

May 2020

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Michael R. de Lisle

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Recommended Citation

Michael R. de Lisle, Powell v. U.S. Bureau of Prisons: The Treatment of Mexican Work Credits by U.S. Authorities under the Prisoner Transfer Treaty with Mexico, 13 Denv. J. Int'l L. & Pol'y 124 (1983).

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defensive" intentions.⁴⁷ Although a well-reasoned approach, this is a highly unlikely alternative, in spite of the almost inevitable destabilization resulting from a unilateral breakthrough. A better and more palatable solution would be the simultaneous reduction of offensive weaponry by both nations, which would serve to demonstrate further the sincerity of their intentions. Recent developments demand that we begin *now* to re-evaluate our dependence on largely ineffective legal restraints and consider the propriety of these and other proposed methods designed to avoid the over-militarization of space as well as the catastrophic destabilization that would be likely to occur with the implementation of High Frontier.

Mark A. Clark

***Powell v. U.S. Bureau of Prisons:* The Treatment of Mexican Work Credits by U.S. Authorities Under the Prisoner Transfer Treaty with Mexico**

In its recent decision in *Powell v. U.S. Bureau of Prisons*,¹ the Court of Appeals for the Fifth Circuit determined that the work credits earned in a Mexican prison by a prisoner subsequently transferred to the United States represented only a conditional reduction in the offender's sentence. The court held that U.S. authorities could order such work credits forfeited when the offender violated the conditions of his parole. Through the court's interpretation of the terms of the United States-Mexico Prisoner Transfer Treaty,² the decision clarifies the Treaty's jurisdictional allocation of sentencing issues to the Transferring State and parole issues to the Receiving State.

The United States entered into the treaty negotiations with Mexico in response to public concern over the frequently inhumane treatment U.S. nationals received in Mexican prisons and out of a desire to lessen the bilateral tensions which resulted.³ Under the terms of the Treaty, U.S. nationals serving time in Mexico can be transferred to American custody for the remainder of their sentences.⁴ Mexican nationals held in U.S.

47. Buckley, *Share Defense Research*, Rocky Mt. News, Apr. 7, 1983, at 70.

1. 695 F.2d 868 (5th Cir. 1983).

2. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718.

3. Kowalski, *Penal Transfer Treaties and the Application of 'Unconstitutional Conditions' Analysis*, 12 U. Tol. L. Rev. 1, 5-6 (1980).

4. In addition to several conditions which must be met before a transfer can be ef-

prisons can be returned to their home country as well. In either case, the Receiving State assumes the role of jailer. The completion of the transferred offender's sentence will be carried out according to that State's laws, including any provisions for parole,⁵ but the sentence itself can only be challenged in the Transferring State.⁶ *Powell* focuses on this division of jurisdiction.

Powell, an American national, was convicted of a drug offense in Mexico and sentenced to six years and three months in prison. Initially, the term was due to end August 13, 1982, but Powell earned 336 days of work credits, and the Mexican authorities advanced his release date to September 8, 1981. Powell was transferred to the United States in 1978, pursuant to the terms of the Treaty. The U.S. authorities released Powell on parole in September of that year. While still on parole, Powell was convicted of another drug-related offense, this time in the United States. The U.S. Parole Commission revoked his parole and ordered additional time added to the two year sentence he received for his latest conviction.⁷ The order forfeited the work credits which Powell had earned in Mexico.

Powell initiated habeas corpus proceedings, arguing that the work credits permanently reduced his original sentence and could not be forfeited under Articles V(3) and VI of the Treaty.⁸ The District Court for the Northern District of Texas agreed.⁹ It granted the writ and ordered that the sentence be recomputed to restore the work credits. The Fifth Circuit reversed, finding that the work credits constituted only a condi-

tioned, the consent of the prisoner, the Transferring State and the Receiving State to the transfer is required. See Treaty on the Execution of Penal Sentences, *supra* note 2, arts. II & IV.

5. *Id.* at art. V(2).

6. *Id.* at art. VI. This provision has been the subject of several attacks on the Treaty's constitutionality, in both cases and law review articles. See, e.g., *Rosado v. Civiletti*, 621 F.2d 1179 (2nd Cir. 1980), *cert. denied*, 449 U.S. 856 (1980); and *Pfeiffer v. United States Bureau of Prisons*, 615 F.2d 873 (9th Cir. 1980), *cert. denied*, 447 U.S. 908 (1980). For a sampling of representative law review articles, see Abramovsky & Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275 (1979); Bassiouni, *Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada*, 11 VAND. J. TRANSNAT'L L. 249 (1978); and Robbins, *A Constitutional Analysis of the Prohibition Against Collateral Attack in the Mexican-American Prisoner Exchange Treaty*, 26 U.C.L.A. L. REV. 1 (1978).

7. Powell was ordered to serve two years, four months and seventeen days. The presumptive parole date was set as March 1, 1982. *Powell*, 695 F.2d at 869.

8. Article V(3) provides: "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 Transferring State." The pertinent part of article VI provides: "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."

9. *Powell*, 695 F.2d at 869-70 n.2. Footnote 2 of the federal circuit court opinion discussed the opinion of the lower court, which stressed time constraints and rejected the recommendation of the magistrate that the issue be referred to the Mexican courts for determination. The federal district court also asserted that the Mexican courts would hold that Powell's work credits operated to reduce his prison sentence permanently.

tional reduction in Powell's sentence.

After disposing of Powell's mootness argument,¹⁰ the court turned to the issues surrounding the forfeiture of the work credits. It found that the only clearly applicable Treaty provision stated that the laws of the Receiving State govern the completion of the transferred prisoner's sentence, including the granting of parole, unless another term of the Treaty provided otherwise.¹¹ The provisions relied upon by Powell dealt only with the modification or improper enforcement of the sentence handed down by the Mexican courts. Since Powell's work credits were administratively awarded, they were not part of the sentence of the court.¹² The court thus found the Treaty articles cited by Powell inapplicable.

Once the Fifth Circuit concluded that no other Treaty term removed jurisdiction of the matter from the Receiving State, the court was faced with the dilemma of deciding how American laws could be applied to a foreign penal program. Using the legislation passed to implement the Treaty in the U.S.,¹³ the court drew an analogy between work credits and the good time credits awarded in the U.S. prison system. Because the two credit systems are treated as equal under the implementing legislation and good time credits may be revoked because of parole violations, the court reasoned that work credits should also be forfeitable. In a footnote, the court cited Mexico's Penal Code to show that Mexico would also consider the award of work credits as conditioned upon the offender's continued good behavior.¹⁴

The *Powell* decision is in harmony with *Boyden v. Bell*,¹⁵ a Ninth Circuit decision involving the United States-Canada Prisoner Transfer Treaty.¹⁶ The *Boyden* case concerned a prisoner transferred to the United States after being sentenced to twenty years of imprisonment by a Cana-

10. Powell argued that the full term of the sentence imposed by the Mexican court had ended on August 13, 1982, and that a reversal of the district court would have no effect. In addition, article V(3) does not permit the U.S. to extend the sentence beyond that date. The Fifth Circuit pointed out that Powell had been released pending this appeal and determined that the sentence would terminate with the expiration of the six year and three month term, not the specific date of August 13, 1982. The six year and three month period would expire when Powell served the balance owed on that term at the time of his early release. *Id.* at 870.

11. Article V(2) provides in pertinent part: "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."

12. *Powell*, 695 F.2d at 871-72.

13. Act of Oct. 28, 1977, § 1, 18 U.S.C. §§ 3244, 4100-4115 (Supp. V 1981). The court quoted specific sections of section 4105(c), which provides in subpara. (1) that "all credits for good time, for labor or any other credit" awarded by the Transferring State will be added to the good time credits given by the United States. *Powell*, 695 F.2d at 871.

14. *Powell*, 695 F.2d at 871 n.5.

15. *Boyden v. Bell*, 631 F.2d 120 (9th Cir. 1980), *cert. denied*, 454 U.S. 1051 (1981).

16. Treaty on the Execution of Penal Sentences, Mar. 2, 1977, United States-Canada, 30 U.S.T. 6263, T.I.A.S. No. 9522.

dian court. The Canadian authorities informed the U.S. authorities that the prisoner was entitled to 1,827 days of remission credit over the life of the sentence. The Ninth Circuit, faced with a Treaty very similar to the Treaty with Mexico and the same implementing legislation,¹⁷ concluded that U.S. authorities could prorate the prisoner's remission credits before awarding him any good time credits.¹⁸ In both the *Boyden* case and the *Powell* case, American authorities were permitted to modify sentence reductions awarded by foreign governmental authorities other than the sentencing courts. The Ninth Circuit's reasoning was nearly identical to that of the *Powell* court.¹⁹

The Fifth Circuit court in *Powell* felt no need to consult the Mexican government concerning the classification of work credits as conditional sentence reductions. Once it found Treaty provisions allowing application of U.S. law to the case, the court ignored any interest which Mexico might have had in its outcome. In addition, the court saw no conceptual difficulty in basing its decision to permit the revocation of the credits earned *before* the prisoner's transfer on a Treaty provision that only granted U.S. jurisdiction over the *completion* of the offender's sentence. Given the basic similarities between all the prisoner transfer treaties to which the United States is a party,²⁰ the reasoning of the *Powell* decision could well be applied in situations involving such treaties. Although decisions such as *Powell* are not likely to harm foreign relations significantly, future prisoner transfer treaties should be carefully drafted to avoid any potential misunderstandings.

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17. Articles V(2) and (3) of the Treaty with Mexico appear almost verbatim in the Treaty with Canada in articles IV(1) and (3) respectively. The same legislation is used to implement all prisoner transfer treaties to which the United States is a party.

18. The prisoner was allowed 240 days of Canadian remission credits to be combined with over 2,084 days of good time credits awarded under U.S. law. *Boyden*, 631 F.2d at 122.

19. The court stated specifically that it did not "accept *Boyden's* argument that the proration of remission credits contravenes the 'exclusive jurisdiction' of Canadian courts under art. V of the Treaty. Remission credits do not modify the term of a prisoner's sentence, but determine his release on parole." *Id.* at 123 n.11.

20. In addition to the Treaty with Canada, note 16 *supra*, see Treaty on the Execution of Penal Sentences, Feb. 10, 1978, United States-Bolivia, 30 U.S.T. 796, T.I.A.S. No. 9219; Treaty on the Execution of Penal Sentences, Jan. 11, 1979, United States-Panama, ___ U.S.T. ___, T.I.A.S. No. 9787; Treaty on the Enforcement of Penal Judgments, June 7, 1979, United States-Turkey, ___ U.S.T. ___, T.I.A.S. No. 9892; Treaty on the Execution of Penal Sentences, July 6, 1979, United States-Peru, ___ U.S.T. ___, T.I.A.S. No. 9784. All of these treaties permit the Transferring State to retain sole jurisdiction over the sentence to be governed by the laws of the Receiving State. See also Note, *Prisoner Transfer Treaties: Need for the Elimination or Modification of the Retention Provision*, 13 CAL. W. INT'L L.J. 321, 325 (1983).