International Prisoner Transfer

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I. Introduction

International prisoner transfer is a well-established, treaty-based mechanism for sending foreign nationals to their home countries to complete their U.S.-imposed sentences. Transfer allows prisoners to serve their sentences in their home cultures (where language, food, and customs are more familiar) and closer to friends and family. It also ensures that the home country, to which the prisoner will in almost every case be deported anyway if he completes his sentence in the United States, will understand precisely what his offenses of conviction in the United States entailed, ensuring that he will be monitored, be supervised, and receive needed treatment when he is released into that society. Perhaps most importantly for purposes of this discussion, it saves the U.S. taxpayer significant sums of money.

Why then is the program so poorly understood? Why are so few prisoners actually transferred? And what can be done to improve the situation? This article attempts to answer those questions and to highlight international prisoner transfer for U.S. policy makers seeking to improve sentencing practices and save U.S. tax dollars.

II. History of International Prisoner Transfer

The original international transfer treaties went into effect in the late 1970s when bilateral treaties were signed with Canada, Mexico, and a few other countries. Although there are still a number of bilateral treaties in existence, the overwhelming majority of treaty transfer relationships have been established through two multilateral treaties, the Council of Europe Convention on the Transfer of Sentenced Persons (the COE Convention), and the Inter-American Convention on Serving Criminal Sentences Abroad (the OAS Convention). The original intent of the treaties was not the transfer of foreign nationals out of the United States. It was, rather, the retrieval of American citizens who were incarcerated abroad in countries such as Mexico, Turkey, and Thailand, sometimes under extremely difficult conditions. As time has gone by, the numbers of Americans seeking to return to the United States has remained constant or dwindled. The numbers of foreign nationals in U.S. prisons seeking transfers to their home countries, however, continues to increase almost every year. Obviously, the Sentencing Guidelines have played an important role in this increase, both because the numbers of convicted persons serving sentences of incarceration (as opposed to being placed on probation, for example) have grown and because the length of these sentences has grown, giving inmates so much more incentive for transferring home.

III. How Our Treaty Partners View Their Transfer Relationships with the United States

In general, our treaty partners are not happy with the way we administer our part of the transfer program. The high denial rate is frustrating to some of our strongest diplomatic allies because it requires their consular officials to minister to the needs of their nationals in our custody for years, because it causes families of foreign prisoners considerable expense as they come to the United States to visit their loved ones, and because, to their way of thinking, it is so nonsensical. All of their nationals are going to be deported home sooner or later anyway, they argue, and denial of transfer is a disservice to the home countries. Prisoners who receive treaty transfers return home with their convictions a matter of record in the home country, and the home country's correctional system can decide when they are ready to be paroled and set parole conditions to protect those societies. When inmates are simply deported home at the end of serving their U.S. sentences, the details of their convictions (and often even the fact of conviction itself) are not known to the home government, and even if known this information usually does not allow the home government to set conditions on the freedom of the former U.S. prisoners because they have already served their full sentences.

These are difficult arguments to refute, and they justify vigorous efforts to transfer as many inmates as possible to home countries that maintain a principled correctional system.

IV. Disabilities Suffered by Foreign Nationals in Bureau of Prisons Custody

Prisons tend to be built, not surprising, where land is cheap and population density is low. In designating inmates, the official policy of the Bureau of Prisons is to

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attempt to locate American citizen inmates within 500 miles of their homes to facilitate family visits, but this policy is abandoned for foreign nationals. Little or no attempt is made to place foreign-born inmates close to their families or close to a port of entry for visitors from their home countries. Thus, there are Europeans and Canadians incarcerated in rural Texas, and Mexicans incarcerated along our northern border. Foreign nationals are used to fill in population gaps in remote institutions, which are often contract facilities with poor programming.

Because of their immigration status,[1] foreign nationals are not eligible to participate in the residential drug program. Pursuant to 18 U.S.C. § 3621, successful completion of the residential drug program can reduce a sentence of incarceration by up to one year. Also because of their immigration status, foreign nationals are not eligible for minimum-security institutions (the federal prison camps). Because the cost of incarceration in the federal system goes up as the security level goes up, this policy costs the taxpayers significant amounts of money, too.

Moreover, their time in American jails and prisons does not conclude on their release dates. Instead, they spend additional time in immigration custody even after their full sentence has been served while awaiting out-processing and transportation to their home country. This adds weeks, and sometimes months, to their time in U.S. custody.

V. Numbers of Foreign Nationals in U.S. Custody

Although it is surprisingly difficult to obtain precise figures, it is generally agreed that approximately 28 percent of all Bureau of Prisons inmates are foreign-born, and for the most part they are still citizens of their home countries.[2] (Some, of course, are naturalized U.S. citizens, who will be deported only if they lied to enter the United States and the government succeeds in denaturalizing them, but this situation is unusual.) Because of changes that entered immigration law through the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRAIRA") and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), almost everyone convicted of a federal felony today stands convicted of an "aggravated felony" and is therefore "removable" (the new term for deportable). This means that, with a few rare exceptions, these inmates will be deported at the end of their sentence from the United States and ordered never to return. It usually does not affect the outcome that some of these deportable aliens have very strong ties to the United States (e.g., all family members reside in the United States) and very weak ties to their country of citizenship (e.g., the deported persons do not speak the language of their country of citizenship). Most are going to their country of citizenship; it is just a question of when.

VI. Why Do So Few Foreign Nationals in U.S. Custody Apply for Transfer?

While these numbers are increasing, the Department of Justice receives only about 1,500 requests for international transfer every year. Why so few?

Although we have treaty transfer relationships with more than 100 countries, we do not have treaties with a half dozen countries with significant numbers of foreign nationals incarcerated here: Colombia, Cuba, the Dominican Republic, Jamaica, El Salvador, and Haiti. There are also no treaty relationships with a number of countries that have only a few nationals apiece in U.S. prisons—that is, many Asian, African, and Mideast countries.[3]

The application process was designed to be simple for those who speak no English, and it places virtually the entire burden of assembling the set of official documents which constitute an official application on Bureau of Prisons case managers. The case managers are like government employees everywhere, running the full gamut from dedicated public servants to time-serving bureaucrats. Some inmates beg to transfer, only to be ignored by their case managers. A few institutions are particularly bad in this respect, and everyone who works in the field has known about them for years, but neither case managers nor wardens are disciplined for failing to submit transfer applications in a timely fashion.

At least some inmates do not apply because they know that the denial rate is high and the program is anything but transparent. They assume that they will not be approved and do not see the point in trying.

Some do not apply because they do not understand that they will be deported anyway at the end of their sentences and, having lived in the United States for years, they hope to remain here with friends and family.

Some do not apply because case managers genuinely do not know that there is a treaty relationship with the home country or because they are confused about qualifications for transfer.[4]

As to state inmates—although every state can theoretically participate in the transfer program, only a few do so as a matter of policy. Those that do participate interpose many barriers to applying (e.g., requiring the inmate to have been through removal proceedings, and not providing any information on the program to inmates and correctional staff). The Department of Justice (which must also approve the state inmate for transfer and to which foreign governments appeal for help when the states do not cooperate) has mounted several outreach programs to the states to explain the benefits of transfer to them and to the United States as a whole, but these efforts have met with very limited success, and our federal system affords few tools to federal officials seeking to enforce treaty obligations, especially in the criminal justice area.[5] Perhaps this will change as states experience their own budget crises.

VII. Special Problem Situations: Mexico, Colombia, Cuba, and Canada

A large proportion of foreign nationals in the federal prison system are from these four countries. We have no treaty relationships with Colombia and Cuba, and our implementing legislation (18 U.S.C. § 4100 et seq.) forbids transfer to countries except pursuant to treaty. Even if

Colombia or Cuba signed the Council of Europe Convention, there would likely be a great reluctance to transfer prisoners to Colombia and Cuba because of the political differences and lack of confidence in the criminal justice systems of those countries.

The situation with Mexico is more complex. We have been transferring prisoners to and from Mexico since the late 1970s, and the Department of Justice has said that approximately 90 percent of the applications it receives are from Mexican nationals. In September 2008 the Bureau of Prisons published statistics showing that more than 17 percent of its total inmate population was Mexican.[6] Yet last year we transferred fewer than 200 prisoners home to Mexico. Here are the reasons, in roughly the order of importance:

1. The Government of Mexico has sharply limited the numbers of citizens it is willing to take back.
2. Our bilateral treaty with Mexico does not permit the transfer of those who are deemed to be domiciliaries[7] of the sentencing country.
3. Our bilateral treaty with Mexico does not permit the transfer of those whose offenses of conviction are immigration offenses.

Mexico has limited the numbers of citizens it is willing to take back for a host of reasons. Mexico's own prisons are already crowded. Feeding and housing more prisoners is not an attractive way to spend scarce government funds. Mexico has been pressured by the United States to reduce corruption in its prison system and to ensure that transferred Mexicans serve their full U.S. sentences; Mexico has responded to this pressure by refusing to take back citizens who have more than two or three years left to serve and by refusing to take back those who appear to have significant assets, which are viewed as a corrupting factor. As a result, the numbers of Mexicans transferred under the program have decreased even as the numbers incarcerated in the United States have doubled.[8]

Canada has long been a bright spot in the transfer program with the United States, at least from an economic point of view. Sentencing disparities and stark differences in conditions of confinement have meant that almost no U.S. citizens seek to transfer home, while substantial numbers of Canadians seek transfer from the United States. However, since the Conservative Party's coalition government took office in Canada approximately four years ago, the Correctional Service of Canada has introduced many new criteria for transfer which have caused lengthy delays in processing; indeed, some Canadians who have managed to run the whole gauntlet in the United States to a Department of Justice approval have been denied the right to return. Canada's liberal tradition may reassert itself in time, or the legal challenges that are being mounted to the administration of the transfer program in Canada may cause the Conservative government to rethink its views, but in the short term the United States has no recourse.

VIII. Congressional Mandates

Congress has been expressing frustration with our international prisoner transfer program since at least 1995, and it seems likely that those seeking legislative amendments to increase the numbers of outgoing transfers would find a sympathetic ear on the Hill. Two sections of the IIRAIRA spoke directly to the issue. Section 331 of the IIRAIRA required a single report from the secretary of state and the attorney general on the use and effectiveness of the treaties with the three countries with the greatest numbers of nationals incarcerated in the United States. That report focused on the transfer relationship with Mexico and, because it made no sense to focus on a transfer relationship that did not exist because there were no treaties in place, on the transfer relationships with Canada and the United Kingdom. Section 330 of the IIRAIRA requires the attorney general to file an annual report to Congress on international prisoner transfer "stating whether each prisoner transfer treaty to which the United States is a party has been effective in the preceding 12 months in bringing about the return of deportable incarcerated aliens to the country of which they are nationals and in ensuring that they serve the balance of their sentences."[9] These reports are made available to the public only through the Freedom of Information Act, which means that dissemination and criticism of them have been sharply limited.

IX. Countries to Which Transfer Should Almost Always Be Approved

There is almost no justification for refusing transfers to Canada, Israel, or any country in western Europe. These countries have principled correctional systems, even if they do not conform in every respect with our views on the benefits of lengthy incarceration. These countries also have mutual legal assistance treaties with the United States so that the occasional inmate who is needed later as a witness can usually be brought back.[10]

There are probably certain countries in eastern Europe and South America that also belong in this category. We need to confer with the Department of State and consult the roster of countries with which we have mutual legal assistance treaties to identify them.

X. How the Process Is Supposed to Work (*and Where It Frequently Breaks Down*)

1. Pursuant to Bureau of Prison program statements, all foreign national inmates are supposed to receive what is called a "team meeting" as part of their orientation within four weeks of arriving at their "designated" institution. Foreign nationals are supposed to have the international prisoner transfer program explained to them and be given a chance to sign a Transfer Inquiry Form at the team meeting.

   The time between sentencing and arrival at a designated institution is dead time for purposes of international transfer, and it can take months for an inmate to arrive at his designated institution.

2. After the inmate signs the Transfer Inquiry Form, the prison has up to sixty days within which to forward a set of official documents to Bureau of Prisons headquarters in Washington. The set of official documents includes the transfer inquiry form, presentence report, judgment, fingerprints, photographs, a sentence computation, and what is termed a "case summary." The case summary is a short-form presentence report that can be sent to the home country to give them the facts of the case and some information about the applicant. The case summary and the sentence computation are the only original written documents prepared in the prison.

   Depending on how comfortable the case manager is with writing, the case summary can be easy or difficult to prepare. It is not at all uncommon for the assembly of these documents to take more than sixty days. There is no disincentive for case managers and institutions to delay forwarding the official documents to Washington.

3. The official documents are reviewed for completeness by Bureau of Prisons headquarters and delivered twice a week to the International Prisoner Transfer Unit, a part of the Office of Enforcement Operations in the Criminal Division of the Department of Justice. The applications then wait several days or more for assignment to one of the analysts in the Unit. The analysts, who can be lawyers, paralegals, or law students, begin the process by requesting the views of the prosecutor and principal law enforcement agency on the proposed transfer, and by asking the Department of Homeland Security for the immigration status of the applicant.[11] Depending on the foreign government, the Department of Justice sometimes sends a set of documents to the other country so that the foreign government understands who is applying for transfer and can investigate and evaluate the situation itself.

   The internal processes of some law enforcement agencies have so many layers of bureaucracy that it can take months for them to return the requests for views. Their lengthy processes do not seem to yield more accurate or insightful information. Although the Department of Justice's official position is that requests for views should be returned within ten days, the Department does not enforce this in any way.

4. From this point forward, the process is mostly shrouded in mystery. The analysts consider the various views and write a kind of summary of the situation for the decision maker which includes the analyst's own recommendation. It appears that a supervisor in the unit reviews the file and adds his or her own recommendation. The file is then delivered to one of the officials with signature authority, usually within the Office of Enforcement Operations but occasionally to a higher official, who almost invariably follows the recommendations of the staff.

   A few analysts are remarkably quick to assemble the paperwork and make insightful recommendations to their superiors. *More typically there can be significant delay at this stage as analysts cope with heavy caseloads and other duties.*

5. The inmate, the foreign government, and the Bureau of Prisons are notified of the decision on the application. In what is often a vain effort to avoid additional correspondence, the Department of Justice gives a reason or reasons for a decision to deny an application.

   The reasons for decision given in denial letters are not always enlightening, meaning that the inmate and the foreign government are left with very little idea of what went wrong.

6. Where a decision has been made to approve the outgoing transfer, the foreign government is asked whether it will accept the prisoner and if so, how it will enforce the sentence. Will the prisoner be eligible for parole? Will the sentence be shortened?

   This can become a very time-consuming process as the foreign government struggles to answer these questions. Moreover, once the treaty relationship is well established, the general outlines of the foreign government's method of enforcing sentences is already known to the Department of Justice. The treaties do not permit a receiving country to increase the sentence, and it is so rare for a country to have no parole or furlough system that it makes little sense to ask for the details.

7. If the foreign government also approves the transfer, a consent verification hearing is scheduled and, after that, the foreign government is asked to make arrangements to take custody of the prisoner. If the inmate is slated to go to Canada or Mexico, he joins one of four regularly scheduled transfers from FCI Ray Brook in Upper New York State, or FCI LaTuna in Texas. If he is going anywhere else, his file enters the queue of situations requiring special consent verification hearings, which are required under 18 U.S.C. § 4107.

   Special consent verification hearings require "writting" the prisoner to the nearest federal courthouse, arranging a hearing before a federal magistrate-judge at which the government is represented by an assistant U.S. attorney and the inmate is represented by an assistant federal defender. Sometimes an interpreter must also be brought to the courthouse.

   Arranging the consent verification hearing can be a time-consuming process for Department of Justice staff and for any inmate not going to Canada or Mexico.

8. After the documents confirming the result of the consent verification hearing are received in Washington, the foreign government is notified that it must make arrangements with the Bureau of Prisons to pick up the inmate, almost invariably from an international airport. Once the inmate is turned over to the foreign officials at the airport, they must leave the country with no stops within the United States.

Because the inmate is almost always returned to his regular place of incarceration rather than moved to a port city after a consent verification hearing, there is a delay of at least six weeks between the conclusion of all legal proceedings and the turning over of the prisoner to the foreign authorities.

XI. Why the Denial Rate Is So High

As discussed above, only about 1,500 applications for transfer are received in a year. Perhaps even more surprisingly, the denial rate for these applications is approximately 60 percent. How can that be?

The United States views international prisoner transfer as a discretionary process; that is, the United States can deny a transfer for any reason or for no reason.[12] The treaties do not require the Department of Justice to give a reason when it denies a transfer, but the practice of giving reasons—either real or pretended—is well established. While there are at least ten reasons for denying a transfer, some are worth discussing here either because they occur so frequently or because they make no sense under current law.

A. Domiciliary Status

This is usually interpreted to mean that the applicant has been residing in a country with an intent to remain there permanently. Domiciliary status is conclusively presumed where the inmate has made the effort to obtain lawful permanent resident status in the United States, but even illegal aliens are said to be domiciliaries of the United States if they have lived here for a "lengthy" period of time. Only the Mexican treaty actually forbids the transfer of domiciliaries, but the general rule against their transfer is applied by the United States against all nationalities as a matter of policy. Sometimes the reasons for denial refer to "domiciliary status," while other times they refer to "ties to the United States." Either way, the result is the same: if the applicant has lived in the United States a significant amount of time, he will not be transferred.

B. "The Seriousness of the Offense"

While there are undoubtedly a few offenses that are too serious to allow the foreign national inmate to leave the jurisdiction of the United States, this reason for denial is given frequently and inconsistently. The transfer authorities do not seem to recognize that virtually all applicants are serving felony sentences because there simply isn't time to go through the whole process unless the inmate has several years to serve,[13] and that most federal felonies are "serious." In the view of the writer, the United States should not deny transfer because of the "seriousness of the offense" except in rare instances, but it has become code for "the prosecutor really doesn't want this applicant to be approved for transfer because he doesn't want him to receive a break," or "this sentence seems awfully long; there is probably more to this case than appears in my file," or simply, "I am not in the giving vein to-day."[14] Oddly, denials that are justified on this basis often advise the inmate that he may reapply in two years, and recommend that he do everything in his power in the coming two years to "address the reasons for denial over which he has some control." But where the "seriousness of the offense" is the only reason given for the denial, how can he do this?

C. The Need for Testimony

Inmates make plea agreements in which they commit to testifying against codefendants, and the United States must hold them to those agreements. The difficulty arises when the codefendants' whereabouts are unknown, or where they are known to reside in countries with vigorous extradition proceedings; in these cases, it happens repeatedly that inmates serve their whole sentences here in the United States before the codefendants are extradited here.

D. Restitution

No prisoner is allowed to transfer from the United States with unpaid restitution. When the first treaties were negotiated in the late 1970s, the Departments of State and Justice sent witnesses to the Hill to urge their ratification and to testify about the need for implementing legislation. Congress inquired as to how restitution and fines would be handled. As to restitution, the Executive Branch guaranteed to Congress that no foreign nationals would be allowed to transfer who still owed restitution.

At that time, sentencing was still a largely discretionary judicial prerogative, and judges were permitted to consider a defendant's ability to pay restitution in deciding whether to order it. Then came the Victim and Witness Protection Act of 1982, removing this discretion from sentencing judges. Now, restitution must be ordered for a large number of financial crimes, without regard to the defendant's ability to pay. The result? Applications for transfer are denied, these prisoners serve every day of their sentence here in the United States, and the victims still do not receive any restitution.

XII. Streamlining the Process—Reducing the Time Spent in U.S. Custody

The following changes would not require treaty renegotiation or amendment of U.S. law.

1. Immediate repatriation for certain nationals who have arrived in the United States pursuant to extradition. A few countries, notably Israel and the Netherlands, have either formal or informal agreements about transfer in their extradition treaties with the United States, which require transfer. Where the result is a foregone conclusion, the long decision process seems particularly wasteful. In these cases, judicial removal orders and inmate consent to transfer should take place in the sentencing courtroom, and pickup of the prisoner by foreign correctional officers should take place immediately thereafter.

2. Consider *all* foreign nationals whose countries usually take their own citizens back for transfer, and offer it to those who have been approved by the United States. For good or ill, federal prisoners have no right to be incarcerated in any particular place or region. Why limit transfer to those who have expressed an affirmative desire to go home, or delay consideration of those who will invariably apply? If federal prosecutors were directed to forward the presentence reports and judgments on these foreign nationals to Washington as part of closing a case, it would be fairly simple for the Department of Justice to make a preliminary determination of eligibility while the foreign government assembles its own file.
3. Interpret the statutory requirement for a consent verification hearing to allow videoconferencing. This would eliminate the necessity of bringing the inmate to a federal courthouse, a step that the Bureau of Prisons and U.S. marshals insist cannot be accomplished reliably in less than five and a half weeks, even if the prison and courthouse are very near one another.
4. When a prisoner is approved for an outgoing transfer, the foreign government can merely be advised of that fact and asked when and where within the United States (New York, Los Angeles, or Miami) it would like to pick him up. As it is done now, the pickup is arranged only after the consent verification hearing has been completed, meaning that the inmate is returned to his designated institution until arrangements have been finalized, whereupon another six weeks are consumed by moving him to the pickup location.
5. Advise Congress formally that the Departments of State and Justice no longer consider it reasonable to deny transfer to inmates with court-ordered restitution where the presentence report does not evidence ability to pay, and that this commitment will be abandoned if Congress does not renew its objection within some reasonable period of time.
6. Relax the definition of domiciliary so that more people who want to transfer can obtain approval. The transfer of illegal aliens should not be defeated by a finding that they are domiciliaries or because of the strength of their ties here no matter how long they have been in the United States.

XIII. More Complicated Proposals for Reducing the Foreign National Prison Population[15]

Widespread deportation of prisoners significantly in advance of their projected release dates is authorized by law,[16] but it has run into heavy opposition from prosecutors and no implementing regulations have ever been written. It is also not fair to American citizen codefendants who will not receive such consideration. However, American citizens receive advantages that foreign nationals do not—such as halfway house placement in advance of release, and service of sentence in a camp. It would be logical and principled to consider reductions in term for foreign nationals to compensate for the benefits that are provided to Americans. Perhaps an across-the-board percentage reduction in sentence could be applied to the sentences of foreign national. What we want to do, though, is avoid involving the immigration authorities in detention prior to deportation of such persons until the immigration system has undergone a massive improvement, or we will find that we are incarcerating these individuals in immigration prisons rather than in regular prisons. This has apparently happened in some locations. A federal law authorizes deportation in lieu of further incarceration, but the immigration authorities have never coordinated with the Federal Bureau of Prisons and Department of Justice to write regulations to implement the process. A few of the states have, however, with the result that the state correctional system saves money by transferring its foreign inmates to federal immigration custody.

Other possibilities are described in the following paragraphs.

A. Building U.S. Prisons in Mexico

This possibility was explored in the early and mid-1990s and abandoned because (1) there was scant indication that we would receive permission, let alone cooperation, from the Government of Mexico, and (2) there were formidable liability problems. Nevertheless, this proposal deserves another look given the numbers of Mexican nationals in U.S. prisons, the desperate desire on the part of many of them to serve their sentences closer to their families, and the cost savings that would result from incarcerating them in Mexico.

Alternatively, we could renounce the bilateral Mexican treaty and its domiciliary clause so that transfers would then proceed between the two countries pursuant to the COE or OAS conventions. Virtually every foreign national in BOP custody will be deported, even if he has spent his whole life in the United States and all of his family continues to reside here; let these people begin to make the adjustment to the other culture as soon as possible. No one benefits when they are retained here for their full sentence.

B. Renegotiating the Treaties to Avoid the Necessity of Prisoner Consent to a Transfer

This approach was recommended by Congress in 1996 and caused much unhappiness in the Department of State. There is also likely to be at least some resistance from our treaty partners. This is probably too complicated, but it should perhaps be reconsidered. It certainly justifies implementation of the simpler approaches to improve the process.

C. Amending 18 U.S.C. § 4100 to Eliminate the Need for a Consent Verification Hearing

There is no reason to require a full-blown “consent verification hearing,” as a condition of every transfer. Why not handle this the way every other country does, on the papers?

D. Amending 18 U.S.C. § 4100 to Eliminate the Need for a Treaty

A few countries would be willing to accept an occasional, ad hoc prisoner transfer, but signing a multilateral transfer treaty does not appeal to them; they fear that the situation will somehow get out of hand. The United States does not enjoy any advantages by insisting that a treaty relationship must be the exclusive means for the transfer of prisoners.

XIV. Unintended but Foreseeable Consequences of Reducing the Prison Population

No matter what the legal mechanism, there will be consequences if the inmate population of the Federal Bureau of Prisons is reduced. Caseloads will go down, meaning that the remaining U.S. citizen inmates could, at least theoretically, receive better educational programming and psychological counseling. Closing of facilities will throw some Bureau of Prisons employees out of work, and some of these employees are unionized, which makes the Bureau itself reluctant to tangle with them. Many facilities are placed in remote areas where land is cheaper and far from large urban areas where there are more employment opportunities. To the degree possible, the closure of facilities should probably be planned for regions where job growth is expected.

XV. Conclusion

Because such a large proportion of foreign inmates in Federal Bureau of Prisons custody are from Mexico, the transfer program alone could not greatly reduce the numbers of foreign inmates. The transfer program could, however, repatriate perhaps 4 percent to 10 percent of the inmate population if it were determined to do so. The bureaucracy to do this is in place and for the most part we would have the cooperation of our treaty partners.

Notes

1 Stephen Sady discusses these issues in his article on reducing unauthorized over-incarceration.

2 The Federal Bureau of Prisons keeps statistics only on the birthplace of inmates and assumes that everyone is a citizen of the country in which he was born. Although this approach produces a rough approximation of citizenship, it ignores the fact that every country sets its own standards for deciding who its citizens are, the fact that borders have changed in many areas, and the fact that some individuals are dual nationals. The fifty states all have their own ways of establishing or estimating citizenship of their inmates; in the absence of evidence to the contrary, this paper assumes that the citizenship statistics for state inmates, taken as a whole, are probably consistent with those of the federal system.

3 The Department of State resists negotiating new bilateral treaties, arguing that this process is labor-intensive and produces no benefits that are not realized by extending the multilateral Convention on the Transfer of Sentenced Persons to additional signatories. It is also clear that there are many efficiencies in having most or all treaty partners adhere to the same standards, definitions, and procedures and that this is much more likely to take place when all countries are bound by the same treaty. It appears, though, that at least a few countries are not even aware of the possibility of establishing a treaty relationship with the United States by signing the Council of Europe Convention when neither the United States nor the other country is a member of the Council of Europe. It might be helpful if the Department of State began a more aggressive education campaign in this regard—something it tends to undertake only when there is a U.S. citizen incarcerated in the foreign country.

4 For example, the process for updating the Program Statement that tells case managers about the transfer program is lengthy and cumbersome. The Bureau of Prisons does not simply go to the online version of the program statement and add a new country to the country list. In addition, case managers sometimes do not think a prisoner can apply for transfer if he still owes any portion of his fine or special assessment (he can), or if he has an appeal pending (although the treaties are clear that an inmate may not *transfer* with an appeal pending, he should be allowed to *apply* for transfer and if approved, withdraw his appeal.)

5 *See Medellin v. Texas*, 128 S. Ct. 1346 (2008).

6 According to the Bureau of Prisons "Quick Facts," the foreign population is divided as follows: 17.2 percent from Mexico, 1.5 percent from Colombia, 0.9 percent from Cuba, 1.4 percent from the Dominican Republic, and 5.5 percent whose citizenship is "other/unknown," which would include a significant number of inmates from Canada.

7 Our treaty with Mexico requires "that the offender not be a domiciliary of the Transferring State." Article II (3). The term is not defined in the treaty. It has been widely interpreted to mean someone who has attained lawful permanent resident status in the United States *or* someone who has lived in the United States some significant period of time and whose closest relatives live in the United States.

8 In 2000 there were about 16,000 Mexican citizens in federal custody, and a mere 285 were repatriated. Disappointing as that number was, the situation deteriorated further: in 2004, only 101 were repatriated; in 2005, only 115; and in 2006, only 113. Statistics for 2007 were still not available at the time this article went to press.

9 The Section 331 Report and all of the Section 330 Reports have gone to the House and Senate Judiciary Committees.

10 Until recently, the Government of Canada said that it could not send Canadians back to the United States once they were in Canada without going through full-blown extradition proceedings. That appears to no longer be its position, or perhaps it has simply thought of more creative ways of coercing Canadians to agree to return.

11 Significantly, the views of the sentencing judge are never asked, and where they have been volunteered (as in a Judgment), they are of little influence. The Department of Justice believes that transfer is the responsibility of the attorney general alone.

12 Federal courts refuse to review these decisions, saying that the attorney general's discretion in determining the wisdom of approving an international transfer application is unfettered. *See Bagguley v. Bush*, 953 F.2d 660 (D.C. Cir. 1991), and *Scalise v. Thornburgh*, 891 F.2d 640 (7th Cir. 1989), cert denied, 494 U.S. 1083 (1990).

In addition, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) introduced formidable requirements regarding the exhaustion of administrative remedies, meaning that inmates who seek to challenge the failure of Bureau of Prisons personnel to comply with the treaties and their own program statements must "grieve" the failure through multiple layers of the same prison bureaucracy, a formidable task for non-English speakers or for anyone who fears the power of the prison officials who have total power over their day-to-day lives.

13 Occasionally, applicants decide not to transfer at the last minute because the process has taken so long that they have only a few months left to serve. Because a transferring prisoner "brings his conviction home" with him, producing a clear record in the home country, some applicants begin to see that perhaps finishing the sentence in the United States and then simply going home by way of deportation offers some advantages.

14 Richard III, Act 4, Scene 2, by William Shakespeare.

15 The writer is indebted to Lisa A. Kahn, an attorney at the Department of Justice who authored a study on the feasibility of proposed improvements to the International Prisoner Transfer Program in June 1998.

16 *See* the AEDPA at 8 U.S.C. § 1252(h)(2)(A), which authorizes deportation of an alien if he is confined for a nonviolent offense (other than alien smuggling), so long as the attorney general finds such deportation "appropriate" and in the best interest of the United States.