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Rosado v. Civiletti Tests the United States-Mexico Prisoner Transfer Treaty

The United States-Mexico Prisoner Transfer Treaty[1] has spawned a handful of *habeas corpus* suits in its short life.[2] One of the most recent cases is *Rosado v. Civiletti,* which concerned the situation of three United States nationals imprisoned in Mexico who were transferred to the United States under the Treaty and who subsequently petitioned for *habeas corpus* relief from United States custody. The petitioners' case was ultimately rejected in the face of overwhelming policy considerations.[3] This decision displays a critical weakness in the Treaty as it is applied by the courts.

In response to public concern for the treatment of American prisoners in Mexico, Congress undertook extensive hearings and eventually approved a treaty proposed by Mexico, under the terms of which nationals of either nation would be allowed to serve out the remainder of their prison terms in their state of nationality. Although the transferred prisoners may benefit from amelioration of the condition of their incarceration under the Treaty,[4] the transferring state retains exclusive jurisdiction over any proceedings to challenge, modify, or set aside a conviction or sentence.[5] Primarily, the prisoners must consent to the transfer.[6]

In this case, the petitioners were arrested for alleged narcotics offenses[7] in various Mexican airports as they were starting on their respective vacations. For several days, they were violently tortured in order to draw out confessions. Transferred to prison after interrogation, they paid large sums of money extorted for the basic necessities of life, for protection, and for "dormitory fee[s],"[8] in addition to suffering continual torture[9] and lack of heat and toilet facilities. Their imprisonment in Mexico lasted about twenty-five months. They lived "in daily fear of bodily harm

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1. Prisoner Transfer Treaty, Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718 [hereinafter cited as the Treaty]. The enabling statute is contained in 18 U.S.C. § 3244 (Supp. II 1978).

2. *See, e.g.,* Mitchell v. United States, 483 F. Supp. 291 (E.D. Wis. 1980); Pfeifer v. Bureau of Prisons, 468 F. Supp. 920 (S.D. Cal. 1979), *aff'd* 615 F.2d 873 (9th Cir. 1980).

3. 621 F.2d 1179 (2d Cir. 1980).

4. Advantages to the prisoner also include: (1) being held in a familiar cultural setting with better accessibility by families; (2) the receiving state's law governs parole, which is unavailable to drug offenders in Mexico; and (3) challenges to the constitutionality of the Treaty will be heard by the receiving state.

5. Treaty, art. VI, 18 U.S.C. § 3244(1).

6. Treaty, art. VI(2), 18 U.S.C. § 3244(2).

7. No evidence was ever found or produced against any of the petitioners.

8. 621 F.2d at 1185 n.12.

9. Velez v. Nelson, 475 F. Supp. 865, 870 n.12 (D. Conn. 1979).

and believ[ed] that they would be killed if they remained incarcerated in Mexico."[10]

The petitioners were accorded minimum legal process. One week and a half after their arrest and interrogation, they were briefly informed of the cocaine importation charges as they stood crowded in a pen "separated from the courtroom by a chain link fence."[11] A sort of arraignment followed, and the officiating law secretary offered to help them at that time for a fee, but they did not have enough money.[12] Next, there was an appearance, without the opportunity for confrontation, by the officers who had arrested just one of the petitioners.[13] Seven months later the petitioners were sentenced to nine years imprisonment.[14]

Petitioners initiated *habeas corpus* proceedings in the United States after their return, challenging that their consent to custody in the hands of the United States was obtained under extreme coercion and duress. The district court granted their petitions,*Velez v. Nelson,*[15] extensively reiterating testimony regarding conditions of their Mexican imprisonment, and saying that "under the unique facts of this case, petitioners' consents were not truly voluntary, and are therefore, invalid."[16] On appeal by the United States, the Court of Appeals, Second Circuit, reversed, holding that: (1) access to a United States Court is available where petitioners are incarcerated under federal authority pursuant to foreign convictions and make a persuasive showing that their convictions were obtained without benefit of any process whatsoever;[17] but, (2) petitioners were denied *habeas corpus* relief, on the principle of estoppel, by their consent to the Treaty's assignment of jurisdiction.

The court's rationale was threefold. First, a desire to protect our relations with Mexico colors adjudication of the question since Mexico would not have accepted the Treaty if the United States had required the right to review Mexican criminal convictions.[18] Second, the statutory requirement that prisoners' consents be given freely and knowingly was fulfilled to the satisfaction of the United States magistrate after interviewing the prisoners.[19] And third, in the interest ("of paramount importance"[20]) of

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10. 621 F.2d at 1183.

11. *Id.* at 1185.

12. *Id.*

13. *Id.* at 1186.

14. "At no time did they see the judge who sentenced them, obtain the assistance of counsel, or confront the witnesses against them." *Id.*

15. 475 F. Supp. at 865.

16. *Id.* at 874.

17. The court expressly declined to impose the United States standard of process on foreign systems. 621 F.2d at 1197-98. *Cf.* United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974) (normally a court will not inquire into internal legal procedures which await an offender upon extradition).

18. 621 F.2d at 1200.

19. 621 F.2d at 1187. *See also* 18 U.S.C. § 4108.

20. 621 F.2d at 1200.

other Americans imprisoned in Mexico, now and in the future, the petitioners can and must be held to their original agreements since their consents were found free from coercion.[21]

Problems in this decision rest in large measure with the Treaty itself and its enabling legislation. Congress was concerned with obtaining consents, or waivers, that would stand up to constitutional challenge in order to ensure the validity of the Treaty[22] and the smooth processing of the transfers. The intention was to place transferring prisoners in an estoppel posture by their acceptance of the stated conditions, especially regarding Mexican jurisdiction over challenges to convictions.[23] They therefore approved a "voluntary and with full knowledge of the consequenses thereof"[24] standard by which to judge validity of consent. This court applied the standard very strictly, whereas the district court had found as a matter of fact that petitioners' consents were the result of duress produced by brutality and were thus constitutionally suspect.[25] Under the "unique" facts of the case, the consents were invalidated in the district court and writs granted.[26] But the Second Circuit, taking their authority from *North Carolina v. Alford*,[27] said of these petitioners, "[i]f [their] consents to transfer are viewed in light of the alternatives legitimately available to them, it cannot be seriously doubted that their decisions were voluntarily and intelligently made."[28] The *Alford* standard they asserted was: "not whether the defendant's decision reflected a wholly unrestrained will, but rather whether it constituted a deliberate, intelligent choice between available alternatives."[29] In contrast, the district court had said the extent of duress was so great that "petitioners would have signed anything, regardless of the consequences, to get out of Mexico,"[30] a fact recognized by the Second Circuit, but given no weight by them. In light of their acceptance of this finding by the lower court, the appellate court's holding amounts to a rule that a criminal defendant who is offered a choice between two alternatives, and chooses either, waives his right to relief on the ground of duress, no matter what the circumstances.[31] It

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21. "We refuse to scuttle the one certain opportunity open to Americans incarcerated abroad to return home, an opportunity, we note, the benefit of which [the petitioners] have already received." *Id.*

22. *Id.* at 1198.

23. *Id.*

24. Treaty, art. V, para. 1, 18 U.S.C. § 3245.

25. 475 F. Supp. at 873. *See also* Brown v. Mississippi, 297 U.S. 278 (1936).

26. 475 F. Supp. at 874.

27. 400 U.S. 25 (1970).

28. 621 F.2d at 1191.

29. *Id.*

30. *Id.* at 1183.

31. 621 F.2d at 1190.

> If, here, the conduct of Mexican officials on Mexican soil were held to be determinative of the voluntariness of an American prisoner's consent to transfer, those prisoners most desperately in need of transfer to escape torture and extortion, including the petitioners at bar, would never be able to satisfy a

must follow that if no consent or waiver of constitutional rights can be found to be involuntary, under its own facts, then no consent can be found to be voluntary. To that extent, the Treaty's standard is applied unconstitutionally by this court. By limiting the possibilities of an invalid consent, the holding impairs the protection that the Treaty provides by requiring a valid consent for waiver of challenge to the Mexican conviction in other than Mexican courts. It seems especially unfair to use consent in this context against a *habeas corpus* petitioner on the basis of a theory of estoppel.[32]

The causes of international human rights and of the fundamental rights of persons in foreign prisons would be better served if the United States assiduously pursued other nations' acknowledgement of and adherence to those rights rather than by such application of this particular treaty. Although the idea is a good one, its execution leaves unchallenged a gross violation of rights by avoiding the issue and thus keeping it out of international focus. Perhaps the other treaties entered into in this same area[33] will be administered so as to vindicate Americans' rights, but in the case of the Mexican treaty, as *Rosado v. Civiletti* shows, there is just too much strain on the law's integrity for it to stand as is.

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magistrate that their consents were voluntarily given.

Id.

32. The estoppel theory requires reliance by the United States to its detriment. Granting that there is no law enforcement interest claimed by the government, the court upheld two other interests: (1) the government's interest in relations with Mexico by honoring its criminal convictions and recognizing the integrity of its criminal justice system (*but cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state doctrine)); and (2) the interest of those who will similarly become victims in the future. 621 F.2d 1190.

33. In addition to the treaties with Mexico and Canada, the Senate has approved a similar treaty with Bolivia. Treaties with Panama, Peru, and Turkey have been approved for ratification, but have not yet become effective. Each of these treaties contains a provision similar to article VI of the Mexican Treaty, which confers exclusive jurisdiction over challenges to convictions and sentences to the courts of the transferring nation. *See, e.g.*, Treaty on the Execution of Penal Sentences, Feb. 10, 1978, United States-Bolivia, T.I.A.S. No. 9219, *reprinted in* S. EXEC. DOC. No. 6, 95th Cong., 2d Sess. (1978).