer would be made on the basis of the whole record of the prisoner and the authorities' estimate as to the likelihood that the transfer would be beneficial (Article III). In each case, the express consent of the prisoner concerned would have to be obtained, there can be no involuntary transfer under this Treaty. Certain categories of prisoners are excluded from the terms of the Treaty: (1) military offenders; (2) those having less than six months to serve when processing of their transfer begins; and (3) offenders against the immigration laws (Article II). The program is basically one between the two federal Governments. Prisoners who are transferred become the responsibility

VI

of the federal Government in the Receiving State. However, a state or province in either country which wishes to allow some of the prisoners which it holds to be transferred may exercise that option if it chooses.

When a prisoner has been transferred, the following procedures govern his treatment thereafter. The original sentence would carry over to his new confinement, preserving deductions for good behaviour in prison, labor done by him and pretrial confinement. The Transferring State retains the power to grant pardon or amnesty. With these exceptions, the execution of the sentence is to be carried out according to the rules and practices prevailing in the state to which he is transferred (Article IV(1)). In particular, the rules of the Receiving State as to parole will determine the date at which the prisoner is released from confinement. Each nation is to report to the other on the manner in which it is administering the confinement of transferred prisoners.

The Treaty provides in Article II(3) that no prisoner will be transferred until the time for leave to appeal has expired and that no proceedings by way of appeal or collateral attack be pending. It further provides that any collateral attack on the sentence must proceed through the courts of the country which imposed the sentence (Article V).

The Treaty will require implementing legislation to give it effect within the United States. Such legislation will be submitted to Congress in the near future.

Respectfully submitted.

CYRUS VANCE.

Treaty Between the United States of America and Canada on the Execution of Penal Sentences

The Government of the United States of America and the Government of Canada,

Desiring to enable Offenders, with their consent, to serve sentences of imprisonment or parole or supervision in the country of which they are citizens, thereby facilitating their successful reintegration into society;

Have agreed as follows:

ARTICLE I

For the purposes of this Treaty:

(a) "Sending State" means the Party from which the Offender is to be transferred;

(b) "Receiving State" means the Party to which the Offender is to be transferred;

(c) "Offender" means a person who, in the territory of either Party, has been convicted of a crime and sentenced either to imprisonment or to a term of probation, parole, conditional release or other form of supervision without confinement. The term shall include persons subject to confinement, custody, or supervision under the laws of the Sending State respecting juvenile offenders; and

(d) "Citizen" includes an Offender who may be a dual national of the Parties and in the case of the United States also includes nationals.

ARTICLE II

The application of this Treaty shall be subject to the following conditions:

(a) That the offense for which the Offender was convicted and sentenced is one which would also be punishable as a crime in the Receiving State. This condition shall not be interpreted so as to require that the crimes described in the laws of the two Parties be identical in such matters not affecting the character of the crimes as the quantity of property or money taken or possessed or the presence of interstate commerce.

(b) That the Offender is a citizen of the Receiving State.

(c) That the offense is not an offense under the immigration laws or solely against the military laws of a Party.

(d) That there is at least six months of the Offender's sentence remaining to be served at the time of his application.

(e) That no proceeding by way of appeal or of collateral attack upon the Offender's conviction or sentence be pending in the Sending State and that the prescribed time for appeal of the Offender's conviction or sentence has expired.

ARTICLE III

1. Each Party shall designate an authority to perform the functions provided in this Treaty.

2. Each Party shall inform an Offender, who is within the scope of the present Treaty, of the substance of the Treaty.

3. Every transfer under this Treaty shall be commenced by a written application submitted by the Offender to the authority of the Sending State. If the authority of the Sending State approves, it will transmit the application, together with its approval, through diplomatic channels to the authority of the Receiving State.

4. If the authority of the Receiving State concurs, it will so inform the Sending State and initiate procedures to effectuate the transfer of the Offender at its own expense. If it does not concur, it will promptly advise the authority of the Sending State.

5. If the Offender was sentenced by the courts pursuant to the laws of a state or province of one of the Parties, the approval of the authorities of that state or province, as well as that of the federal authority, shall be required. The federal authority of the Receiving State shall be responsible for the custody of the transferred Offender.

6. In deciding upon the transfer of an Offender, the authority of each Party shall bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender.

7. No Offender shall be transferred unless:

(a) he is under a sentence of imprisonment for life; or

(b) the sentence which he is serving states a definite termination date, or the authorities authorized to fix such a date have so acted; or

(c) he is subject to confinement, custody or supervision under the laws of the Sending State respecting juvenile offenders; or

(d) he is subject to indefinite confinement as a dangerous or habitual offender.

8. The Sending State shall furnish to the Receiving State a statement showing the offense of which the Offender was convicted, the termination date of the sentence, the length of time already served by the prisoner and any credits to which the Offender is entitled on account of work done, good behavior or pretrial confinement. Where requested by the Receiving State a translation shall be provided.

9. Each Party shall establish by legislation or regulation the procedures necessary and appropriate to give legal effect within its territory to sentences pronounced by courts of the other Party and each Party agrees to cooperate in the procedures established by the other Party.

10. Delivery of the Offender by the authorities of the Sending State to those of the Receiving State shall occur at a place agreed upon by both Parties. The Sending State shall afford an opportunity to the Receiving State, if it so desires, to verify, prior to the transfer, that the Offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof, through the officer designated by the laws of the Receiving State.

ARTICLE IV

1. Except as otherwise provided in this Treaty, the completion of a transferred Offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise. The Sending State shall, in addition, retain a power to pardon the Offender and the Receiving State shall, upon being advised of such pardon, release the Offender.

2. The Receiving State may treat under its laws relating to youthful offenders any Offender so categorized under its laws regardless of his status under the laws of the Sending State.

3. No sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the date at which it would have terminated according to the sentence of the court of the Sending State.

4. The Receiving State shall not be entitled to any reimbursement from the Sending State for the expenses incurred by it in the completion of the Offender's sentence.

5. The authorities of each Party shall at the request of the other Party provide reports indicating the status of all Offenders transferred under this Treaty, including in particular the parole or release of any Offender. Either Party may, at any time, request a special report on the status of the execution of an individual sentence.

6. The transfer of an Offender under the provisions of this Treaty shall not create any additional disability under the laws of the Receiving State or any State or province thereof beyond those which the fact of his conviction may in and of itself already have created.

ARTICLE V

Each Party shall regulate by legislation the extent, if any, to which it will entertain collateral attacks upon the convictions or sentences handed down by it in the cases of Offenders who have been transferred by it. Upon being informed by the Sending State that the conviction or sentence has been set aside or otherwise modified, the Receiving State shall take appropriate action in accordance with such information. The Receiving State shall have no jurisdiction over any proceedings, regardless of their form, intended to challenge, set aside or otherwise modify convictions or sentences handed down in the Sending State.

ARTICLE VI

An Offender delivered for execution of a sentence under this Treaty may not be detained, tried or sentenced in the Receiving State for the same offense upon which the sentence to be executed is based. For purposes of this Article, the Receiving State will not prosecute for any offense the prosecution of which would have been barred under the law of that State, if the sentence had been imposed by a court, Federal, State, or provincial, of the Receiving State.

ARTICLE VII

If either Party enters into an agreement for the transfer of sanctions with any other State, the other Party shall cooperate in facilitating the transit through its territory of Offenders being transferred pursuant to such agreement. The Party intending to make such a transfer will give advance notice to the other Party of such transfer.

ARTICLE VIII

1. This Treaty shall be subject to ratification and shall enter into force on the date on which instruments of ratification are exchanged. The exchange of instruments of ratification shall take place at Ottawa as soon as possible.

2. The present Treaty shall remain in force for three years from the date upon which it enters into force. Thereafter, the Treaty shall continue in force until thirty days from the date upon which either Party gives written notice to the other Party of its intention to terminate the Treaty.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed the present Treaty.

DONE in duplicate, in the English and French languages, each language version being equally authentic, at Washington this second day of March, 1977.

For the Government of the United States of America:

GRIFFIN B. BELL.

For the Government of Canada:

FRANCIS FOX.

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95TH CONGRESS
1st Session

SENATE

EXECUTIVE
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TREATY WITH MEXICO ON THE EXECUTION OF PENAL SENTENCES

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES ON THE EXECUTION OF PENAL SENTENCES WHICH WAS SIGNED IN MEXICO CITY ON NOVEMBER 25, 1976

FEBRUARY 21, 1977.—Treaty was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

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U.S. GOVERNMENT PRINTING OFFICE
89-118 WASHINGTON : 1977

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LETTER OF TRANSMITTAL

THE WHITE HOUSE, *February 15, 1977.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty between the United States of America and the United Mexican States on the Execution of Penal Sentences which was signed in Mexico City on November 25, 1976.

I transmit also, for the information of the Senate, the report by the Department of State with respect to the Treaty.

The Treaty would permit citizens of either nation who had been convicted in the courts of the other country to serve their sentences in their home country; in each case the consent of the offender as well as the approval of the authorities of the two governments would be required.

This Treaty is significant because it represents an attempt to resolve a situation which has inflicted substantial hardships on a number of citizens of each country and has caused considerable concern to both governments. It received the approval of the Senate of the United Mexican States on December 30, 1976. I recommend that the Senate give favorable consideration to this Treaty at an early date.

JIMMY CARTER.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, January 17, 1977.

THE PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit a Treaty between the United States of America and the United Mexican States on the Execution of Penal Sentences which was signed in Mexico City on November 25, 1976. I recommend that the Treaty be submitted to the Senate for its advice and consent to ratification.

The Treaty would permit citizens of either nation who had been convicted in the courts of the other country to serve their sentences in their home country; in each case the consent of the offender as well as the approval of the authorities of the two governments would be required.

The Treaty was first suggested by the Foreign Minister of Mexico at a meeting in June of this year and was then negotiated in a series of three meetings from September to November. It was approved by the Senate of the United Mexican States on December 30, 1976. It is contemplated that a similar Treaty will be negotiated with Canada in the near future.

The Treaty is intended both to relieve the special hardships which fall upon prisoners incarcerated far from home and to make their rehabilitation more feasible, and also to relieve diplomatic and law enforcement relations between the two countries of the strains that arise from the imprisonment of large numbers of each country's nationals in the institutions of the other. It constitutes part of an ongoing effort to improve relations between the two countries. It is also part of various efforts to establish closer international cooperation in law enforcement activities. The Treaty is without a direct analogy in United States practice, except for the Status of Forces Agreement with South Korea (17 UST 1677; TIAS 6127), but there are multilateral arrangements of this kind among the Nordic countries and in the Council of Europe.

The basic terms of the Treaty are as follows. Each transfer would be contingent upon the consent both of the state which sentenced the prisoner (the Transferring State) and of the state which was to receive and confine him (the Receiving State). The decision to transfer would be made on the basis of the whole record of the prisoner and the authorities' estimate as to the likelihood that the transfer would be beneficial (Article IV). In each case, the express consent of the prisoner concerned would have to be obtained; there can be no involuntary transfer under this Treaty. Certain categories of prisoners are

VI

excluded from the terms of the Treaty: (1) political and military offenders, (2) offenders who are domiciliaries of the Transferring State, (3) those having less than six months to serve when processing of their transfer begins, and (4) offenders against the immigration laws (Article II). The program is basically one between the two federal governments. Prisoners who are transferred become the responsibility of the federal government in the Receiving State. However, a state in either country which wishes to allow some of the prisoners which it holds to be transferred may exercise that option if it chooses.

When a prisoner has been transferred, the following procedures govern his treatment thereafter. The original sentence would carry over to his new confinement, preserving deductions for good behaviour in prison, labor done by him and pre-trial confinement. The Transferring State retains the power to grant parden or amnesty. With these exceptions, the execution of the sentence is to be carried out according to the rules and practices prevailing in the state to which he is transferred (Article V(2)). In particular, the rules of the Receiving State as to parole will determine the date at which the prisoner is released from confinement. Each nation is to report to the other on the manner in which it is administering the confinement of transferred prisoners.

The Treaty provides in Article II(5) that no prisoner will be transferred until the time for leave to appeal has expired and that no proceedings by way of appeal or collateral attack be pending. It further provides that any collateral attack on the sentence must proceed through the courts of the country which imposed the sentence (Article VI).

The Treaty will require implementing legislation to give it effect within the United States. Such legislation will be prepared in time for transmission to Congress for its consideration in conjunction with the Treaty.

Respectfully submitted.

HENRY A. KISSINGER.

Treaty Between the United States of America and the United Mexican States on the Execution of Penal Sentences

The United States of America and the United Mexican States, desiring to render mutual assistance in combating crime insofar as the effects of such crime extend beyond their borders and to provide better administration of justice by adopting methods furthering the offender's social rehabilitation, have resolved to conclude a Treaty on the execution of penal sentences and, to that end, have named their plenipotentiaries Joseph John Jova, Ambassador Extraordinary and Plenipotentiary by the President of the United States of America and Alfonso Garcia Robles, Secretary of Foreign Relations by the President of the United Mexican States,

Who, having exchanged their full powers and having found them in proper and due form, have agreed on the following Articles:

ARTICLE I

(1) Sentences imposed in the United Mexican States on nationals of the United States of America may be served in penal institutions or subject to the supervision of the authorities of the United States of America in accordance with the provisions of this Treaty.

(2) Sentences imposed in the United States of America on nationals of the United Mexican States may be served in penal institutions or subject to the supervision of the authorities of the United Mexican States in accordance with the provisions of this Treaty.

ARTICLE II

This Treaty shall apply only subject to the following conditions:

(1) That the offense for which the offender was convicted and sentenced is one which would also be generally punishable as a crime in the Receiving State, provided, however, that this condition shall not be interpreted so as to require that the crimes described in the laws of the two States be identical in such matters not affecting the character of the crimes such as the quantity of property or money taken or possessed or the presence of interstate commerce.

(2) That the offender must be a national of the Receiving State.

(3) That the offender not be a domiciliary of the Transferring State.

(4) That the offense not be a political offense within the meaning of the Treaty of Extradition of 1899 between the parties, nor an offense under the immigration or the purely military laws of a party.

(5) That at least six months of the offender's sentence remains to be served at the time of petition; and

(6) That no proceeding by way of appeal or of collateral attack upon the offender's conviction or sentence be pending in the Transferring State and that the prescribed time for appeal of the offender's conviction or sentence has expired.

ARTICLE III

Each State shall designate an authority to perform the functions provided in this Treaty.

ARTICLE IV

(1) Every transfer under the Treaty shall be commenced by the Authority of the Transferring State. Nothing in this Treaty shall prevent an offender from submitting a request to the Transferring State for consideration of his transfer.

(2) 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.

(3) If the Authority of the Receiving State approves the request, it shall promptly so inform the Transferring State and shall initiate the necessary procedures to effect the transfer of the offender. If it does not approve the request, it shall so notify promptly the Authority of the Transferring State.

(4) In deciding upon the transfer of an offender the Authority of each Party shall 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.

(5) If the offender was sentenced by the courts of a state of one of the Parties, the approval of the authorities of that state, as well as that of the Federal Authority, shall be required. The Federal Authority of the Receiving State shall, however, be responsible for the custody of the transferred offender.

(6) No offender shall be transferred unless either the sentence which he is serving has a specified duration, or such a duration has subsequently been fixed by the appropriate administrative authorities.

(7) The Transferring State shall furnish the Receiving State a statement showing the offense of which the offender was convicted, the duration of the sentence, the length of time already served by the prisoner and any credits to which the offender is entitled, such as, but not limited to, work done, good behavior or pretrial confinement. Such statement shall be translated into the language of the Receiving State and duly authenticated. The Transferring State shall also furnish the Receiving State a certified copy of the sentence handed down by the competent judicial authority and any modifications thereof. It shall

also furnish additional information that might be useful to the Authority of the Receiving State in determining the treatment of the convict with a view to his social rehabilitation.

(8) If the Receiving State considers that the documents supplied by the Transferring State do not enable it to implement this Treaty, it may request additional information.

(9) Each Party shall take the necessary legislative measures and, where required, shall establish adequate procedures, to give for the purposes of this Treaty, legal effect, within its territory to sentences pronounced by courts of the other Party.

ARTICLE V

(1) Delivery of the offender by the authorities of the Transferring State to those of the Receiving State shall occur at a place agreed upon by both parties. The Transferring State shall afford an opportunity to the Receiving State, if it so desires, to verify, prior to the transfer, that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof, through the officer designated by the laws of the Receiving State.

(2) Except as otherwise provided in this Treaty, the completion of a transferred offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise. The Transferring State shall, however, retain the power to pardon or grant amnesty to the offender and the Receiving State shall, upon being advised of such pardon or amnesty release the offender.

(3) No sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the date at which it would have terminated according to the sentence of the court of the Transferring State.

(4) The Receiving State shall not be entitled to any reimbursement for the expenses incurred by it in the completion of the offender's sentence.

(5) The Authorities of each party shall, every six months, exchange reports indicating the status of confinement of all offenders transferred under this Treaty, including in particular the parole or release of any offender. Either Party may, at any time, request a special report on the status of the execution of an individual sentence.

(6) The fact that an offender has been transferred under the provisions of this Treaty shall not prejudice his civil rights in the Receiving State in any way beyond those ways in which the fact of his conviction in the Transferring State by itself effects such prejudice under the laws of the Receiving State or any State thereof.

ARTICLE VI

The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts. The Receiving State shall, upon being advised by the Transferring State of action affect-

ing the sentence, take the appropriate action in accordance with such advice.

ARTICLE VII

An offender delivered for execution of a sentence under this Treaty may not be detained, tried or sentenced in the Receiving State for the same offense upon which the sentence to be executed is based. For purposes of this Article, the Receiving State will not prosecute for any offense the prosecution of which would have been barred under the law of that State, if the sentence had been imposed by one of its courts, federal or state.

ARTICLE VIII

(1) This Treaty may also be applicable to persons subject to supervision or other measures under the laws of one of the Parties relating to youthful offenders. The Parties shall, in accordance with their laws, agree to the type of treatment to be accorded such individuals upon transfer. Consent for the transfer shall be obtained from the legally authorized person.

(2) By special agreement between the Parties, persons accused of an offense but determined to be of unsound mental condition may be transferred for care in institutions in the country of nationality.

(3) Nothing in this Treaty shall be interpreted to limit the ability which the Parties may have, independent of the present Treaty, to grant or accept the transfer of youthful or other offenders.

ARTICLE IX

For the purposes of this Treaty—

(1) "Transferring State" means the party from which the offender is to be transferred.

(2) "Receiving State" means the party to which the offender is to be transferred; and

(3) "Offender" means a person who, in the territory of one of the parties, has been convicted of a crime and sentenced either to imprisonment or to a term of probation, parole, suspended sentence, or any other form of supervision or conditional sentence without confinement.

(4) A "domicilary" 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.

ARTICLE X

(1) This Treaty is subject to ratification. The exchange of ratifications shall take place in Washington.

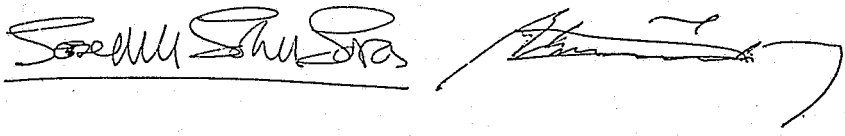
(2) This Treaty shall enter into force thirty days after the exchange of ratifications and shall remain in force for three years.

(3) Should neither contracting party have notified the other ninety days before the three-year period mentioned in the preceding paragraph has expired of its intention to let the Treaty terminate, the Treaty shall remain in force for another three years, and so on every three years.

DONE at Mexico City in duplicate, this twenty-fifth day of November, one thousand nine hundred seventy six, in the English and Spanish languages, each text of which shall be equally authentic.

FOR THE UNITED STATES OF AMERICA:

FOR THE UNITED MEXICAN STATES:



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At the present time there are approximately 600 American prisoners in Mexican jails and 275 in Canadian Institutions. A large portion of these individuals would become immediately eligible for transfer under the provisions of the treaty upon enactment of this legislation.

Hearings on the treaties were held in the Senate Foreign Relations Committee on June 15 and 16, 1977. The Senate gave its advice and consent to ratification of the Canadian and Mexican treaties on July 19 and July 21, 1977, respectively. However, the treaties are not self-executing and require legislation implementing their terms.

History of Legislation

On July 13 and July 14, 1977, the Senate Subcommittee on Penitentiaries and Corrections held hearings on the implementing legislation. That subcommittee solicited the opinions and recommendations of the House Judiciary Committee and of the Department of Justice to resolve some problems with the bill as originally proposed by the Carter administration. These amendments, incorporating the recommendations made by the House Judiciary Committee were then approved by the Senate Penitentiary Subcommittee. The full Senate Committee on the Judiciary favorably reported the bill on September 15, with a number of amendments. The full Senate passed the bill by unanimous consent on September 21, 1977 and on September 23, 1977 sent S. 1682 to the House of Representatives for approval.

A similar bill, H.R. 7148, was introduced into the House of Representatives and referred to the Judiciary Committee. Hearings were held before the Subcommittee on Immigration, Citizenship, and International Law on September 16 and October 6, 1977, and on October 13, 1977 the subcommittee favorably and unanimously ordered reported the Senate bill, S. 1682. Action on H.R. 7148 was postponed indefinitely.

The full Committee on the Judiciary on October 18, 1977 in an open session and with a quorum present, considered S. 1682 and by a voice vote ordered it reported favorably without amendment.

Summary of Major Provisions of the Bill

Major provisions of the bill include:

(1) The transfer of offenders pursuant to offender transfer treaties in existence at the time of such transfer. The transfers would be effected in accordance with procedures outlined in the bill and under the direction of the Attorney General.

(2) Verification proceedings to be conducted in the transferring state, before a U.S. magistrate and with the right to counsel, to be appointed by the court if necessary, and paid by the Department of State. The purpose of the proceeding is to verify that the offender has willingly and knowingly agreed to the transfer.

(3) Immediate parole eligibility for prisoners returning to the United States for completion of their sentences.

(4) Exclusive jurisdiction in the courts of the sentencing state to entertain collateral challenges to the foreign convictions and/or sentences. It should be noted that this provision does not preclude or suspend in any way an American prisoner's right to petition U.S.

courts, for appropriate relief subsequent to transfer, by way of habeas corpus.

(5) If the courts of a receiving country determine that the transfer under an offender transfer treaty was not in accordance with the treaty, or the laws of the receiving country, and orders the offender's release, then the offender could be returned to the transferring country.

(6) Prosecution in the United States based upon conduct resulting in a foreign conviction and/or acquittal is barred upon execution of the transfer into the United States.

Need For Legislation

The benefits to be derived as a result of the implementation of the Mexican and Canadian offender transfer treaties and other future transfer treaties in general are many.

INCREASED PROBABILITY OF REHABILITATION OF OFFENDER

Offender rehabilitation which is one of the primary objectives of U.S. penal policy, is facilitated as a result of execution of penal sentences in an offender's own country. Rehabilitation is less likely to take place where the environment in which the offender finds himself is unfamiliar and sometimes hostile to him. Recipients of benefits of this greater possibility for rehabilitation are: (1) the individual offender and (2) the community into which the offender will eventually return.

IMPROVED BILATERAL RELATIONS BETWEEN TRANSFERRING COUNTRIES

Incarceration of individuals in prisons and institutions of a foreign country invariably have the effect of straining bilateral relations between the offender's home country and the foreign country. Conditions existing within a nation's penal facilities and their reform are not generally high on the list of its legislative priorities. As a result, despite good intentions, neglect is often found to exist in this area. The effects of this neglect is felt by foreign prisoners and is not conducive to good foreign relations.

HUMANITARIANISM

The most fundamental justification for offender exchange treaties is human rights. Incarceration in one's own country is severe enough punishment. Service of a custodial term in a foreign jail creates special hardships upon the individual offender, and his family.

Precedent For Innovative Penal Legislation

Extensive hearings on the proposed legislation were held both in the Senate and House of Representatives subcommittees. Experts in the field of constitutional law were asked to give their views regarding the legality of the proposed law. All of the witnesses, as well as those submitting statements for the hearing record after balancing the various considerations involved, supported its legality. The treaties and the implementing legislation were praised as novel, thoughtful re-

sponses to the problems of a worldwide problem—easy access to foreign travel, different standards for arrest, trial and imprisonment of offenders, and resulting foreign policy strains due to application of multiple criminal standards and statutes to foreign travelers or visitors. One problem area revolved around the treaties' provision conferring exclusive jurisdiction upon the courts of the transferring country to entertain collateral attacks on a conviction or sentence by a transferred offender.

The subcommittee was concerned as to whether (1) any constitutionally protected rights of the transferring offender are taken away by the treaty provision, and (2) if such is the case, whether the consent verification procedures set forth in the legislation adequately served as a "waiver" of such rights. As detailed in the section-by-section analysis, all of these experts agreed that the provisions did not constitute a suspension, or even a partial suspension, of the writ of habeas corpus and that the procedures established by the implementing legislation adequately protected both the offender's and the treaty nations' rights.

For example, Prof. Herbert Weschler, professor of law at Columbia Law School, supported the legislation's constitutionality, and suggested the following framework for any constitutional analysis of the treaties and the instant legislation:

> The purpose and effect of the two treaties is not to impose afflictive sanctions on the offenders who may be transferred with their consent from a foreign country to their home country for service of their sentences but rather to alleviate the special hardship incident to confinement or restraining away from home. It is implausible upon its face to perceive a potential violation of the Bill of Rights in such an exercise of the treaty power.—Hearings before the Subcommittee on Immigration, Citizenship and International Law, October 6, 1977 (submitted statement).

Section-by-Section Analysis

S. 1682 would implement all treaties on the execution of penal and other sentences which may be ratified and then enter into force. Enactment would allow the existing ratified treaties with Mexico and Canada to become operative and allow future treaties to become operative on their ratification.

SECTION 1—PROCEDURES FOR PRISONER EXCHANGE

The first section of S. 1682 adds a new chapter 306 to title 18 of the United States Code and contains the basic implementing provisions for prisoner exchange treaties. Sixteen new sections are included.

§ 4100. *Scope and Limitations of Chapter*

Treaty Requirement

Subsection 4100(a) requires that the procedures detailed in this legislation can only be applied if there is an applicable treaty. This is the same as in the case of extradition (18 U.S.C. 3181). Thus, agreements for the transfer of offenders shall be in the form of treaties.

The proposed legislation does not refer specifically to all conditions which the Mexican and Canadian treaties impose on the transfer of an offender. There is some divergence between those two treaties and additional treaties may include conditions not included in the present treaties. Therefore S. 1682 has been designed to accommodate the differences between the Mexican and Canadian treaties as well as any future treaties.

This subsection provides that the authorization to transfer offenders is limited to transfers "pursuant to such a treaty." Therefore, all of the conditions contained in the Mexican and Canadian treaties, other than those pertaining to the consent of the offender, are exclusively the concern of the contracting Parties, that is the countries involved. Acceptance by the Receiving State of an offender from the Transferring or Sending State constitutes a binding determination that all conditions precedent required by the treaty and legislation have been satisfied.

The acceptance by the Receiving State does not have the same binding effect with regard to the consent of the offender to the transfer. The offender has such an interest in this co ıdition, that his transfer may occur only with his consent, that he may assert the absence of consent and is not bound by any understandings or agreements by the Parties on this matter. This question would first be raised with the "authority" of the Receiving State and in the event of an adverse decision by that authority, the offender may seek relief from the courts . f the Receiving State. Any such claim would have to be made without undue delay or it could be barred by the doctrine of laches.

Subsection (a) further provides that if an offender is transferred pursuant to a treaty, the fact that the treaty thereafter ceases to be in force shall not operate to prevent the continued execution of the sentence.

Applicability

The treaties with Mexico and Canada provide only for the transfer of citizens or nationals to the country of which they are citizens or nationals. This bill—to implement these treaties—in subsection 4100 (b) similarly limits transfers only to citizens or nationals. The committee received recommendations that the legislation provide for applicability of prisoner exchange arrangements to permanent resident aliens of a receiving State. However, the committee does not recommend the inclusion of this category of offenders at this time. Expeditious enactment of S. 1682—and thus expeditious implementation of present treaties which are limited only to citizens or nationals—was the primary goal. The committee expects its Subcommittee on Immigration, Citizenship and International Law to promptly consider the issue, problems, and benefits of amendments to this bill to provide for expanding the coverage of this legislation to include permanent resident aliens. Such an amendment could be adopted sufficiently in advance of fu ure treaties to provide for inclusion of these individuals in future bilateral prisoner exchanges.

Subsection (b) provides other limitations on prisoner exchanges—reiterating the principles found in the Mexican and Canadian treaties and thus, except as noted above, expresses congressional endorsement of the applicability of these and future treaties. In addition to limit-

ing applicability to citizens and nationals, this subsection provides that offenders may only be transferred to the country of which they are citizens or nationals; transfer may occur only with the consent of the offender; the offense for which the offender was sentenced satisfies the requirements of double criminality as defined in this chapter; and that an offender's consent to transfer is irrevocable once it is verified by a verifying officer. The requirement of the consent of the offender is not intended to be an expression of the view that transfer of offenders could not be accomplished without their consent, but rather an expression of a policy against involuntary transfers of civilian offenders in the international area.

Subsection (b) also implements provisions in any treaty, such as in article VIII (1) of the Mexican treaty relating to transfer of youthful offenders. It endeavors to protect a person who is under the age of eighteen by providing that the consent to transfer be by a parent or guardian, or by a court of the sentencing country. The consent by a court of the sentencing country has been included to avoid problems occasioned by a parent or guardian who, despite the desire of his child or ward to transfer, withholds consent.

This subsection provides that once an offender's consent to transfer is verified, it is irrevocable. It is the understanding and expectation of the committee that such irrevocability applies only once a transfer has been actually physically commenced.

The provision as to the irrevocability of consent has been included to avoid the legal problems which would arise if the consent were considered to be revocable as some courts have held with regard to a consent to search or to be questioned. There is no intent to preclude withdrawal of consent by an offender prior to actual transfer.

Finality of Sentences Required

Subsection (c) provides that only sentences which have become final may be the basis of a transfer. If litigation concerning the conviction or sentence is pending, such litigation must be finally resolved before the offender is eligible to be considered for transfer.

It is noted that in Mexico, Canada, and many other countries an appeal may be taken by the prosecution. Therefore, until the expiration of the prescribed time for appeal, the sentence is not final and the offender is not eligible to be considered for transfer.

The prescribed time for appeal is generally short. In Mexico such matters are regulated in the applicable Code of Penal Procedure, that is, in the Federal Code, the Code for the Federal District of Mexico or in the Code of the particular State by which the sentence was imposed.

In Canada the time for appeal is regulated by the rules of the court which imposed the sentence.

Both the Mexican and Canadian treaties bar a transfer until the time for appeal has run. However, under subsection (c) it would be possible under future treaties to provide for transfer prior to the expiration of the time for appeal if all parties entitled to appeal waived appeal and the sentence thereby became final. Transfers under the Mexican and Canadian treaties must await the expiration of the appeal period.

The fact that there may be a collateral attack on the sentence does not prevent the offender from being considered for transfer. The pendence of litigation regarding issues other than the conviction or sentence does not effect eligibility for transfer.

Pardons, Amnesty and Sentence Modification

Subsection (d) recognizes the right of the sentencing country to pardon the offender, to grant him a commutation or amnesty, to modify the sentence to the benefit of the offender, and to revoke the sentence.

Under the laws of many countries, including Mexico, an offender is given the benefit of subsequent ameliorating legislation even if it is enacted after his conviction has become final. Thus if a person was sentenced to 3 years for an offense for which the maximum at the time of sentencing was 6 years and subsequently the maximum penalty for that offense is reduced to 4 years, the offender's sentence would be reduced to 2 years. A convicted offender is also given the benefit of a subsequent repeal. If the provision under which he was sentenced is repealed, he is entitled to be released.

The subsection requires the United States to recognizes subsequent ameliorations of the sentence, but only when it has received notice of such actions from the country in which the sentence was imposed.

§ 4101. *Definitions*

This new section provides definitions for 10 terms used throughout S. 1682.

Double Criminality

The requirement of § 4100(b) that there be double criminality is a recognition of the fact that the United States would not want to be in the position of executing a sentence of a foreign country which was imposed for an offense which is not known to the federal or state criminal laws of the United States and which might be abhorrent to the United States. For example, if in country X it is a crime to attend a religious service on any day but Saturday the United States would not want to execute a sentence imposed for such an offense.

On the other hand, if the Federal Government and all but one State were to repeal all laws relating to marijuana, a sentence by a court of a foreign country for marijuana offense would not be regarded as so abhorrent to the legal principles of the United States that it could not be executed by the United States. The definition of double criminality contained in 4101(a) reflects this view. The definition also requires that the offense for which the sentence was imposed is still an offense at the time of transfer. Since Mexico and many other countries throughout the world give a person convicted of an offense the benefit of a subsequent repeal of the law under which he was convicted, the requirement that at the time of transfer the act for which the person was sentenced still be a crime will avoid problems which would arise if the United States were to attempt to transfer a prisoner with a sentence which at the time of transfer could not be executed in the receiving country. This definition implements article II(1) of the Mexican treaty and article II(a) of the Canadian treaty.

The Mexican treaty requires that the offense be "generally punishable in the Receiving State" (article II(1)) this requirement relates

to the nature of the offense. It does not require that the act be an offense under the Federal law or under the laws of a majority of the States of the Receiving State.

Imprisonment, Juveniles, and Offenders

The definition of "imprisonment" in subsection 4101(b) specifies that this penalty must have been imposed by a court. However, if the imprisonment imposed by a court does not have a specific duration, a specific duration may be subsequently fixed by the appropriate administrative authority as authorized by law.

The definition of "juvenile" in 4101(c) adopts the definition of chapter 403—Juvenile Delinquency (18 U.S.C. 5031), and the definition of "juvenile delinquency" in 4101(d) adopts the definition of chapter 403—Juvenile Delinquency (18 U.S.C. 5031), and includes a definition of a juvenile status offense.

The definition of "offender" in 4101(e) includes only those who have been convicted of an offense or adjudged to have committed an act of juvenile delinquency who may be transferred. The present treaties and this legislation do not otherwise provide for the transfer of an arrested person, or a person awaiting trial.

The definition of "offender" does not include those individuals who are accused of an offense but who have been determined to be mentally ill. Therefore, the provisions and safeguards of S. 1682 do not automatically apply to such persons. Section 4102(9) provides that the Attorney General, working with the Secretary of Health, Education and Welfare, can make arrangements for transfer of such individuals. The committee expects such arrangements to be made and that the protections and procedures, especially as to consent and counsel, applicable to transfer of offenders under this bill be applied to the transfer of mentally ill individuals.

Probation and Parole

The concept of "parole" is known in most other countries of the world but bears different names such as "conditional release before the expiration of the term." The Mexican "preparatory liberty" is within the concept of parole as defined in subsection (f).

The concept of "probation" is similarly known to many countries of the world under various names, for example, Mexico has provisions for suspension of the sentence (condena condicional). The definition in subsection (g) is broad enough to encompass all of them. The definition does not, however, encompass a sentence of straight probation nor one which grants probation but defers imposition of a sentence of imprisonment. These forms of probation have been excluded because if the offender having such a sentence violated the probation conditions, the courts of the country executing the sentence would be faced with determining the sentence of imprisonment to be imposed. At this time, it was not deemed expedient to authorize such action.

Sentence

The definition of "sentence" in subsection (h) was drafted to include and to express the concept of the sentence in other countries. A sentence of a Mexican court includes the determination of culpability and lack of culpability. If a sentence is not guilty as to certain offenses but guilty as to others charged in the same proceeding and the

convicted offender is transferred to the United States, the acquitting portion of the sentence will bear on the question of prosecutability of the offender in the United States. See section 4111.

The Mexican treaty (article VIII(1)) provides: "this treaty may also be applicable to persons subject to supervision of other measures under the laws of one of the Parties relating to youthful offenders."

The inclusion within the definition of "sentence" of an adjudication of delinquency in a juvenile delinquency proceeding is an expression of the intent of Congress that the transfer of "juveniles" who have been treated as "juveniles" is authorized, although such proceedings are generally regarded as civil in nature. The definition also permits a juvenile to receive the benefits of a dismissal of an allegation of juvenile delinquency in the same proceedings.

As with the definition of offender, mental health commitments are not included in the definition of "sentence." Section 4102(9) authorizes arrangements for the transfer and treatment of such individuals under such a commitment to be separately established. The committee urges the Attorney General and the Secretary of HEW to negotiate such arrangements and to issue the necessary regulations as quickly as possible. The committee expects such arrangements to cover the procedures and protections of this act applicable to transfer of convicted or sentenced offenders.

Other Definitions

The definitions of "State," "transfer," and "treaty" in subsections (i), (j) and (k) are self-explanatory.

§ 4102. *Authority of the Attorney General*

This section designates the Attorney General as the "authority" referred to in the treaties and gives him the necessary authority to implement the treaties with regard to receiving American offenders from a foreign country who are serving a sentence of imprisonment, or who are on probation or parole. It also authorizes the Attorney General to transfer Federal offenders who are serving a sentence of imprisonment or who are on probation or parole, to the country of which they are citizens or nationals.

Standards for Attorney General Consent

Under existing treaties and this legislation, the Attorney General must agree to the receipt or transfer of an offender. The committee was concerned that the Attorney General exercise his discretion on this consent with care. In most cases, and possibly almost all cases, he should agree to any receipt or transfer, if the offender requests or voluntarily consents to such transfer. However, they may be an unusual situation, involving possibly a dangerous offender, where the Attorney General should not agree to the return of the offender, and his immediate eligibility for parole, to the United States. Similarly, there may be an unusual situation, involving an individual in American persons, who for matters of future law enforcement, continuing investigation, or other national interests, should not be sent to his home country. The committee therefore expects the Attorney General to promptly establish regulations and to provide standards and guidelines which will govern the exercise of his discretion as to his consent to receive or transfer offenders.

Other Powers and Responsibilities

The section also authorizes the Attorney General to designate citizens of the United States to act as verifying officers; to make regulations for the implementation of the treaties; to make and receive the reports required under the treaties; and to designate agents to receive and transport offenders.

The section authorizes the Attorney General to make agreements with the States concerning the transfer of State offenders who are foreign nationals and the confinement of transferred offenders in State institutions.

The expenses of transferring a State prisoner from the time he is turned over to the Federal authorities until he is transferred to the authorities of the Receiving State shall be paid by the United States. The confinement of a transferred offender in a State institution will be subject to the provisions of chapter 301 of title 18, United States Code. The expenses of such confinement will be paid as provided in that chapter.

The Attorney General is authorized to make agreements with other countries which presumably would be subject to the Case Act (1 U.S.C. 112(b)). These international agreements would concern:

1. The transit of offenders through the territory of the United States. Such an agreement would enable a country, for example Canada, to transfer an offender from a third country through the United States and avoid the necessity of making such a transfer nonstop from the third country. Expenses of such transit shall be paid by the country requesting the transit.

2. The transfer and treatment of juvenile offenders. The problems which may arise in connection with the transfer of juveniles are such that the proper protection of the juvenile may require a special agreement.

3. The transfer of individuals who are accused of an offense, but who have been determined to be mentally ill. This provision is supplementary to those contained in 24 U.S.C. 321, et seq. Such agreements would be made in conjunction with the Secretary of Health, Education, and Welfare who has available experts in the field of mental health. The committee expects such arrangements to be promptly made and to provide, to the maximum degree possible, for the procedures and protections of this bill, applicable to other transfers.

Finally, this section authorizes the Attorney General to delegate the authority conferred on him by this chapter to officers of the Department of Justice.

§ 4103. *Applicability of United States laws*

This section establishes that all laws of the United States relating to a prisoner, probationer, parolee, or juvenile offender shall apply to an offender transferred to the United States for service of his sentence, unless the treaty or another provision of law precludes their application. The effect of this provision is to treat a foreign-imposed sentence as if it were one imposed by a court of the United States, bringing all questions of sentence computation, good time credits, parole release and revocation, and any other related subjects, under United States laws.

An example of a provision of law requiring a different course of action than that which would be available if the sentence had been by a United States court is found in section 4104(d). It requires that if probation is revoked, the suspended sentence imposed by the foreign country shall be executed. If the revocation had been of probation imposed by a U.S. court, the court could reduce the sentence.

An example of a treaty provision which may require a different course of action than that which would be available if the sentence had been imposed by a U.S. court is found in article V(3) of the Mexican treaty, and article IV(3) of the Canadian treaty. Those articles provide "no sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the date at which it would have terminated according to the sentence of the court of the transferring (sending) State." As a result of these provisions, an offender who violates his parole must be given credit for the time he was under parole prior to its revocation. Under certain circumstances, the Parole Commission, if there has been a revocation of parole from a sentence of a U.S. Court, may determine not to give the parole violator credit for all such time (18 U.S.C. 4210(b)(2)).

§ 4104. *Transfer of offenders on probation*

This section requires that the Attorney General obtain the assent of the appropriate U.S. district court to the transfer of offenders on probation.

A probationer transferred to the United States is treated as though he had been placed on probation by a U.S. district court. The U.S. court or probation officer will impose the appropriate conditions of probation. If the foreign court had imposed special conditions, these should be considered in the determination of the appropriate conditions. However, if the probationer violates the conditions of probation, the U.S. court may not reduce the term of imprisonment which was imposed by the foreign court. The safeguards surrounding the revocation of probation are applicable.

§ 4105. *Transferred offender serving sentence of imprisonment*

In accordance with the concept that a transferred offender will be subject to the rules and conditions of the United States from the time of his transfer as to the incidents of his sentence, this section provides the mechanics for the implementation and computation of a sentence of imprisonment.

Custody of Attorney General

The foreign sentence to a term of imprisonment is translated into a term of imprisonment of precisely the same length to the custody of the Attorney General. This places a transferred prisoner in the same custody status as persons committed by U.S. District Courts, who are sentenced to the custody of the Attorney General.

Credit

Subsection (b) parallels section 3568 of title 18, to give the transferred offender credit for all time actually spent in custody on the charges for which he is sentenced. The phrase "date of commencement of sentence" is used, to allow for the fact that sentences may be considered to commerce on different dates in different conutries, that is, the date of arrest, the date of conviction, of sentencing or of final af-

firmance of the conviction and sentence by the courts. The commencement date used by the foreign country will be used, but all prior custody will also be credited.

Under subsection (c), a transferred prisoner will be credited for all good time, work credits, or other credits of similar type which are given by the foreign country up to the date of transfer. From that date forward, he will receive good time credits in accordance with federal law (18 U.S.C. 4161 and 4162) and Bureau of Prisons standards for earning good time. The two portions or allowances of good time will be combined to give a single mandatory release date (18 U.S.C. 4164), which is the date on which the prisoner must be released if he is not earlier paroled, good time allowances may be forfeited, and forfeited good time restored in the same manner as for any Federal inmate (18 U.S.C. 4165 and 4166).

Subsection (c)(2) provides for those cases where the foreign country does not have any good time credits. In those cases, the prisoner will be given the good time allowance provided by Federal law (sec. 4161) for the entire length of his sentence. Extra good time (sec. 4162) may only be earned from the date of transfer. Work time credits earned in foreign prisons will be added to such good time credits.

Subsection (c)(5) provides for the aggregation, or combination, of any new Federal sentence with the foreign sentence. The intent is to treat the transferred offender in the same way as a person in custody on a Federal sentence. For computation purposes, the offender shall be treated as if he is serving a Federal sentence of the same length as the foreign sentence. Thus, a Federal court may order a new sentence to be served concurrently or consecutively, with respect to the sentence already being served. The two (or multiple) sentences will then be aggregated according to the court's order, except for those unusual sentences which have attributes which prevent aggregation (for example, life sentences; indeterminate Youth Act or Narcotic Act sentences—13 U.S.C. 5010, 4253). If the court is silent as to the running of the new Federal sentence, current sentencing law will apply—that is, the sentences will run concurrently, since the defendant is in Federal custody.

All good time, work time, and other credits may be forfeited and restored, as if the sentence had been imposed by a court of the United States.

§ 4106. *Transfer of offenders on parole; parole of offenders transferred*

Under subsection 4106(a), the Attorney General is to assign any offender on parole in a foreign country who is transferred to the United States to the jurisdiction of the Parole Commission for supervision for the remainder of his sentence.

Parole Commission Powers

Subsection (b) establishes that the U.S. Parole Commission shall possess the same authority and responsibility over a prisoner or parolee returned under a treaty to serve a sentence of imprisonment as it does over a prisoner or parolee serving a sentence imposed by a court of the United States. General powers of the Commission over such prisoners or parolees are recognized by this provision, including the authority to grant or deny parole, to impose reasonable conditions on the

parole of such a prisoner, and to modify or revoke the parole of any prisoner released by the Commission. This subsection also provides that any proceeding pursuant to these actions is to be conducted in accordance with applicable federal law relating to parole.

Parole Eligibility

Under subsection 4106(c), an offender transferred to the United States is eligible for immediate parole.

The majority of U.S. nationals serving sentences in foreign countries for offenses committed in those countries were convicted of narcotics offenses. More than two-thirds of federal narcotics offenders who receive sentences of more than 1 year are presently sentenced under 18 U.S.C. 4205(b)(2) which permits them to be released on parole at such time as the Parole Commission determines. Thus, it is more in accord with present sentencing practices in the federal courts to apply such parole eligibility standards to offenders transferring to the United States to serve their foreign sentences.

Both the treaties and the implementing legislation make it clear that the parole laws of the receiving state shall govern the release of a transferred offender. Specifically section 4106(b) of S. 1682 provides that the parole laws of the U.S. shall apply to an offender who is already on parole or who is transferred to this country to serve a sentence of imprisonment. As noted, section 4106(c) establishes immediate parole eligibility for transferred offenders. In this regard, the committee wishes to emphasize that the parole determination criteria set forth in 18 U.S.C. 4206 (and made specifically applicable to transferred offenders by the instant legislation) shall be uniformly applied. In other words, the Committee expects the U.S. Parole Commission to apply the same standards and criteria to transferred offenders as are applied to U.S. offenders.

Although there does not appear to be any great divergence between the sentences permitted under the laws of the United States, Mexico, and Canada for essentially similar offenses, in the future we may enter into a treaty with a country which imposes substantially more severe sentences. By making transferring offenders sentenced in such countries eligible for parole at the Parole Commission's discretion, the Parole Commission will be able to treat such offenders as if they had been convicted and sentenced for similar offenses in the United States. Such a result would enhance the Government's ability to attain the goal of substantially equal treatment of all similarly situated persons who commit similar offenses. Again, the Committee expects that the Parole Commission will apply the same standards to offenders transferred, based in part on the offense involved, as are applied to those convicted and sentenced by U.S. courts.

§ 4107. *Verification of consent of offender to transfer from the United States*

Neither the Mexican nor Canadian treaty explicitly mentions verification of consent by the transferring country. However, the Mexican treaty requires the transferring country to obtain the "express consent" of the offender to the transfer. The Canadian treaty provides that the transfer shall be commenced "by a written application" of the offender. Therefore, it was deemed advisable to provide a procedure for

the verification by the United States when it is the transferring State. The record of such verification proceedings will be most helpful in the event of the institution of proceedings in the courts of the United States challenging the consent. The verification proceedings require that the offender personally appear before the verifying officer, who must be a U.S. magistrate or a judge of the United States as defined in section 451 of title 28, United States Code.

The verifying officer must personally inform the offender of the conditions under which the transfer may be made and determine that the offender understands them and agrees to them. If necessary, an interpreter will be utilized. The right of the offender to consult counsel and to have counsel appointed must be explained to him by the verifying officer. The verifying officer is directed to make the necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements. Such inquiries may be directed not only to the offender but to any other person. The verifying officer may also consider any document or physical evidence which will assist him in making his determination.

The entire proceedings must be recorded either by a reporter or by suitable sound recording equipment.

To provide readily available evidence of the validity of the consent, a form to be utilized at the proceeding will be prepared. The content of the form and instruction for its use will be specified in the regulations.

§ 4108. *Verification of consent of offender to transfer to the United States*

The Mexican and Canadian treaties provide that the Transferring State shall afford an opportunity to the Receiving State, if it so desires, to verify, prior to the transfer, through an officer designated by the laws of the Receiving State, that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences. To minimize the litigation problems which may arise it has been deemed desirable for the United States to verify the consent in each case and to have the verification procedure included in the implementing legislation. The verification proceedings require that the offender personally appear before the verifying officer in the country in which the sentence was imposed.

The verifying officer may be a United States magistrate, a judge of the United States as defined in section 451 of title 28, United States Code, or a citizen specifically designated by a judge of the United States as defined in section 451 of title 28, United States Code.

The verifying officer must personally inform the offender of the conditions under which the transfer may be made and determine that the offender understands them and agrees to them. If necessary, an interpreter will be utilized. The right of the offender to consult counsel and to have counsel appointed must be explained to him by the verifying officer. The verifying officer is directed to make the necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements. Such inquiries may be directed not only to the offender but to any other person. The verifying officer may also consider any document or physical evidence which will assist him in making his determination.

The entire proceedings must be recorded either by a reporter or by suitable sound recording equipment.

To provide readily available evidence of the validity of the consent, a form to be utilized at the proceeding will be prepared. The content of the form and instruction for its use will be specified in the regulations.

§ 4109. *Right to counsel, appointment of counsel*

The ramifications of the offender's consent to transfer are such that it is imperative he have an opportunity to consult with counsel before final consent to the transfer. If the offender is financially able to obtain counsel, he may do so. If the offender is financially unable to obtain counsel, counsel should be supplied. It is not intended to convert the verification into an adversary proceeding. The consent must be given by the offender personally not through an attorney.

For the offender who is being transferred from the United States, this section authorizes the utilization of the Criminal Justice Act to supply counsel.

For the offender who is being transferred to the United States, the appointment of counsel will be by the verifying officer. The Administrative Office of the United States Courts will prescribe regulations for the appointment of counsel. The fees and expenses of the appointed counsel will be paid by the Department of State.

It is anticipated that federal defenders will be the primary source of appointed counsel as the implementation of the treaties is begun. The absence of even the appearance of conflict of interest in the appointment of counsel for the verification proceedings is vital to the transfer process.

It is also expected that appointments of counsel will be made promptly so as not to delay any transfer. The Attorney General should promulgate regulations so as to provide set maximum time limits between a request for, and the appointment of counsel.

§ 4110. *Transfer of juveniles*

This section provides that, as appropriate, the federal provisions concerning the treatment of juveniles shall be applicable to a transferred juvenile. Because of the complex problems which may be encountered with regard to juveniles, future treaties or special agreements relating to juveniles may require deviations from the provisions of 18 U.S.C. 5031 to 5042.

§ 4111. *Prosecution barred by foreign conviction*

This section provides the offender transferred to the United States the same protection against double jeopardy that he would have had had he been sentenced by a court of the jurisdiction seeking to prosecute him.

In addition, if the jurisdiction seeking to prosecute the offender would be barred from prosecuting him, if the sentence which is the basic for his transfer has been imposed by a Federal court or a court of another state, the offender may not be prosecuted.

For example, a transferring offender who was sentenced in Mexico for a substantive narcotics violation could be prosecuted for a conspiracy involving the transaction of which the conviction for the substantive offense was based only if he could be prosecuted for that

conspiracy had the substantive conviction been by a court of the jurisdiction seeking to prosecute.

If in the sentence issued by the Mexican court the offender had been found not guilty of one or more offenses, but guilty of one or more other offenses with which he had been charged, the acquittal would operate as a bar to further prosecution to the same extent as it would had it been by a court of the jurisdiction seeking to prosecute. The word "conviction" in this section means the "sentence" upon which the transfer was based.

The provisions of this section are not intended to adversely affect the rights of an offender under the laws of any state which are more favorable to the offender. Thus, if state A has a law which prohibits a prosecution based upon the same transaction for which an offender was convicted in a foreign country, that law is not affected by this section.

§ 4112. *Loss of rights, disqualification*

This section insures that an offender transferred to the United States will not lose any right or be subject to any disqualification because of the transfer.

However, this section does not affect any loss of rights or disqualification incurred under existing Federal or State law by virtue of the conviction in the foreign country.

§ 4113. *Status of alien offender transferred to foreign country*

Under the Immigration and Nationality Act (Title 8, U.S.C.) an alien who has been granted voluntary departure by the Immigration and Naturalization Service and who voluntarily leaves the country within the specified time avoids the consequences of an order of deportation. Aliens who are under outstanding orders of exclusion or deportation from the United States execute those orders by departing the United States of their own volition. The purpose of section 4113 is to maintain the status quo with respect to the immigration laws by treating aliens transferred under this legislation the same as other aliens who have left the United States of their own volition. Consequently, aliens transferred under the legislation who have been granted voluntary departure will be considered to have voluntarily departed from the United States while those who are under orders of exclusion or deportation will be considered to have executed those orders by departure from the United States.

§ 4114. *Return of transferred offenders*

Neither the Mexican nor Canadian treaty has an express provision concerning the return of a transferred offender in the event it is not possible for the Receiving State to execute the sentence of the Transferring State. The transfer of an offender is ordinarily based upon the Receiving State executing the sentence. If it is unable to do so there may be a breach of the condition and the Receiving State may feel it appropriate to restore the parties to the status they possessed prior to the transfer.

Section 4114 describes only one situation under which the United States could return the transferred offender—if a court of the United States decides finally that the transfer was not in accordance with the treaty or the laws of the United States and orders the offender released

from serving the sentence in the United States. This could occur if the offender were found not to have properly consented to the transfer. Section 4114 provides the procedure for the return of such an offender.

The Committee was concerned that an adequate opportunity might not be afforded to allow the Attorney General to inquire of the sending state whether or not they wish the return of an offender. This section provides that "upon a final decision by the court", involving the release of an offender, the Attorney General within ten days is to notify the sending state of the order of release. It is the understanding of the Committee, that as with extradition proceedings, actual release from custody will not automatically result if a court order declares the basis for custody invalid. In fact, the courts, in almost all situations grant the government the opportunity to appeal, or otherwise challenge the release order by a court without the actual release of an individual from custody. Such procedures are, of course, to apply when the release is ordered as a result of a challenge to custody by a transferred offender.

In addition, the Department of Justice has indicated that once an offender has filed a motion or petition challenging his imprisonment or transfer, they will immediately contact the sending State even prior to any court hearing, in order to determine whether that sending State will wish to have the offender returned if his release is ordered. The 10-day period for contacting the sending State is a maximum, and as a practical matter, the Department of Justice has indicated they will be able to tell the court at the time of any other whether or not it will send the offender back.

First the country in which the sentence was imposed must request the return. Second, the Attorney General must determine whether a return is appropriate—because of the underlying basis of the treaty or other foreign policy considerations. It is hoped that the release of an offender because of a defect will not result in the automatic return of the offender. The basis for release, legal or constitutional; the amount of imprisonment already served and rehabilitative, punitive, and deterrence goals should be weighed by the sending and receiving state before a return is requested or ordered.

The procedures to obtain the return of a transferred offender, in general, correspond to those utilized in extradition proceedings. However, an extradition treaty is not required, the offense need not be included in a list of extraditable offenses, the conviction substitutes for probable cause, and an offender returned is subject to the jurisdiction of the country to which he is returned. The return of the offender is conditioned upon his being given credit towards service of the sentence for time spent in the custody of or under the supervision of the United States. The section incorporates by reference sections 3186–3195 of title 18.

§ 4115. *Execution of sentences imposing an obligation to make restitution or reparations*

In some foreign countries, including Mexico, sentences with respect to crimes in which there is a victim often include restitution or reparations as part of the penalty or award of damages attendant to conviction. Although the handling of criminal fines imposed as part of criminal sentences should pose no significant impediment to the transfer

process because of the ability of the affected governments to work out between themselves the procedures for dealing with such fines, restitution to the victims of crimes committed by United States citizens and nationals in foreign countries presents a more substantial problem.

Neither the Mexican nor Canadian treaty contain specific provisions concerning sentences which include an obligation to make reparations. However, where the obligation to make reparations is an integral part of a sentence which also imposes imprisonment or supervision, neither treaty specifically excludes a transfer.

The section provides that an obligation may be enforced as though it were a civil judgment rendered by a United States district court. Thus, all collection measures available for the satisfaction of a civil judgment may be utilized. The procedures to be utilized for the collection of an obligation to make reparation are those which would govern the enforcement of a civil judgment rendered by a U.S. district court.

The committee is concerned about the possible procedural and other problems that may be involved in civil enforcement of portions of criminal sentences. At the hearings before the Subcommittee on Immigration, Citizenship, and International Law, representatives of both the Justice and State Departments indicated that restitution or reparation conditions of sentences would be ordinarily satisfied, settled, or resolved, prior to a transfer. The committee supports this position. It expects that transfer will be limited, in almost all cases, to individuals who must only comply with terms of probation, imprisonment, or parole and that restitution and reparation conditions will be satisfied, settled or resolved prior to a transfer.

SECTION 2—MAGISTRATES CAN CONDUCT VERIFICATION PROCEEDINGS

Section 2 of S. 1682 amends section 636 of title 28, United States Code by adding a new subsection (f) authorizing a United States Magistrate to conduct verification proceedings within the United States. It further authorizes a judge of any United States district court to assign a United States magistrate to conduct verification proceedings outside of the United States.

The authority of a magistrate abroad is limited to conducting the verification proceedings, including the appointment of counsel.

SECTION 3—JURISDICTION OF PROCEEDINGS

Section 3 of S. 1682 delineates the jurisdiction of the courts, state and federal, over matters which may arise from the treaties and implementing legislation by adding a new section 2256 to title 28.

Challenges to Conviction and Sentences and Habeas Corpus

This new Section 2256 provides that exclusive jurisdiction of any proceeding seeking to challenge, modify, or set aside convictions or sentences shall be in the country in which the offender was convicted and sentenced. Some question has been raised as to whether this is an improper limitation or an individual's right, under the United States Constitution, to seek a writ of Habeas Corpus. This provision does not, in any way, suspend the writ of Habeas Corpus. It merely

states that certain types of challenges—to foreign convictions and sentences—may not be brought in American courts.

Witnesses before the Subcommittees of both the House and Senate Judiciary Committees were unanimous that such a provision is constitutionally valid. First, it is important to note that these provisions were considered essential in protecting the integrity of the judicial process of the respective countries and in securing approval for prisoner exchange treaties, in the past and presumably in the future. The Departments of Justice and State indicated that neither the United States nor any other country which is currently a party or expected to become a party to a treaty for the execution of penal sentences would have acquiesced to a provision which would permit the courts of the Receiving State to set aside or modify a sentence imposed by the courts of the Transferring State. Otherwise the fundamental sovereignty of a nation over crimes committed within its territorial boundaries would be impugned.

Second, the limitation does not affect any existing right of an offender. If such an individual were not transferred, and remained in the sentencing or convicting nation, he could only challenge his conviction or sentence in that nation. See *Neely* v. *Henkel*, 180 U.S. 109 (1901).

Third, under the provisions of this bill, the offender will be made fully aware of the fact that one of the conditions of the transfer is that the Transferring State retains exclusive jurisdiction over challenges to the sentence or conviction and that neither the treaty or legislation, nor the fact of transfer confers jurisdiction to the Receiving State over the validity of the sentence or conviction. Prior to any transfer, he must expressly and voluntarily consent to such a condition and under this bill, such consent must be verified under carefully developed safeguards.

Fourth, assuming adequate alternative procedures are available in the sending state for challenges to a conviction or sentence, limitation of such challenges in the federal courts are perfectly proper. Compare *Stone* v. *Powell*, 428 U.S. 465 (1976).

The committee wishes to make it clear that this limitation does not deprive the United States courts of their supervisory jurisdiction over activities of United States law enforcement agents, even abroad. A transferred prisoner could seek, through habeas corpus procedures, relief where he can show that American officials engaged in conduct connected with his foreign detention or conviction which would have been unlawful or constitutionally impermissible in the United States. In such a situation, the gravamen of the transferee's complaint would not go to the validity of the foreign conviction, but would instead focus on the supervisory authority of the court over government agents. In other words, it would be proper for United States courts to consider the right of the United States to maintain custody over a transferred offender against whom unconstitutional acts by United States government agents have been perpetrated if these acts are connected to the foreign conviction and therefore to the prisoner's present incarceration. Neither the treaties nor the implementing legislation require a waiver of a right the transferee might have to seek redress for constitutional violations committed by the U.S. Government or its agents.

Other challenges

Any challenge in the courts of the receiving state, other than to the foreign conviction or sentence is not precluded by this bill, or any treaty. Thus, a transferred offender may challenge in the receiving state, the procedures for transfer, the manner of the execution of his confinement, or the constitutionality of the legislation or any treaty. Specifically, this section does not preclude a transferred offender from challenging the constitutionality of the provisions of the treaties and legislation which preclude the courts of the United States from modifying or setting aside the sentence of a foreign court.

This section also has no effect on civil suits by the offender against individuals.

Finally, it should be noted that although the treaties and implementing legislation are legislative acts which affect a specified group of individuals and there is no judicial trial in the United States, they do not constitute bills of attainder because neither the treaties nor the legislation inflict punishment. They merely make available to certain offenders convicted abroad the option of serving in the United States a binding sentence of a foreign court. The conferring of this option cannot be equated to punishment. See *United States* v. *Lovett*, 328 U.S. 303 (1946); *Barenblatt* v. *United States*, 360 U.S. 109 (1959); *United States* v. *Brown*, 381 U.S. 437 (1965).

Venue

This section provides that exclusive jurisdiction of any proceeding seeking to challenge, modfy, or set aside convictions or sentences shall be in the country in which the offender was convicted and sentenced.

It further provides that proceedings by or on behalf of an offender transferred from the United States seeking to attack the conviction or sentence must be in the court, State or Federal, which would have had jurisdiction of such proceedings if the offender had not been transferred.

All litigation in the United States, or other than an attack on a sentence of a State court, must be brought in the Federal courts.

The venue provisions for Federal litigation conform generally to existing law.

SECTION 4—TRANSFER OF MILITARY OFFENDERS

Section 4 amends chapter 48 of title 10, United States Code, by adding a new section 955.

§ 955. *Prisoners transferred to or from foreign countries*

Subsection (a) would simply permit the transfer of foreign citizens who had been convicted by United States courts-martial of offenses other than purely military ones and would otherwise have been eligible to be transferred abroad under a treaty. Due to the ruling in *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), there will not be many persons in this category but cases may arise occasionally, particularly overseas.

Subsection (b) relates to executive agreements which contain provisions such as Article XXII, paragraph 7(b) of the Status of Forces Agreement between the United States and the Republic of Korea, 17 U.S.T. 1677, T.I.A.S. 6127, which was authorized by Article IV of the Mutual Defense Treaty of 1953, 5 U.S.T. 2368, T.I.A.S. 3097. That

provision, which has not heretofore been implemented, would permit the Secretary of the appropriate Military Department upon his request to receive a member of the United States Armed Forces from Korean custody and keep him in American facilities to serve his sentence.

The provisions of § 955 supplement the provisions of the new chapter 306 of Title 18 of the United States Code which would be added by the first section of S. 1682.

A member of the United States Armed Forces convicted of an offense in a foreign country with which the United States does not have a Status of Forces Agreement, e.g. Mexico, may be transferred to the United States pursuant to a general treaty on the execution of penal sentences and the provisions of chapter 306 to title 18.

However, if the United States is a party to an agreement on the status of forces contained in a treaty or authorized by a treaty, a member of the United States Armed Forces convicted by the courts of one of the other parties to such an agreement, pursuant to such an agreement, may be transferred to United States custody to serve his sentence.

SECTION 5—APPROPRIATIONS

This section authorizes appropriations to the Department of State and Justice, and the Administrative Office of the U.S. Courts to carry out the purposes of this legislation. The two subsections provide for allocation of expenses to the agencies which are given responsibility for payment under the legislation.

Estimate of Cost

The Department of Justice has informed the Committee that no additional Bureau of Prisons or other Department of Justice personnel will be required as a result of the enactment of this legislation. However, an initial onetime cost of $60,000 for transporting prisoners will be required for the current fiscal year. Other costs, contained within the budget of the Department of Justice, will involve support, including food, clothing, and release procedures for individuals housed in Federal prisons as a result of the transfer of offenders to such prisons. At this time, it is not known exactly how many individuals will be coming to the United States as a result of this legislation so no exact determination can be made as to the increased support costs for the Bureau of Prisons. In future years, additional support costs will also be required because of the transfer of additional American prisoners. These support costs will, of course, be offset by savings resulting from the transfer of prisoners in Federal prisons to foreign jail.

The Department of State has indicated that there will be a one-time additional expense of $200,000 for the first year of implementation of this Act to pay for attorneys fees during verification proceedings as to the consent of an offender to return to his home country. Thereafter, there should be an annual cost of approximately $20,000 to cover

attorneys fees based on a estimate of forty individuals per year. No additional personnel or travel costs should be required by the Department of State as such costs will be absorbed within the present resources of that Department.

These estimates, of course, are based on implementation of existing ratified treaties with Mexico and Canada. If additional treaties are ratified, additional costs may be involved.

The Congressional Budget Office has advised the Committee that the annual cost of S. 1682 will be approximately $.7 million. The Congressional Budget Office estimate is included as part of this report.

Pursuant to clause 7 of rule XIII of the Rules of the House of Representatives, the committee concurs with the cost estimate submitted by the Congressional Budget Office and believes that it accurately reflects the cost associated with the effective implementation of S. 1682.

Inflationary Impact Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that this bill will have no inflationary effect on prices and costs in the operation of the national economy.

Oversight Statements

Pursuant to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Subcommittee on Immigration, Citizenship, and International Law has been charged by the Committee on the Judiciary with the responsibility of overseeing the implementation of prisoner exchange treaties pursuant to this legislation. In particular, the Subcommittee has been charged with overseeing the administration of this legislation by the Departments of State and Justice. Consequently, the subcommittee will closely monitor the implementation of this legislation through periodic hearings and other mechanisms. Such oversight has already commenced as a part of the hearing process in considering and approving this legislation.

Clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives is inapplicable since no oversight findings and recommendations have been received from the Committee on Government Operations.

Administration Position

Departmental reports have not been received on S. 1682. However, in forwarding the administration bill, H.R. 7148, in an Executive Communication to the Speaker, and in the testimony of representatives of the Departments of State and Justice, the executive branch made it clear that it strongly supports the enactment of this legislation.

Copies of the executive communication forwarding H.R. 7148, and the testimony of representatives of the Departments of State and Justice are set forth below:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., April 28, 1977.

THE SPEAKER,
House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Enclosed for your consideration and appropriate reference is a legislative proposal to implement treaties for the transfer of criminal law offenders to or from foreign countries. The transfer provisions of this proposal would only be operative when there is a relevant treaty in force.

On November 25, 1976, a Treaty between the United States of America and the United Mexican States on the Execution of Penal Sentences was signed in Mexico City. This Treaty was submitted to the United States Senate for its advice and consent to ratification on February 15, 1977. A similar treaty has recently been signed with Canada.

The Treaty and the proposed legislation would permit nationals or citizens of either nation who have been convicted in the courts of the other country to serve their sentences in their home country; in each case the consent of the offender as well as the approval of the authorities of the two governments would be required. The Treaty is intended both to relieve the special hardships which fall upon offenders incarcerated far from home and to make their rehabilitation more feasible, and also to relieve diplomatic and law enforcement relations between the two countries of the strains that arise from the imprisonment of large numbers of each country's nationals in the institutions of the other. The decision to transfer would be made on the basis of the whole record of the offender and the authorities' estimate as to the likelihood that the transfer would be beneficial.

Certain categories of offenders are excluded from the terms of the Mexican Treaty: (1) political and military offenders, (2) offenders who are domiciliaries of the Transferring State, (3) those having less than six months to serve when processing of their transfer begins, and (4) offenders against the immigration laws. Such exclusions are not included in this legislation since the proposal is drafted to implement any such treaty. The program is basically one between the two federal governments. Offenders who are transferred become the responsibility of the federal government in the Receiving State. However, a state in either country which wishes to allow some of the prisoners which it holds to be transferred may exercise that option, if it chooses, through and with the consents of the federal governments.

When an offender has been transferred, the following procedures govern his treatment thereafter. The original sentence would carry over to his new confinement, preserving deductions for good behavior in prison, labor done by him and pre-trial confinement. The Transferring State retains the power to grant pardon or amnesty. With these exceptions, the execution of the sentence is to be carried out according to the rules and practices prevailing in the state to which he is trans-

ferred. The proposed legislation is broad enough to permit the transfer of offenders who are on parole and even those who have been placed on probation with a suspended sentence of imprisonment. In particular, the rules of the Receiving State as to parole will determine the date at which the offender is released from confinement. Each nation is to report to the other on the manner in which it is administering the confinement of transferred offenders.

The treaty and the proposed legislation provides that no offender may be transferred until the time for leave to appeal has expired and that no proceedings by way of appeal or collateral attack be pending. It is further provided that any collateral attack on the sentence must proceed through the courts of the country which imposed the sentence.

The enclosed legislative proposal is necessary to implement these treaties and any other treaties pertaining to the subject matter which may enter into force. The proposal is premised on the consent of both countries and the offender involved in the transfer, and therefore it is essential that a procedure for the verification of the consent to transfer be provided. Thus, this proposed legislation recognizes the right to counsel for the offender, and the necessity of the consent being given with full knowledge of the consequences concerning which the offender must be advised prior to his consent.

Also, the proposal provides that the sentence shall be executed in this country as though the sentence was imposed by a court of this country. Exclusive jurisdiction for challenges to the sentence, however, is reserved to the transferring country. Other proceedings, such as those pertaining to the manner of execution in the United States of a sentence imposed by a foreign country, are reserved to the Federal courts. Proceedings instituted in the United States by or on behalf of an offender transferred from the United States to a foreign country seeking to challenge, modify or set aside the conviction or sentence upon which the transfer was based are within the jurisdiction of the court which would have had jurisdiction had the offender not been transferred.

The proposal only pertains to the transfer of citizens or nationals who have been convicted of a criminal offense or who have been adjudged to have committed an act of juvenile delinquency, or who are accused of an offense but have been determined to be mentally ill. The legislation would also authorize the return of an offender to the transferring country if he is ordered to be released by courts of the United States for failure to comply with the relevant treaty or laws of the United States regarding the transfer. The law regarding immigration status under title 8, United States Code, is preserved. The provisions of the proposed legislation concerning agreements for the transfer of one accused of a crime but who is in need of treatment for a mental illness supplement the existing law (24 U.S.C. 321 et seq.) which authorizes the transfer of the mentally ill from a foreign country to the United States.

This proposed legislation is necessary to fully implement treaties for the transfer of criminal law offenders to or from foreign countries. I

therefore urge the early consideration and adoption of this legislative initiative.

The Office of Management and Budget has advised that enactment of this legislation would be in accord with the program of the President.

Sincerely,

GRIFFIN B. BELL, *Attorney General.*

STATEMENT OF PETER F. FLAHERTY, DEPUTY ATTORNEY GENERAL, CONCERNING H.R. 7148—PRISONER TRANSFER LEGISLATION, SEPTEMBER 16, 1977

Mr. Chairman and members of the committee, thank you for the opportunity to appear before this Subcommittee today on behalf of the Justice Department in support of H.R. 7148, which is essential for the implementation of treaties on the Execution of Penal Sentences. The concepts embodied in this measure are strongly endorsed by the Administration. As you know, a companion bill, S. 1682, has been introduced in the Senate by Senator Joseph Biden, Chairman of the Subcommittee on Penitentiaries and Corrections.

The United States has signed a treaty with the United Mexican States and a treaty with Canada based upon the principle that the sentence of an offender convicted of a crime in a foreign country can be more effectively and more humanely served in his or her own country. This is a principle which we wholeheartedly endorse.

The Senate has given its advice and consent to the ratification of both treaties. Those actions are subject to declarations in the Senate resolutions of ratification that the United States will not deposit its instruments of ratification until after the implementing legislation has been enacted. The actions of the Senate and the declarations in the resolutions of ratification emphasizes the fact that these treaties are not self-executing, but require legislation before they can be implemented. H.R. 7148 would accomplish this purpose. H.R. 7148 is designed to permit the implementation not only of the present treaties, but also of any future treaties on the execution of penal sentences. It should be noted, however, that the implementing legislation is operative only where there is an underlying treaty.

Neither H.R. 7148 nor the treaties confer a right on an offender to be transferred. They merely authorize the countries to transfer offenders. The treaties and H.R. 7148 have been drafted to give the greatest consideration to the interests of the offender for humane incarceration.

We believe the treaties and the proposed implementing legislation will improve the administration of criminal justice, while safeguarding and insuring that the humanitarian purpose of these treaties will not be subverted. A transfer may be accomplished only if the offender consents with full knowledge of the consequences of the transfer. Recognizing the potentially coercive situation in which offenders find

themselves, every effort has been made in the proposed implementing legislation to guarantee that the consent required by the treaties in fact will be voluntarily and understandingly given, including providing an offender an opportunity to consult counsel prior to giving final consent.

Benefits accrue to the offender who is transferred. First, the treaties and the proposed legislation provide that the sentence, for the execution of which the offender is transferred, shall operate as a bar to further prosecutions in the Receiving State to the same extent as if the sentence had been issued by a court of the particular jurisdiction seeking to prosecute. This provision, in effect, is an extension of the policy behind the double jeopardy clause of the Bill of Rights to a situation to which that clause otherwise would not apply.

Second, although recognizing the sentence of the foreign jurisdiction for this purpose, neither the treaties nor the proposed legislation converts the foreign sentence to a domestic sentence for the purpose of determining the adverse consequences of the sentence. Rather, it is provided that the transfer will not result in adverse consequences other than those which in any event would flow from the fact of the foreign conviction.

Third, the parole system of the Receiving State will govern timing and conditions of release from prison.

Canada will not be prepared to implement its treaty until late this year at the earliest. Mexico, however, is presently ready to implement its treaty, and we have plans for the rapid implementation of the treaty with Mexico. We are also working with the State Department and the Mexican Government to complete as much of the necessary preparatory work as possible in order to permit us to effect the transfers under the treaty with Mexico at the earliest possible date. We presently anticipate that the first transfers under the Treaty with Mexico could occur within a matter of days of the effective date of the treaty.

It should be noted that at least nine agencies are actively involved in making the arrangements for the transfer of offenders if the treaties are ratified and the legislation enacted. The Parole Commission, the Bureau of Prisons, and the Probation Office, Magistrates Division, and the Criminal Justice Act Division of the Administrative Office of the U.S. Courts are developing plans to expedite the transfer processing and the determination of parole eligibility after the transfer.

As a result of our internal review of the proposed legislation and having taken into consideration comments and suggestions from this subcommittee and other committees, various amendments have been made to S. 1682 and, as amended, it has been reported to the full Senate Judiciary Committee. The original version of S. 1682 was identical to H.R. 7148. I request, Mr. Chairman, that the amended version of S. 1682 be made a part of the record of this hearing. Also, I would urge that this committee consider amending H.R. 7148 to conform to the amended version of S. 1682. The proposed amended bill does not deviate from the basic objectives expressed in the original bill, but rather enhances our ability to attain them.

I also request, Mr. Chairman, that the section by section analysis of the amended S. 1682 be made a part of the record of this hearing.

Under the treaties and the proposed implementing legislation, American prisoners confined in Mexican (Canadian) prisons under sentences imposed by Mexican (Canadian) courts may be transferred, subject to their consent, to the United States to serve their sentences in the custody of the Attorney General. The treaties and the proposed legislation bar prisoners transferred to the United States from collaterally attacking their Mexican (Canadian) convictions in any courts other than Mexican (Canadian) courts. Thus, an American prisoner returning to the United States retains whatever right he or she may have to attack collaterally the conviction in the courts of the sentencing country, but may not challenge that conviction in an American court.

I would like to discuss the constitutionality of the provision which disallows Federal and State court jurisdiction to entertain an attack on foreign convictions brought by transferred prisoners. I would also like to discuss the effectiveness of the consent of an American held in a foreign prison, as a condition of the transfer.

The Office of Legal Counsel of the Department of Justice has examined these constitutional questions and has concluded (1) the treaties and the proposed implementing legislation do not strip prisoners held in a Mexican jail by Mexican authorities of any existing right to challenge in the United States their foreign convictions; and (2) even if such a right were found to exist, that right could be properly waived pursuant to the procedures outlined in the proposed implementing legislation.

The unique nature of the prisoner transfer treaties and proposed implementing legislation means that there are no judicial decisions precisely on point. There is, however, judicial precedent in analogous situations that underscores the opinion of the Office of Legal Counsel that the treaties and implementing legislation are constitutional. For example, in that legal memorandum, which I request be made part of the record, it is pointed out that the Supreme Court has, in extradition cases, concluded that the Constitution has no relation to crime committed without the jurisdiction of the United States against the laws of a foreign country, and that the courts are bound to accept the determination implicit in an extradition treaty that the foreign trial is presumptively fair. Therefore, an American accused of crime or having been convicted of crime in a foreign country may not challenge the fairness of the foreign proceedings in an extradition proceeding.

Does the fact of transfer into the custody of the Attorney General carry with it the right to challenge the conviction? Again we believe the extradition analogy is appropriate here.

Neeley v. *Henkel*, in which an extradition treaty was challenged as unconstitutional because it did not guarantee rights, privileges and immunities guaranteed by the Constitution to those accused of crime in the United States, supports the proposition that there is no constitutional right to have a federal or state court examine into the fairness of the foreign proceedings. The Court concluded that the provisions of the treaty, in the judgment of the Congress, were deemed adequate to

the ends of justice in cases of persons committing crimes in a foreign country. 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.

It should be noted here that we do not view the treaties or the implementing legislation as limiting the right a transferred prisoner might have to habeas corpus relief or civil damages where the prisoner alleges and can prove that American officials engaged in conduct connected with his foreign detention or conviction which would not have been constitutionally permitted if the conduct had been in the United States. In such a situation the gravamen of the transferee's complaint would not go to the validity of the foreign conviction but would instead focus on the right of the United States to hold in custody a person against whom unconstitutional acts by Government agents have been perpetrated which are connected with his incarceration. In short, neither the treaties nor the implementing legislation require the transferee to waive whatever right he might have to seek redress for constitutional violations committed against him by the United States or its agents.

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 to establish a waiver of that right. The issue, as we understand it, is whether such consent may be voluntarily given because the prisoner has, in reality, no viable options. While consent that is inherently involuntary cannot be cured by the employment of elaborate procedures, we see no basis for concluding that the consent here would be "inherently involuntary."

Two recent Supreme Court cases—*Jackson* v. *United States* and *Brady* v. *United States*—deal with the waiver of a constitutional right and whether or not alternative means existed whereby the Government might obtain its objectives without impermissibly encouraging the waiver of a constitutional right. In *Brady*, the Court determined that even faced with the possibility of a death penalty, a defendant could knowingly and intelligently plead guilty although the plea would automatically preclude a death sentence. If a guilty plea entered in part in fear of the death penalty is not "inherently involuntary," we do not think the consent to be given by prisoners under the transfer treaty and legislation would be said to be so.

Unlike the situation in *Jackson*, there is no alternative means to provide the benefits of these treaties to the prisoners. Unless the treaties contained the provision prohibiting collateral attack by American prisoners in American courts, they would not have been negotiated. We think a court would be reluctant to hold that the Government may not, under these circumstances, confer the benefits accruing from the transfer with condition requiring waiver of any habeas corpus rights attached.

The treaties authorize the Receiving State, if it so desires, to verify that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof. Both H.R. 7148 and S. 1682, as introduced, required that such verification be by a U.S. magistrate or by a specifically designated citizen of the United States. S. 1682 has been amended to provide that such designation be by a judge of the United States in order to avoid even the slightest appearance of a conflict of interest.

In the proceedings to verify consent the offender has the right to the advice of counsel, and if the offender is financially unable to obtain counsel, counsel will be assigned. For the offender being transferred from the United States the Criminal Justice Act (18 U.S.C. 3006A) is made applicable. For the offender being transferred to the United States, H.R. 7148 provides that the Secretary of State shall provide counsel. Again, to avoid even the slightest appearance of a conflict of interest, S. 1682 has been amended to provide that the Verifying Officer shall make the appointment of counsel pursuant to regulations to be prescribed by the Director of the Administrative Office of the Courts. The Secretary of State will pay for such appointed counsel.

H.R. 7148 lists three major consequences of the transfer which must be brought to the attention of the offender at the verifying proceedings. In order to make these consequences even more explicit, and further assure the voluntariness of the consent of the prospective transferring offender, S. 1682 has been amended to provide even more detailed directions for the conduct of the verification proceedings and to require that they be recorded.

H.R. 7148 basically provides that a transferred prisoner will be eligible for parole upon service of one-third of his or her sentence, except in the case of an offender who was under the age of 22 years at the time of conviction. Such an offender would be eligible for parole at any time. S. 1682, as amended, provides that an offender transferred to the United States to serve a sentence of imprisonment may be released on parole at such a time as the Parole Commission may determine.

This change was made because:

(1) The majority of U.S. nationals serving sentences in foreign countries for offenses committed in those countries were convicted of drug offenses. More than two-thirds of Federal drug offenders who receive sentences of more than 1 year are presently sentenced under section 4205(b)(2) which permits them to be released on parole at such time as the Parole Commission determines. Thus S. 1682, as amended, is more in accord with present sentencing practices in the Federal courts.

(2) This change would also permit greater flexibility in parole adjustment of foreign sentences which are significantly longer than sentences for similar offenses in the United States—a situation which does not exist with respect to Mexican and Canadian sentences.

In closing, let me again stress that the Department of Justice believes that the treaties and legislation represent an extremely worthwhile opportunity to ameliorate the hardships of imprisonment which presently result from conviction in a foreign country of violations

of its criminal laws, and to enhance the rehabilitative potential of our respective criminal justice systems.

Again, I wish to emphasize that the amendments to S. 1682, developed in conjunction with this subcommittee and other congressional committees, greatly enhance our ability to attain the objectives of treaties on the execution of penal sentences. Therefore, I strongly urge the adoption of these amendments by this Subcommittee. As you may know, S. 1682 was reported out of the Senate Judiciary Committee yesterday.

This concludes my statement, Mr. Chairman. We will be happy to answer any question the Committee may have.

Thank you.

PREPARED STATEMENT OF WARREN CHRISTOPHER, DEPUTY SECRETARY, DEPARTMENT OF STATE

Mr. Chairman and members of the committee, I am pleased to have this opportunity to be with you today to discuss H.R. 7148, the bill to implement the Mexican and Canadian Prisoner Transfer Treaties. The administration strongly supports the treaties and the legislation, both as humanitarian measures to relieve the hardships of the prisoners and as steps to improve relations with our two neighbors.

Only a few days ago, I had a conversation with our Ambassador to Mexico, the former Governor of Wisconsin, Patrick Lucey, who stressed the importance that Mexico attaches to early implementation of our treaty on prisoner transfer. The Foreign Minister of Mexico made the same point during his conversation with Secretary Vance and me last month. Both of them were assured that we shared their hope that the Congress will shortly enact the legislation necessary to implement the treaty.

In my statement I will set forth the context of the treaties and the need for the legislation. We have reviwed the legislation to make certain that it is consistent with the treaties and that its operation will enhance and not adversely affect our foreign relations. I will defer to my colleague, Deputy Attorney General Flaherty regarding the details of the implementing legislation.

BACKGROUND

It is essential to remember the context of the treaties and this legislation. Most Americans probably have never had reason to consider how exceedingly fortunate we are to have excellent relations with our two neighbors, Mexico and Canada. The borders between many countries are heavily fortified, and the people on either side look across with suspicion and hostility.

Happily this is not the case, as we look North or South across our long borders.

However, the presence of U.S. citizens in the jails of Mexico and Canada (and the converse) has come to be a dark shadow on our good relations. The treaties were negotiated to remove that impediment, and the legislation is necessary to complete the task.

As a general matter, the welfare of American prisoners in foreign jails has greatly concerned the Department of State. Today approxi-

mately 2,200 are in foreign jails, nearly 600 of them in Mexico and 275 in Canada.

The situation in Mexico is well known. Congressional hearings have high-lighted the prisoners' problems. They have shown the inadequacy of prison conditions there with respect to food, medical treatment, security against violence, and other matters. In spite of efforts by the Mexican authorities there is still much that is unsatisfactory.

In any case, there are special hardships involved in being in a prison abroad. It is difficult or impossible to maintain contact with one's family or friends. Language problems can make prison life more difficult. The isolation inherent in being imprisoned abroad can aggravate the always difficult problems of readjustment after release.

Comparable hardships exist for foreigners in U.S. prisons even though there is less publicity about them. The problem of prisoners, and the publicity they generate, has been a burden in our diplomatic relations.

The treaties and this implementing legislation will lift that burden. Following signature of the treaties, the President transmitted them to the Senate for advice and consent. The Senate by an overwhelming majority gave that advice and consent, specifying only that ratification should be withheld until enactment of the implementing legislation. Parallel procedures were followed in Mexico which completed all necessary steps by January of this year to permit exchange of ratification and entry into force of the treaty. Although Canada has not yet passed its necessary legislation, it is expected to introduce such legislation before the end of the year.

Operation of the Legislation

A good deal of the necessary spadework to begin implementation of the treaty with Mexico has already commenced. State Department personnel have accompanied representatives of the Justice Department to Mexico to discuss matters with their Mexican counterparts. While the transfer of prisoners is the responsibility of the Department of Justice and of the magistrates assigned to that task, the State Department will have the function of helping to make sure that relations beween the Mexican and American penal authorities go smoothly. The important steps of identification of American prisoners, adjudication of the citizenship of those who have never had passports before and the issuance of certificates of identity have already begun. In addition, the State Department is working closely with the Immigration and Naturalization Service to ensure that the U.S. Immigration preclearance program proceeds on schedule.

Failure to act promptly in implementing the treaties could increase the chances for diplomatic misunderstanding as well as additional problems in our bilateral relations. As I noted, the Mexican Government gave final approval to the treaty in January of this year. Since then, they have reiterated on several occasions their eagerness to begin the exchange promptly. We share fully the Mexicans' view that prompt repatriation is the most desirable and humane solution for the problems of American offenders in prison—particularly the younger

ones. We would not wish to give the Mexicans, by our failure to act, the impression that we no longer share their sense of urgency.

The American prisoners themselves have followed the course of this legislation closely. They are aware that the Mexican Government has taken final action and that the repatriation of those who are eligible awaits only legislative action by the United States. For us to delay could further increase the understandable anxiety and frustration that those prisoners have so frequently expressed to their families and to U.S. officials.

Conclusion

The Department of State, without reservation, joins with the Department of Justice in urging the speedy enactment of H.R. 7148 which is necessary for the implementation of the treaties with Canada and Mexico.

Mr. Chairman, this concludes my formal presentation. I will be pleased to try to answer any questions the Committee may have.

Budgetary Information

Clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives is inapplicable because the instant legislation does not create new budgetary authority. Pursuant to Clause 2(l)(3)(C) of rule XI, the following estimate and comparison was prepared by the Congressional Budget Office and submitted to the committee:

Congressional Budget Office Cost Estimate, October 1977

Congressional Budget Office,
U.S. Congress,
Washington, D.C., October 17, 1977.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 1682, a bill to provide for the implementation of treaties for the transfer of offenders to or from foreign countries.

Should the Committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

Alice M. Rivlin, *Director.*

Congressional Budget Office—Cost Estimate

October 17, 1977.

1. Bill number: S. 1682.
2. Bill title: A bill to provide for the implementation of treaties for the transfer of offenders to or from foreign countries.
3. Bill status: As considered by the House Judiciary Committee on October 18, 1977.

4. Bill purpose: This legislation provides for the implementation of treaties permitting the transfer of offenders to and from foreign countries for the purpose of serving penal sentences, and authorizes the appropriation of such funds as may be necessary for such purposes.

5. Cost estimate:

Authorization amounts and estimate costs

[by fiscal years, in millions of dollars]

Fiscal year:	
1978	0.7
1979	0.6
1980	0.7
1981	0.8
1982	1.0

The costs of this bill fall within budget function 750.

6. Basis for estimate: This estimate assumes enactment of this legislation and ratification of the treaties with Mexico and Canada on the execution of penal sentences on or before October 30, 1977.

Costs in 1978 and out years are subject to appropriations.

Implementation of the treaties would involve the following activities:

(1) the processing of returning American citizens serving penal sentences in foreign countries, including:

(a) the review and litigation of individual cases;

(b) the provision of counsel for indigent offenders; and

(c) the transportation of returning offenders to institutions in the U.S.;

(2) the imprisonment and/or parole of returnees;

(3) the processing of foreign nationals incarcerated in the U.S. who elect to return to their country of origin;

(4) the transfer of foreign nationals.

The costs of processing the return of U.S. citizens, their imprisonment and parole review, and of screening of requests for transfer of foreign nationals are assumed to be borne by the Department of Justice. The costs associated with the provision of counsel for indigent returnees will be borne by the Department of State.

Costs to the U.S. are sensitive to the number of offenders electing to return to their home country and granted permission for transfer. The Department of Justice estimates that there are 570 Americans in Mexican jails, of which approximately 225 are eligible and willing to return to the U.S. They estimate that 140 to 170 offenders in Canada are eligible to return to the U.S., but that a small percentage will elect to return. One hundred twenty to two hundred Americans are expected to return to the U.S. each year after the initial transfer of prisoners in fiscal year 1978.

The Bureau of Prisons estimates that as of March 1977 there were 488 Mexican nationals and 65 Canadian nationals in federal prisons. A Department of Justice poll of Mexican nationals held in federal prisons indicates that only one percent are interested in returning to Mexico.

This estimate assumes a workload of 225 offenders returning to the U.S. in December 1977 from Mexico and a net flow of 150 offenders per

year returning to the U.S. thereafter. Canada has not enacted enabling legislation, but it is expected in the current session. This estimate assumes a net transfer of 25 offenders per year from Canada to the U.S. beginning in the third quarter of fiscal year 1978. The Department of Justice estimates that fifty percent of the first group returning to the U.S. will be eligible for parole or mandatory release after a short processing period. The estimate assumes that the returning offenders will serve an average of 18 months in federal prison and 5 years on parole. The estimate also includes $100,000 in fiscal year 1978 for the defense of Constitutional attacks on the treaties and the implementing legislation.

Costs in fiscal year 1979 and later years are estimated using current CBO economic assumptions.

7. Estimate comparison: None.

8. Previous CBO estimate: Estimates were prepared for the resolutions of ratification for the treaties with Mexico and Canada and the bill as passed by the Senate. This estimate differs by using more recent information on the numbers of offenders involved and by using average per capita care costs in computing the costs of imprisonment rather than average per capita prison costs.

9. Estimate prepared by: Joseph Whitehill.

10. Estimate approved by:

C. G. NUCKOLS
(For James L. Blum, Assistant Director for Budget Analysis).

COMMITTEE RECOMMENDATION

After careful consideration of this legislation, the Committee is of the opinion that this bill should be enacted and accordingly recommends that S. 1682 do pass.

CHANGES IN EXISTING LAW

In compliance with Clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law is shown in roman, matter repealed enclosed in black brackets, and new matter is printed in italic).

TITLE 18, UNITED STATES CODE

* * * * * * *

Chapter 306.—TRANSFER TO OR FROM FOREIGN COUNTRIES

"Sec.
4100. Scope and limitation of chapter.
4101. Definitions.
4102. Authority of the Attorney General.
4103. Applicability of United States laws.
4104. Transfer of offenders on probation.
4105. Transfer of offenders serving sentence of imprisonment.
4106. Transfer of offenders on parole; parole of offenders transferred.
4107. Verification of consent of offender to transfer from the United States.

§ 4100. Scope and limitation of chapter

(a) The provisions of this chapter relating to the transfer of offenders shall be applicable only when a treaty providing for such a transfer is in force, and shall only be applicable to transfers of offenders to and from a foreign country pursuant to such a treaty. A sentence imposed by a foreign country upon an offender who is subsequently transferred to the United States pursuant to a treaty shall be subject to being fully executed in the United States even though the treaty under which the offender was transferred is no longer in force.

(b) An offender may be transferred from the United States pursuant to this chapter only to a country of which the offender is a citizen or national. Only an offender who is a citizen or national of the United States may be transferred to the United States. An offender may be transferred to or from the United States only with the offender's consent, and only if the offense for which the offender was sentenced satisfies the requirement of double criminality as defined in this Chapter. Once an offender's consent to transfer has been verified by a verifying officer, that consent shall be irrevocable. If at the time of transfer the offender is under eighteen years of age the transfer shall not be accomplished unless consent to the transfer be given by a parent or guardian or by an appropriate court of the sentencing country.

(c) An offender shall not be transferred to or from the United States if a proceeding by way of appeal or of collateral attack upon the conviction or sentence be pending.

(d) The United States upon receiving notice from the country which imposed the sentence that the offender has been granted a pardon, commutation, or amnesty, or that there has been an ameliorating modification or a revocation of the sentence shall give the offender the benefit of the action taken by the sentencing country.

§ 4101. Definitions

As used in this chapter the term—

(a) "double criminality" means that at the time of transfer of an offender the offense for which he has been sentenced is still an offense in the transferring country and is also an offense in the receiving country. With regard to a country which has a federal form of government, an act shall be deemed to be an offense in that country if it is an offense under the federal laws or the laws of any state or province thereof;

(b) "imprisonment" means a penalty imposed by a court under which the individual is confined to an institution;

(c) "juvenile" means—

(1) a person who is under eighteen years of age; or

(2) for the purpose of proceedings and disposition under chapter 403 of this title because of an act of juvenile delinquency, a person who is under twenty-one years of age;

(d) "juvenile delinquency" means—

(1) a violation of the laws of the United States or a State thereof or of a foreign country committed by a juvenile which would have been a crime if committed by an adult; or

(2) noncriminal acts committed by a juvenile for which supervision or treatment by juvenile authorities of the United States, a State thereof, or of the foreign country concerned is authorized;

(e) "offender" means a person who has been convicted of an offense or who has been adjudged to have committed an act of juvenile delinquency,

(f) "parole" means any form of release of an offender from imprisonment to the community by a releasing authority prior to the expiration of his sentence, subject to conditions imposed by the releasing authority and to its supervision;

(g) "probation" means any form of a sentence to a penalty of imprisonment the execution of which is suspended and the offender is permitted to remain at liberty under supervision and subject to conditions for the breach of which the suspended penalty of imprisonment may be ordered executed;

(h) "sentence" means not only the penalty imposed but also the judgment of conviction in a criminal case or a judgment of acquittal in the same proceeding, or the adjudication of delinquency in a juvenile delinquency proceeding or dismissal of allegations of delinquency in the same proceedings;

(i) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(j) "transfer" means a transfer of an individual for the purpose of the execution in one country of a sentence imposed by the courts of another country; and

(k) "treaty" means a treaty under which an offender sentenced in the courts of one country may be transferred to the country of which he is a citizen or national for the purpose of serving the sentence.

§ 4102. Authority of the Attorney General

The Attorney General is authorized—

(1) to act on behalf of the United States as the authority referred to in a treaty;

(2) to receive custody of offenders under a sentence of imprisonment, on parole, or on probation who are citizens or nationals of the United States transferred from foreign countries and as appropriate confine them in penal or correctional institutions, or assign them to the parole or probation authorities for supervision;

(3) to transfer offenders under a sentence of imprisonment, on parole, or on probation to the foreign countries of which they are citizens or nationals;

(4) to make regulations for the proper implementation of such treaties in accordance with this chapter and to make regulations to implement this chapter.

(5) to render to foreign countries and to receive from them the certifications and reports required to be made under such treaties;

(6) to make arrangements by agreement with the States for the transfer of offenders in their custody who are citizens or nationals of foreign countries to the foreign countries of which they are citizens or nationals and for the confinement, where appropriate, in State institutions of offenders transferred to the United States;

(7) to make agreements and establish regulations for the transportation through the territory of the United States of offenders convicted in a foreign country who are being transported to a third country for the execution of their sentences, the expenses of which shall be paid by the country requesting the transportation;

(8) to make agreements with the appropriate authorities of a foreign country and to issue regulations for the transfer and treatment of juveniles who are transferred pursuant to treaty, the expenses of which shall be paid by the country of which the juvenile is a citizen or national;

(9) in concert with the Secretary of Health, Education, and Welfare, to make arrangements with the appropriate authorities of a foreign country and to issue regulations for the transfer and treatment of individuals who are accused of an offense but who have been determined to be mentally ill; the expenses of which shall be paid by the country of which such person is a citizen or national;

(10) to designate agents to receive, on behalf of the United States, the delivery by a foreign government of any citizen or national of the United States being transferred to the United States for the purpose of serving a sentence imposed by the courts of the foreign country, and to convey him to the place designated by the Attorney General. Such agent shall have all the powers of a marshal of the United States in the several districts through which it may be necessary for him to pass with the offender, so far as such power is requisite for the offender's transfer and safekeeping; within the territory of a foreign country such agent shall have such powers as the authorities of the foreign country may accord him;

(11) to delegate the authority conferred by this chapter to officers of the Department of Justice.

§ 4103. Applicability of United States laws

All laws of the United States, as appropriate, pertaining to prisoners, probationers, parolees, and juvenile offenders shall be applicable to offenders transferred to the United States, unless a treaty or this chapter provides otherwise.

§ 4104. Transfer of offenders on probation

(a) Prior to consenting to the transfer to the United States of an offender who is on probation, the Attorney General shall determine that the appropriate United States district court is willing to undertake the supervision of the offender.

(b) Upon the receipt of an offender on probation from the authorities of a foreign country, the Attorney General shall cause the offender to be brought before the United States district court which is to exercise supervision over the offender.

(c) The court shall place the offender under supervision of the probation office of the court. The offender shall be supervised by a probation officer, under such conditions as are deemed appropriate by the court as though probation had been imposed by the United States district court.

(d) The probation may be revoked in accordance with section 3653 of this title and rule 32(f) of the Federal Rules of Criminal Procedure. A violation of the conditions of probation shall constitute grounds for revocation. If probation is revoked the suspended sentence imposed by the sentencing court shall be executed.

(e) The provisions of section 4105 and 4106 of this title shall be applicable following a revocation of probation.

(f) Prior to consenting to the transfer from the United States of an offender who is on probation, the Attorney General shall obtain the assent of the court exercising jurisdiction over the probationer.

§ 4105. Transfer of offender serving sentence of imprisonment

(a) Except as provided elsewhere in this section, an offender serving a sentence of imprisonment in a foreign country transferred to the custody of the Attorney General shall remain in the custody of the Attorney General under the same conditions and for the same period of time as an offender who had been committed to the custody of the Attorney General by a court of the United States for the period of time imposed by the sentencing court.

(b) The transferred offender shall be given credit toward service of the sentence for any days, prior to the date of commencement of the sentence, spent in custody in connection with the offense or acts for which the sentence was imposed.

(c)(1) The transferred offender shall be entitled to all credits for good time, for labor, or any other credit toward the service of the sentence which had been given by the transferring country for time served as of the time of the transfer. Subsequent to the transfer, the offender shall in addition be entitled to credits for good time, computed on the basis of the time remaining to be served at the time of the transfer and at the rate provided in section 4161 of this title for a sentence of the length of the total sentence imposed and certified by the foreign authorities. These credits shall be combined to provide a release date for the offender pursuant to section 4164 of this title.

(2) If the country from which the offender is transferred does not give credit for good time, the basis of computing the deduction from the sentence shall be the sentence imposed by the sentencing court and certified to be served upon transfer, at the rate provided in section 4161 of this title.

(3) A transferred offender may earn extra good time deductions, as authorized in section 4162 of this title, from the time of transfer.

(4) All credits toward service of the sentence, other than the credit for time in custody before sentencing, may be forfeited as provided in section 4165 of this title and may be restored by the Attorney General as provided in section 4166 of this title.

(5) Any sentence for an offense against the United States, imposed while the transferred offender is serving the sentence of imprisonment imposed in a foreign country, shall be aggregated with the foreign sentence, in the same manner as if the foreign sentence was one imposed by a United States district court for an offense against the United States.

§ 4106. Transfer of offenders on parole; parole of offenders transferred

(a) Upon the receipt of an offender who is on parole from the authorities of a foreign country, the Attorney General shall assign the offender to the United States Parole Commission for supervision.

(b) The United States Parole Commission and the Chairman of the Commission shall have the same powers and duties with reference to an offender transferred to the United States to serve a sentence of imprisonment or who at the time of transfer is on parole as they have with reference to an offender convicted in a court of the United States except as otherwise provided in this chapter or in the pertinent treaty. Sections 4201 through 4204; 4205 (d), (e), and (h); 4206 through 4216; and 4218 of this title shall be applicable.

(c) An offender transferred to the United States to serve a sentence of imprisonment may be released on parole at such time as the Parole Commission may determine.

§ 4107. Verification of consent of offender to transfer from the United States

(a) Prior to the transfer of an offender from the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof shall be verified by a United States magistrate or a judge as defined in section 451 of title 28, United States Code.

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

(1) only the appropriate courts in the United States may modify or set aside the conviction or sentence, and any proceedings seeking such action may only be brought in such courts;

(2) the sentence shall be carried out according to the laws of the country to which he is to be transferred and that those laws are subject to change;

(3) if a court in the country to which he is transferred 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 that country, he may be returned to the United States for the purpose of completing the sentence if the United States requests his return; and,

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

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

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

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

§ 4108. Verification of consent of offender to transfer to the United States

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

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

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

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

(3) if 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 imposed the sentence for the purpose of completing the sentence if that country requests his return; and,

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

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

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

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

§ 4109. Right to counsel, appointment of counsel

In proceedings to verify consent of an offender for transfer, the offender shall have the right to advice of counsel. If the offender is financially unable to obtain counsel—

(1) counsel for proceedings conducted under section 4107 shall be appointed in accordance with the Criminal Justice Act (18 U.S.C. 3006A). Such appointment shall be considered an appointment in a misdemeanor case for purposes of compensation under the Act;

(2) counsel for proceedings conducted under section 4108 shall be appointed by the verifying officer pursuant to such regulations as may be prescribed by the Director of the Administrative Office of the United States Courts. The Secretary of State shall make payments of fees and expenses of the appointed counsel, in amounts approved by the verifying officer, which shall not exceed the amounts authorized under the Criminal Justice Act (18 U.S.C. 3006(a)) for representation in a misdemeanor case. Payment in excess of the maximum amount authorized may be made for extended or complex representation whenever the verifying officer certifies that the amount of the excess payment is necessary to provide fair compensation, and the payment is approved by the chief judge of the United States Court of Appeals for the appropriate circuit. Counsel from other agencies in any branch of the government may be appointed, provided that in such cases the Secretary of State shall pay counsel directly, or reimburse the employing agency for travel and transportation expenses. Notwithstanding Section 3648 of the revised statutes as amended (31 U.S.C. 529), the Secretary may make advance payments of travel and transportation expenses to counsel appointed under this subsection.

§ 4110. Transfer of juveniles

An offender transferred to the United States because of an act which would have been an act of juvenile delinquency had it been committed in the United States or any State thereof shall be subject to the provisions of chapter 403 of this title except as otherwise provided in the relevant treaty or in an agreement pursuant to such treaty between the Attorney General and the authority of the foreign country.

§ 4111. Prosecution barred by foreign conviction

An offender transferred to the United States shall not be detained, prosecuted, tried, or sentenced by the United States, or any State thereof for any offense the prosecution of which would have been barred if the sentence upon which the transfer was based had been by a court of the jurisdiction seeking to prosecute the transferred offender, or if prosecution would have been barred by the laws of the jurisdiction seeking to prosecute the transferred offender if the sentence on which the transfer was based had been issued by a court of the United States or by a court of another State.

§ 4112. Loss of right, disqualification

An offender transferred to the United States to serve a sentence imposed by a foreign court shall not incur any loss of civil, political,

or civil rights nor incur any disqualification other than those which under the laws of the United States or of the State in which the issue arises would result from the fact of the conviction in the foreign country.

§ 4113. Status of alien offender transferred to a foreign country

(a) An alien who is deportable from the United States but who has been granted voluntary departure pursuant to section 1252(b) or section 1254(e) of title 8, United States Code, and who is transferred to a foreign country pusuant to this chapter shall be deemed for all purposes to have voluntarily departed from this country.

(b) An alien who is the subject of an order of deportation from the United States pursuant to section 1252 of title 8, United States Code, is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have been deported from this country.

(c) An alien who is the subject of an order of exclusion and deportation from the United States pursuant to section 1226 of title 8, United States Code, who is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have been excluded from admission and deported from the United States.

§ 4114. Return of transferred offenders

(a) Upon a final decision by the courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return. The Attorney General shall notify the appropriate authority of the country which imposed the sentence, within 10 days, of a final decision of a court of the United States ordering the offender released. The notification shall specify the time within which the sentencing country must request the return of the offender which shall be no longer than 30 days.

(b) Upon receiving a request from the sentencing country that the offender ordered released be returned for the completion of his sentence, the Attorney General may file a complaint for the return of the offender with any justice or judge of the United States or any authorized magistrate within whose jurisdiction the offender is found. The complaint shall be upon oath and supported by affidavits establishing that the offender was convicted and sentenced by the courts of the country to which his return is requested; the offender was transferred to the United States for the execution of his sentence; the offender was ordered released by a court of the United States before he had completed his sentence because the transfer of the offender was not in accordance with the treaty or the laws of the United States; and that the sentencing country has requested that he be returned for the completion of the sentence. There shall be attached to the complaint a copy of the sentence of the sentencing court and of the decision of the court which ordered the offender released.

A summons or a warrant shall be issued by the justice, judge, or magistrate ordering the offender to appear or to be brought before

the issuing authority. If the justice, judge, or magistrate finds that the person before him is the offender described in the complaint and that the facts alleged in the complaint are true, he shall issue a warrant for commitment of the offender to the custody of the Attorney General until surrender shall be made. The findings and a copy of all the testimony taken before him and of all documents introduced before him shall be transmitted to the Secretary of State, that a Return Warrant may issue upon the requisition of the proper authorities of the sentencing country, for the surrender of offender.

(c) A complaint referred to in subsection (b) must be filed within sixty days from the date on which the decision ordering the release of the offender becomes final.

(d) An offender returned under this section shall be subject to the jurisdiction of the country to which he is returned for all purposes.

(e) The return of an offender shall be conditioned upon the offender being given credit toward service of the sentence for the time spent in the custody of or under the supervision of the United States.

(f) Sections 3186, 3188 through 3191 and 3195 of this title shall be applicable to the return of an offender under this section. However, an offender returned under this section shall not be deemed to have been extradited for any purpose.

(g) An offender whose return is sought pursuant to this section may be admitted to bail or be released on his own recognizance at any stage of the proceedings.

§ 4115. Execution of sentences imposing an obligation to make restitution or reparations

If in a sentence issued in a penal proceeding of a transferring country an offender transferred to the United States has been ordered to pay a sum of money to the victim of the offense for damage caused by the offense, that penalty or award of damages may be enforced as though it were a civil judgment rendered by a United States district court. Proceedings to collect the monies ordered to be paid may be instituted by the Attorney General in any U.S. district court. Monies recovered pursuant to such proceedings shall be transmitted through diplomatic channels to the treaty authority of the transferring country for distribution to the victim.

CHAPTER 43 OF TITLE 28, UNITED STATES CODE

§ 636. Jurisdiction, powers, and temporary assignment

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(f) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

CHAPTER 153 OF TITLE 28, UNITED STATES CODE

CHAPTER 153—HABEAS CORPUS

2256. Jurisdiction of proceedings relating to transferred offenders.

§ 2256. Jurisdiction of proceedings relating to transferred offenders

When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted offenders—

(1) the country in which the offender was convicted shall have exclusive jurisdiction and competence over proceedings seeking to challenge, modify, or set aside convictions or sentences handed down by a court of such country;

(2) all proceedings instituted by or on behalf of an offender transferred from the United States to a foreign country seeking to challenge, modify, or set aside the conviction or sentence upon which the transfer was based shall be brought in the court which would have jurisdiction and competence if the offender had not been transferred;

(3) all proceedings instituted by or on behalf of an offender transferred to the United States pertaining to the manner of execution in the United States of the sentence imposed by a foreign court shall be brought in the United States district court for the district in which the offender is confined or in which supervision is exercised and shall name the Attorney General and the official having immediate custody or exercising immediate supervision of the offender as respondents. The Attorney General shall defend against such proceedings;

(4) all proceedings instituted by or on behalf of an offender seeking to challenge the validity or legality of the offender's transfer from the United States shall be brought in the United States district court of the district in which the proceedings to determine the validity of the offender's consent were held and shall name the Attorney General as respondent; and

(5) all proceedings instituted by or on behalf of an offender seeking to challenge the validity or legality of the offender's transfer to the United States shall be brought in the United States district court of the district in which the offender is confined or of the district in which supervision is exercised and shall name the Attorney General and the official having immediate custody or exercising immediate supervision of the offender as respondents. The Attorney General shall defend against such proceedings.

CHAPTER 48 OF TITLE 10, UNITED STATES CODE

CHAPTER 48.—MILITARY CORRECTIONAL FACILITIES

955. Prisoners transferred to or from foreign countries.

§ 955. Prisoners transferred to or from foreign countries

(a) When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted offenders, the Secretary concerned may, with the concurrence of the Attorney Gen-

eral, transfer to said foreign country any offender against chapter 47 of this title. Said transfer shall be effected subject to the terms of said treaty and chapter 306 of title 18, United States Code.

(b) Whenever the United States is party to an agreement on the status of forces under which the United States may request that it take custody of a prisoner belonging to its armed forces who is confined by order of a foreign court, the Secretary concerned may provide for the carrying out of the terms of such confinement in a military correctional facility of his department or in any penal or correctional institution under the control of the United States or which the United States may be allowed to use. Except as otherwise specified in such agreement, such person shall be treated as if he were an offender against chapter 47 of this title.

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