ORAL ARGUMENT NOT YET SCHEDULED

No. 16-5373

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATTHEW SLUSS,
Plaintiff – Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,
Defendant – Appellee.

Appeal from the United States District Court
for the District of Columbia, No. 1:14-cv-00759-CRC
(Hon. Christopher R. Cooper)

BRIEF OF APPOINTED *AMICUS CURIAE* IN SUPPORT OF APPELLANT MATTHEW SLUSS

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Appointed Amicus Curiae in Support of Matthew Sluss

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As called for by Circuit Rule 28, *Amicus Curiae* states:

A. Parties and *Amici*

The parties to this proceeding and in the proceedings before the district court are the plaintiff-appellant Matthew Sluss and the defendants-appellees U.S. Department of Justice. This Court appointed Professor Erica Hashimoto, Director of the Appellate Litigation Program of the Georgetown University Law Center, as *Amicus Curiae* to present arguments in support of Mr. Sluss.

B. Rulings Under Review

Mr. Sluss appeals the November 18, 2016, Order entered by the Honorable Christopher R. Cooper of the United States District Court for the District of Columbia granting Appellees' motion to dismiss for failure to state a claim. J.A. 181.

C. Related Cases

This case has previously been before this Court on review, and this Court reversed and remanded the case to the district court. *Sluss v. DOJ*, No. 15-5075 (D.C. Cir. Oct. 6, 2015). Mr. Sluss has separately filed a

Freedom of Information Act request against the Department of Justice.

Sluss v. DOJ, No. 1:17-cv-00064 (D.D.C. Jan. 11, 2017).

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GLOSSARY OF ABBREVIATIONS

APA: Administrative Procedure Act

Convention: Council of Europe's Convention on the Transfer of Sentenced Persons

DOJ: Department of Justice

HHS: Department of Health and Human Services

IPTU: Department of Justice International Prisoner Transfer Unit

OFAC: Office of Foreign Assets Control

Ratification Report: The Senate Committee on Foreign Relation's Report (recommending that the U.S.-Canada Treaty be ratified)

U.S.-Canada Treaty: Treaty on the Execution of Penal Sentences, Can.-U.S.

STATEMENT OF JURISDICTION

This is an appeal from the final judgment of the United States District Court for the District of Columbia, which had federal-question jurisdiction over the case, 28 U.S.C. § 1331, as the case arose under the Administrative Procedure Act, 5 U.S.C. § 702. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered its final judgment on November 18, 2016, and Mr. Sluss timely filed his Notice of Appeal on December 1, 2016. *See* Fed. R. App. Proc. 4(a)(1)(A).

STATEMENT OF THE ISSUES

I. Whether the U.S.-Canada Treaty's requirement that the Attorney General shall consider if transfer would be in the "best interests" of the transferee when deciding prisoner transfer requests provides a manageable standard for a court to review under the Administrative Procedure Act.

II. Whether the district court erred in concluding that the Attorney General's denial of Mr. Sluss's transfer request was not an abuse of discretion under the Administrative Procedure Act where the Attorney General provided no record demonstrating consideration of whether transfer was in Mr. Sluss's best interests.

STANDARD OF REVIEW

This Court reviews grants of motions to dismiss for failure to state a claim *de novo*. *See Cierco v. Mnuchin*, 857 F.3d 407, 414 (D.C. Cir. 2017). The Court treats "the complaint's factual allegations as true . . . granting plaintiff the benefit of all inferences that can be derived from the facts alleged." *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 314–15 (D.C. Cir. 2014) (citations and alterations removed). When the district court has reviewed an agency action under the Administrative Procedure Act, this Court "review[s] the administrative action directly, according no particular deference to the judgment of the District Court." *Fox v. Clinton*, 684 F.3d 67, 74 (D.C. Cir. 2012) (citation omitted).

STATEMENT OF THE CASE

Appellant Matthew Sluss, a Canadian citizen, is a federal prisoner incarcerated at the Federal Correctional Center in Petersburg, Virginia. J.A. 96. Born in Canada, Mr. Sluss has sought for the past four years to serve his prison sentence in Canada. *Id.* He retains his Canadian citizenship, has established contacts with the Canadian Embassy, and continues to exchange correspondence with them. *See* J.A. 60–61, 126–27. Mr. Sluss has even tried to revoke his United States citizenship but was not permitted because he is currently incarcerated, serving a prison sentence of 396 months after pleading guilty to one count of advertising child pornography. J.A. 54, 96-97.

Mr. Sluss first requested transfer to a Canadian prison under the Treaty on the Execution of Penal Sentences, Can.-U.S. ("the U.S.-Canada Treaty") in 2013. J.A. 97.[1] The DOJ's International Prisoner Transfer Unit ("IPTU") denied his request in 2014. *Id.* The IPTU letter denied Mr. Sluss's transfer request because of "the seriousness of the offense" and his "criminal history" and because Mr. Sluss had "become a

[1] The text of the U.S.-Canada Treaty can be found in the Statutory Addendum at A-3.

domiciliary of the United States" and had "insufficient contacts with the receiving country." J.A. 47.

Mr. Sluss requested reconsideration but again was denied. J.A. 87–88. Explaining its decision, the IPTU stated that "[u]nder all prisoner transfer treaties . . . the sentencing countr[y] ha[s] total discretion to approve or deny a prisoner's transfer request." J.A. 87. It directed Mr. Sluss to review the DOJ's website, noting in its letter that the criteria used for all international prisoner transfer requests included the seriousness of the offense, criminal history, and the prisoner's family and social ties to the sending and receiving countries. *Id.* The letter noted that "one of the purposes" of the international transfer program is to relieve "special hardships" faced by prisoners such as "cultural differences" that did not apply to Mr. Sluss. *Id.*

Proceeding pro se, Mr. Sluss filed this action against the DOJ in the district court asserting that the IPTU acted arbitrarily and capriciously in denying his transfer request because the IPTU failed to consider his best interests as required by the U.S.-Canada Treaty. J.A. 8, 10.[2] He

[2] Mr. Sluss captioned his complaint as a Motion for a Writ of Habeas Corpus, but in the first sentence and throughout his complaint, he made

asked the court to grant a writ of mandamus compelling the agency to comply with the U.S.-Canada Treaty's mandate that the agency consider his best interests. *Id.*

The government filed a motion to dismiss, arguing that the district court lacked jurisdiction because neither the U.S.-Canada Treaty nor the Act implementing the Treaty established a private right of action for Mr. Sluss to challenge the transfer decision. J.A. 65, 71–73. Mr. Sluss opposed that motion, arguing that the denial was reviewable under the APA because the U.S.-Canada Treaty provided a standard for review. J.A. 82–84. The district court granted the government's motion and held that the Council of Europe's Convention on the Transfer of Sentenced Persons ("the Convention") did not provide a manageable standard for judicial review under the APA. J.A. 99–100. It did not address whether the U.S.-Canada Treaty—the Treaty on which Mr. Sluss had relied—provided a manageable standard. *Id.*

Mr. Sluss appealed, and the government moved for summary affirmance. J.A. 129. This Court denied the motion for summary

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clear that he was "seeking relief under the Administrative Procedures Act." J.A. 8.

affirmance, and on its own motion vacated the district court's decision because, although Mr. Sluss had "relied exclusively" on the U.S.-Canada Treaty, the district court's decision "d[id] not address the treaty." *Id.* This Court remanded with instructions for the district court to "consider whether appellant is entitled to relief pursuant to this treaty." *Id.*

The government again moved to dismiss, this time arguing that the U.S.-Canada Treaty did not provide a manageable standard for judicial review. J.A. 131–42. Mr. Sluss again opposed dismissal. J.A. 146–54. Mr. Sluss also moved to augment the district court record with a second denial letter he received from the IPTU after requesting transfer to Canada for a second time (the IPTU allows prisoners to reapply for transfers every two years). J.A. 164–65. This second letter from the IPTU listed the same reasons for denial as the first letter. J.A. 168.

With new briefing and instructions from this Court to consider Mr. Sluss's claim under the U.S.-Canada Treaty, the district court again granted the government's motion to dismiss. J.A. 179. The district court held that the U.S.-Canada Treaty did not provide an adequately manageable standard, and thus the Attorney General's denial was fully

committed to agency discretion and not subject to judicial review. J.A. 176–79.

Mr. Sluss timely appealed. CA Doc. 2 at 7.[3] He also filed a motion to augment the record to include two heavily redacted documents that he had received in response to FOIA litigation he had filed seeking documents related to the IPTU's decision to deny his transfer request. CA Doc. 36 at 1, 3. The government again moved for summary affirmance. CA Doc. 20 at 1. This Court denied that motion, referred the motion to augment the record to the merits panel, and appointed undersigned counsel as amicus in support of Mr. Sluss. CA Doc. 37 at 1–2.

[3] This citation format refers to this Court's docket.

SUMMARY OF ARGUMENT

The district court erred in concluding that the U.S.-Canada Treaty commits transfer decisions to the Attorney General's discretion because that treaty provides a manageable standard for courts to review those decisions. The standard—whether the Attorney General[4] considered if transfer would be in the best interests of the transferee—comes directly from the U.S.-Canada Treaty's text. The U.S.-Canada Treaty requires that the Attorney General "shall bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender." Treaty on the Execution of Penal Sentences, Can.-U.S., art. III, § 6, Mar. 2, 1977, 30 U.S.T. 6263 ("U.S.-Canada Treaty"). The Supreme Court has held that statutes utilizing this textual structure—a requirement followed by a directive—create a standard against which courts can ensure that the required action is taken. *See Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645, 1651–53 (2015).

[4] The U.S.-Canada Treaty and the statute implementing it designate the Attorney General or her designee as the transfer decision-makers. 18 U.S.C. § 4102. For ease of reference, this brief refers to the Attorney General as the decision-maker.

Judicial review ensuring that the Attorney General considers whether transfer is in the transferee's best interests effectuates the U.S.-Canada Treaty's main purpose: the social rehabilitation of the prisoner. Without such review, the government could simply ignore this worthy aim, defeating the goal of the U.S.-Canada Treaty's transfer scheme and the treaty commitments it has made to another nation. The district court thus erred in concluding that U.S.-Canada Treaty transfer decisions are committed to agency discretion.

Because the U.S.-Canada Treaty provides a manageable standard for reviewing transfer decisions, the district court should have examined the agency record to determine whether the Attorney General acted arbitrarily and capriciously by failing to consider Mr. Sluss's best interests in denying his transfer request. The district court erred in reaching its brief conclusion that the government's decision met the Administrative Procedure Act ("APA") standard.

First, the district court erred in concluding that the letter denying Mr. Sluss's transfer request provided sufficient evidence that the Attorney General in fact considered whether the transfer request was in Mr. Sluss's best interests. The letter provided no facts supporting its

conclusory assertions. Nor did it mention Mr. Sluss's best interests. Lacking any facts, the letter could not make a rational connection between the facts considered and the decision made. By citing this letter as evidence that the Attorney General "clearly considered" Mr. Sluss's best interests, the district court thus improperly supplied reasoning that the government did not.

The district court also erred in deciding this case without knowing the contents of the administrative record. Even if the record before the district court supports a conclusion that the Attorney General considered whether transfer was in Mr. Sluss's best interests, other evidence in the administrative record could undermine that conclusion. But neither Mr. Sluss nor the district court had access to the administrative record, other than the three letters the IPTU sent Mr. Sluss. The government either needed to provide Mr. Sluss access to its record related to the transfer denial or needed to file that record with the district court. It did neither. Nor did it comply with the district court's local rule designed to facilitate plaintiffs' review of the record by requiring the government to file a certified list of the contents of the administrative record. Had it complied, Mr. Sluss could have reviewed the list and ascertained the

documents he needed to see. Any conclusion the district court reached about the merits of Mr. Sluss's APA arguments without requiring the government to provide access to the administrative record should be reversed.

ARGUMENT

I. THE U.S.-CANADA TREATY PROVIDES A MANAGEABLE STANDARD FOR A COURT TO REVIEW THE ATTORNEY GENERAL'S TRANSFER DECISIONS.

The text of the U.S.-Canada Treaty—the sole authority under which Mr. Sluss initiated his transfer request—provides a manageable standard for judicial review of the Attorney General's decision denying his request. Through its instruction that the Attorney General "shall bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender," U.S.-Canada Treaty, at art. III, § 6, the Treaty creates a manageable standard to review whether the Attorney General actually conducted that required consideration.

In holding that this decision was committed to agency discretion, the district court (1) concluded that the terms of the U.S.-Canada Treaty resembled those of the Council of Europe's Convention on the Transfer of Sentenced Persons, T.I.A.S. No. 10824, 22 I.L.M. 530 (1983) ("the Convention"), a multilateral treaty that Mr. Sluss did not invoke; and (2) relied on this Court's precedent that the Convention fails to provide a manageable standard. J.A. 178–79. But the U.S.-Canada Treaty's requirement that the Attorney General consider whether transfer would

be in the best interests of the transferee differs markedly from the Convention, which does not require the decision-maker to consider *any* factor. *See Bagguley v. Bush*, 953 F.2d 660, 662–63 (D.C. Cir. 1991). The district court thus erred.

The APA guarantees judicial review of agency action—like the Attorney General's decision denying Mr. Sluss's transfer request—unless that action is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). An action is so committed only when the applicable legal provision fails to provide a "manageable standard" to review the agency's discretion, *Mach Mining*, 134 S.Ct. at 1652, or where the statute is so broadly drawn that "there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe* ("*Overton Park*"), 401 U.S. 402, 410 (1971).

The U.S.-Canada Treaty provides a manageable standard, and thus law to apply, in its command that the relevant authority "shall" consider whether transfer would be in the "best interests" of the transferee. U.S.-Canada Treaty, at art. III, § 6. The Supreme Court recognizes a "strong presumption" favoring judicial review of administrative action, *Mach Mining*, 135 S.Ct. at 1651 (quoting *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)), and the agency bears a "heavy

burden" in attempting to show that Congress "prohibit[ed] all judicial review," *Mach Mining*, 135 S.Ct. at 1651 (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)) (alteration in original). Judicial review of a final agency action "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (overturned on other grounds). The government cannot shoulder this burden given the U.S.-Canada Treaty's direct command to consider whether a transfer would be in the transferee's best interests.

A. The text of the U.S.-Canada Treaty provides a judicially manageable standard.

When interpreting the U.S.-Canada Treaty, this Court must begin with its text. *See Medellin v. Texas*, 552 U.S. 491, 506–07 (2008). The U.S.-Canada Treaty requires that the relevant authority—the Attorney General—"shall bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender." U.S.-Canada Treaty, at art. III, § 6. The "best interests of the Offender" is the *only* consideration the U.S.-Canada Treaty mandates.[5]

[5] Article III of the U.S.-Canada Treaty requires several other actions. For example, Section 1 requires the parties to designate a relevant authority,

By using the word "shall" and then providing the Attorney General with a directive—"bear in mind the probability that transfer will be in the best interests of the Offender"—the U.S.-Canada Treaty requires the Attorney General to consider the best interests of the transferee in its transfer decisions. Courts, in turn, should review whether the Attorney General complied with that requirement, creating a manageable standard for judicial review. *See Mach Mining*, 135 S.Ct. at 1651–53 (holding that a court should review whether an agency actually complied with a statutory obligation to ensure compliance with that statutory scheme is not left to the agency).

The U.S.-Canada Treaty's relevant language—"shall bear in mind"—resembles the language of the statute at issue in *Mach Mining*—"shall endeavor"—that the Court held provided a sufficient standard for judicial review. *See id.* at 1651–53. The statute in *Mach Mining*, 42 U.S.C. § 2000e-5(b), provides that before filing suit, the U.S. Equal Employment Opportunity Commission ("EEOC") "shall endeavor to eliminate any . . .

Section 2 requires the parties to inform prisoners who fall under the scope of the Treaty of its existence, and Section 7 establishes sentencing requirements as a prerequisite for transfer. No other section addresses factors parties shall consider in making decisions. U.S.-Canada Treaty, at art. III.

alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *See Mach Mining*, 135 S.Ct. at 1651. In concluding that the government failed to demonstrate that Congress intended to bar judicial review of the EEOC's compliance with the law's conciliation provision, the Court emphasized that "shall" is "mandatory, not precatory." *Id.* By creating a mandatory prerequisite to suit, Congress imposed a compulsory obligation that courts "routinely enforce." *Id.* Precluding judicial review of the EEOC to ensure it was fulfilling that duty would obviate a "key component of the statutory scheme." *Id.*

So too here. The U.S.-Canada Treaty's requirement that the Attorney General "shall bear in mind" parallels the language from the statute at issue in *Mach Mining*: it asserts a requirement followed by a directive to the relevant authority. Because the U.S.-Canada Treaty creates the same obligation as the statute in *Mach Mining*, it provides the same manageable standard for judicial review. The district court nonetheless concluded that the U.S.-Canada Treaty's "bear in mind" directive provided insufficient guidance to review the Attorney General's decision. J.A. 178 ("The provision does not instruct [the Attorney General] on what

these factors are or how much weight they should be given."). But that conclusion ignores the lesson of *Mach Mining*. Courts should review whether agencies carry out their obligations, and just as "shall endeavor" creates a judicially manageable standard, so too does "shall bear in mind." The district court therefore erred in confusing the scope of review—inquiring into the use and weight of factors—with whether Congress committed the decision to agency discretion under the APA.

The Attorney General surely has some discretion in making transfer decisions. But discretionary decisions are hardly immune from judicial review. As the Supreme Court held in *Mach Mining*, "wide latitude" over a process does not mean that Congress left "*everything*" to the agency. 135 S.Ct. at 1652 (emphasis in original). Instead, as the Court recognized, the issue is whether the agency conducted the action the statute required. *Id.* In other words, the statutory command "shall endeavor" created a standard by which a court can review whether the agency "'endeavor[ed]' at all" to conduct a reconciliation. *Id.* Similarly, the U.S.-Canada Treaty's "shall bear in mind" mandate creates a standard for courts to review whether the Attorney General considered whether transfer would be in Mr. Sluss's best interests.

This Court has repeatedly recognized the distinction between statutes that provide agency discretion and those that preclude judicial review because they commit the matter *entirely* to agency discretion. *See*, *e.g.*, *Menkes v. Dep't of Homeland Sec.*, 486 F.3d 1307 (D.C. Cir. 2007). In *Menkes*, this Court examined the reviewability of a Coast Guard director's authority to decide if a voluntary association on the Great Lakes was capable of providing adequate pilotage services or whether additional independent contractors were needed. *Id.* at 1312–13.[6]

In finding a manageable standard for reviewing the director's decision, this Court delineated between Congress affording the director reviewable discretion in making that decision and precluding review altogether. *Id.* at 1313. The Court found that although the director was entitled to "a good deal of deference" in deciding whether the pool could provide adequate services, such discretion did not permit the director to make the decision "unreasonably" and therefore did not preclude review. *Id.*

[6] The Director of Great Lakes Pilotage's authority is provided in 46 C.F.R. § 401.720(b), which reads: "When pilotage service is not provided by the association authorized under [the Act] because of a physical or economic inability to do so, or when the Certificate of Authorization is under suspension or revocation under § 401.335, the Director may order any U.S. registered pilot to provide pilotage service." 46 C.F.R. § 401.720(b).

Instead, a court could review the initial decision on the adequacy of services—"i.e., whether the pool has the physical and economic ability to provide sufficient service"—under the APA. *Id.* Similarly, although the U.S.-Canada Treaty provides the Attorney General some discretion, it does not allow that decision to be made unreasonably, for example by ignoring the clear requirement to consider whether transfer would be in the best interests of the transferee. Thus, as in *Menkes*, providing some discretion is not the same as precluding judicial review.

To be sure, this Court has recognized that the government has broad discretion in prisoner transfer decisions. *Bagguley v. Bush*, 953 F.2d 660, 662 (D.C. Cir. 1991) (noting that "a broad grant of discretionary authority is particularly appropriate to prison transfer decisions, depending as they do on a variety of considerations"). But this discretion can be cabined by clearly prescribed limitations like those established by the text of the U.S.-Canada Treaty. *Cf. Meachum v. Fano*, 427 U.S. 215, 223 (1976) (holding that prisoners could not challenge state prison transfer decisions in part because "state law does not condition the authority to transfer"); *see also Olim v. Wakinekona*, 461 U.S. 238, 248–49 (1983)

(holding that substantive statutory limitations on official discretion create a liberty interest in transfer).

This Court has even found a manageable standard where Congress used the permissive "may" rather than the obligatory "shall." *See Dickson v. Sec'y of Defense*, 68 F.3d 1396, 1401–02 (D.C. Cir. 1995). In *Dickson*, this Court held that a statute providing that the agency "may" (rather than "shall") waive its limitation period if it finds it in the interest of justice provided the agency with discretion and thus required courts to "show deference." *Id.*. But the Court went on to hold that such discretion did "not mean the matter is *committed* exclusively to agency discretion." *Id.* (emphasis in original). The U.S.-Canada Treaty's provision of a measure of discretion does not give the Attorney General unreviewable authority over that decision, and the district court thus erred.

B. Judicial review of the Attorney General's decision is necessary to ensure that the U.S.-Canada Treaty's underlying purpose—the social rehabilitation of the transferees—is not defeated.

Judicial review of the Attorney General's transfer decisions is necessary to properly implement the U.S.-Canada Treaty's text. In the APA review context, the U.S.-Canada Treaty's mandatory terms cabin agency discretion and subject it to judicial review so that the underlying

purposes of the Treaty are not lost. *See Getty v. Federal Savings and Loans Ins. Corp.*, 805 F.2d 1050, 1058 (D.C. Cir. 1986) (concluding that precluding judicial review over a statute directing "'shall' permit a rebid" would allow Congress's intent to be "undone" by ignoring the fact that "Congress made the rebidding procedure mandatory, and thereby deliberately restricted [agency]'s flexibility"). Judicial review of transfer decisions is necessary because it would defeat a key purpose of the U.S.-Canada Treaty if the Attorney General failed to consider whether transfer would be in the best interests of the transferee.

The Senate Committee on Foreign Relation's report recommending that the U.S.-Canada Treaty be ratified (the "ratification report"), S. REP. NO. 95-10, at 2–3, recognized the purpose behind the Treaty's text: the social rehabilitation of the transferee. The ratification report provides the histories of both the U.S.-Canada Treaty and the U.S.-Mexico Treaty[7] and shows that the treaties were focused on the well-being of transferees facing the special hardships of being imprisoned far from home. *See id.* at 2–3. The United States was particularly concerned about the large

[7] The U.S.-Canada and U.S-Mexico treaties were negotiated at the same time, and the Senate considered them together when it ratified them.

number of Americans imprisoned in Mexico as a result of the war on drugs in Mexico. *Id.* at 2. The treaties were negotiated as a humanitarian means of promoting the reintroduction of incarcerated individuals to their home nations. For those humanitarian reasons, the report recognizes social rehabilitation of the transferee as the U.S.-Canada Treaty's primary purpose. *Id.* at 1, 3.

The U.S.-Canada Treaty's mandatory text is directly tied to that social rehabilitation purpose. By ensuring that the parties consider the best interests of the transferee, the U.S.-Canada Treaty guaranteed that its social rehabilitation aims were taken into account by both parties to the treaty. The ratification report reflects this concern when it states that "[t]he best interest of the prisoner will be the *basis* of any decision by the States on the suitability of transfer." *Id.* at 13 (emphasis added). The ratifying Senate's explanation of the history of the U.S.-Canada Treaty and its concomitant understanding that Article III, Section 6, requires the Attorney General to base transfer decisions on the best interests of the transferee explains the U.S.-Canada Treaty's text mandating consideration of transferees' best interests. *See id.*

Committing transfer decisions to agency discretion by law would allow the Attorney General to disregard the U.S.-Canada Treaty's aim of allowing transfers to benefit the transferee. Judicial review ensures that the aim of the U.S.-Canada Treaty—the social rehabilitation of the transferee—is not lost or sacrificed to the expediency of the government. *See Mach Mining*, 135 S.Ct. at 1652.

C. *Bagguley*'s holding about the Convention does not prevent this Court from finding a manageable standard under the U.S.-Canada Treaty.

The district court erred in relying on *Bagguley v. Bush*, 953 F.2d 660 (D.C. Cir. 1991), to conclude that the U.S.-Canada Treaty does not provide a manageable standard because *Bagguley* did not consider the U.S.-Canada Treaty. *See* J.A. 178. Instead, *Bagguley* held that the Council of Europe's Convention on the Transfer of Sentenced Persons, T.I.A.S. No. 10824, 22 I.L.M. 530 (1983) ("the Convention"), did not set forth a manageable standard. *Bagguley*, 953 F.2d at 662–63. The Convention—a later-adopted and completely separate multilateral treaty—establishes a transfer scheme among the members of the Council of Europe. The Convention, at Article 2, ¶ 2. The Convention has been ratified by both Canada and the United States, but the Convention

specifies that it does not disturb the obligations of the U.S.-Canada Treaty. The Convention, at Article 22.[8] Mr. Sluss explicitly invoked the authority of the U.S.-Canada Treaty, not the Convention. J.A. 129. Because the Convention's terms differ markedly from those of the U.S.-Canada Treaty and *Bagguley* addressed only the Convention, *Bagguley* says nothing about whether the U.S.-Canada Treaty sets forth a manageable standard for review.

Bagguley held that the multilateral Convention does not provide a manageable standard for review because the Convention neither sets out any factors for consideration nor requires such consideration. 953 F.2d at 662. First, *Bagguley* noted that the Convention "provide[d] no criteria to govern the sentencing state's decision as to whether to agree to the transfer." *Id.* at 662 n.2. But that is because the Convention has nothing

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[8] Article 22 provides that:

1. This Convention does not affect the rights and undertakings derived from extradition treaties and other treaties on international co-operation in criminal matters providing for the transfer of detained persons for purposes of confrontation or testimony.
2. If two or more Parties have already concluded an agreement or treaty on the transfer of sentenced persons or otherwise have established their relations in this matter, or should they in future do so, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention.

similar to Article III, Section 6 of the U.S.-Canada Treaty, which requires the Attorney General to consider a particular factor—the transferee's best interests.

Second, the Convention's terms, cast in the permissive "may," give the parties complete discretion over transfer decisions. *Id.* The Convention, as the Court explained, "merely states that a sentenced person *may* be transferred under its provisions only if, *inter alia*, the sentencing state agrees to the transfer." *Id.* (emphasis added). Of course, the use of the permissive "may" does not automatically preclude review. *See supra* at 22; *Dickson*, 68 F.3d at 1401–02. But the U.S.-Canada Treaty's use of the obligatory "shall" consider, which the Supreme Court has held creates a manageable standard, contrasts sharply with the Convention's language neither setting forth any factors to consider nor requiring such consideration. *See Mach Mining*, 135 S.Ct. at 1651–53.

Indeed, those critical differences highlight that the U.S.-Canada Treaty provides a manageable standard for review. By providing an obligatory requirement and the criteria to govern that decision, the U.S.-Canada Treaty does exactly what *Bagguley* decided the Convention did

not do. The district court thus erred in concluding that transfer decisions under the U.S.-Canada Treaty are committed to agency discretion.

II. THE DISTRICT COURT FAILED TO PROPERLY REVIEW THE ATTORNEY GENERAL'S TRANSFER DENIAL UNDER THE APA.

The paucity of the record evidence before the district court prevented it from concluding that the Attorney General's denial of Mr. Sluss's transfer request satisfied judicial review under the APA. 5 U.S.C. § 706 (2)(A). In one sentence, the district court erroneously concluded that "[e]ven assuming *arguendo*" that there is a manageable standard for judicial review, Mr. Sluss "cannot show the [Attorney General] abused its discretion in denying his request because it clearly considered factors related to his best interests, like Sluss's residency in the U.S. and his insufficient contacts with Canada." J.A. 178 n.2 (alterations and quotations in original omitted). The district court erred because the evidence before it did not demonstrate that the agency considered whether the transfer was in Mr. Sluss's best interests, and because the district court needed to consider the whole administrative record when reaching its decision.

The one IPTU letter the district court relied on includes only conclusory statements and provides no indication that the Attorney

General considered whether transfer was in Mr. Sluss's best interests. J.A. 78. Because the decision denying Mr. Sluss's transfer request lacked a satisfactory explanation, the Attorney General acted arbitrarily and capriciously, and the district court erred by supplying its own reasoning for the decision.

Even were that not error, the district court nonetheless erred in reaching this conclusion without knowing the contents of the rest of the administrative record that may have demonstrated best interests were improperly discounted. *See Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("Boswell") (warning that without access to the full record, the agency could "withhold evidence unfavorable to its case"). This Court should therefore reverse and remand with instructions for the government to file a certified list of the contents of the administrative record in compliance with the district court's local rules and to provide Mr. Sluss with access to the documents in the record. *See* D.D.C. R. 7(n)(1). This Court should further direct the district court to examine under the APA whether the record adequately explains that the Attorney General, in denying transfer, considered Mr. Sluss's best interests.

A. The record evidence the district court cited neither provided a factual basis for its conclusory assertions nor rationally connected those assertions to Mr. Sluss's best interests.

Lacking a contemporaneous explanation from the agency about the facts supporting the transfer denial and an articulation of why transfer denial was in Mr. Sluss's best interests, the district court impermissibly supplied those connections. The Supreme Court has expressly instructed courts "not to attempt . . . to make up for such deficiencies" in the agency's explanation because courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

The government filed only one document from the agency record to support its motion to dismiss: the IPTU letter denying Mr. Sluss's first transfer request. J.A. 78. And the only other evidence in the record pertaining to the Attorney General's decision denying Mr. Sluss's transfer request were two subsequent letters the IPTU sent Mr. Sluss when he requested a reconsideration of the denial, J.A. 87, and when he requested transfer the second time, J.A. 168.

The district court erred in concluding that the IPTU letter—which denied Mr. Sluss's transfer request because of the "seriousness of [his] offense" and because Mr. Sluss has "become a domiciliary of the United States," is "a poor candidate due to his . . . criminal history," and has "insufficient contacts with the receiving country," J.A. 78—sufficiently supported the Attorney General's decision. The letter articulates no connection between the transfer denial and Mr. Sluss's "best interests"—the one factor the Attorney General was required to consider—thus rendering the decision arbitrary and capricious. *See Epsilon Elect., Inc. v. U.S. Dep't of Treasury*, 857 F.3d 913, 929 (D.C. Cir. 2017) (holding an agency's decision arbitrary and capricious "[b]ecause [it] failed to justify its conclusion"). The conclusory statements do nothing to establish a "rational connection between the facts found and the choice made" both because they fail to state the factual basis for those conclusions and because they fail to articulate how those factual bases justify the transfer denial. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The IPTU letter articulates only conclusions, rather than any facts leading to those conclusions. For example, the letter concludes that Mr.

Sluss's criminal history makes him a poor candidate for transfer without specifying what in Mr. Sluss's criminal history makes him a poor candidate. Nor does the letter specify the nature or number of Mr. Sluss's contacts in Canada and why it deemed those contacts "insufficient." The government's failure to provide *any* facts supporting the IPTU's conclusory statements necessitates a conclusion that it failed to make a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 52.

The IPTU letter also fails to articulate how these conclusions relate to Mr. Sluss's best interests. *See State Farm*, 463 U.S. at 43 (requiring courts to ensure the agency decision was based on the "relevant factors"); *Epsilon*, 857 F.3d at 927–29 (finding the agency's rational insufficient when it failed to state why it discounted evidence in the record that contravened the decision made). There is no explanation why considerations such as criminal history or seriousness of the offense led to a conclusion about what would be in Mr. Sluss's best interests. Indeed, neither the IPTU letter—nor any other evidence before the district court—stated whether transfer would be in Mr. Sluss's best interests.

The district court thus erred in concluding that the Attorney General "clearly considered" Mr. Sluss's best interests. *See* J.A. 178 n.2.

Nor do the additional letters Mr. Sluss filed adequately show whether the Attorney General considered Mr. Sluss's best interests. The IPTU letter denying Mr. Sluss's second transfer request, identical to the first, presents the same problems. J.A. 168. And while the IPTU letter responding to Mr. Sluss's request for reconsideration of his initial denial provided more facts than the two denial letters, it also failed to connect those facts with Mr. Sluss's best interests. J.A. 87–88. Instead, it only connected the listed facts to a determination that certain "special hardships" did not apply to Mr. Sluss. *Id.* Further, the district court does not appear to have relied on either of these documents in concluding that the Attorney General did not abuse its discretion. *See* J.A. 178 n.2 (citing only to the initial IPTU denial letter the government provided).[9]

These letters suffer similar flaws to those that this Court in *Epsilon* concluded provided an insufficient rationale for the Office of Foreign Assets Control's ("OFAC") decision to impose civil penalties. *See Epsilon*,

[9] Even if the district court considered all three IPTU letters, it was improper for the court to consider them in isolation without the rest of the documents from the administrative record. *See infra* 35–41.

857 F.3d 913 (D.C. Cir. 2017). In *Epsilon*, OFAC imposed civil penalties on Epsilon for exporting goods with knowledge or reason to know that the goods were intended for reexportation to Iran. *Id.* at 916. This Court concluded that OFAC failed to articulate a rational basis for its decision imposing civil penalties for the last five shipments Epsilon exported because the record did not explain why OFAC ignored emails that showed Epsilon had no reason to know that these shipments were intended for reexportation to Iran. *Id.* at 927–29. Before this Court, OFAC explained that it decided to impose civil penalties for these five shipments despite the emails because OFAC did not find the emails credible. *Id.* at 928. This Court declined to credit that explanation because nowhere in the administrative record was there a "reasoned basis" for rejecting the emails as incredible, and it therefore found that OFAC's decision arbitrary and capricious. *Id.* at 928–29.

The two IPTU letters denying Mr. Sluss's transfer request, like the OFAC's decision to impose sanctions, fail to adequately explain the decisions made. As discussed above, although the denial letters articulate four conclusions about Mr. Sluss, they neither include any facts supporting those conclusions nor demonstrate that the Attorney

General considered whether transfer was in Mr. Sluss's best interests. *See supra* at 31–33. Likewise, the reconsideration letter never connects the facts considered to Mr. Sluss's best interests. *See supra* at 33. The district court thus erred by "supply[ing] a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43 (quoting *Chenery*, 332 U.S. at 196).

B. Lacking the full administrative record, the district court could not properly review the Attorney General's decision.

Even if the paltry reasoning and factual basis for the letters does not render the decision arbitrary and capricious, the district court erred in finding that the Attorney General's decision satisfied judicial review under the APA without knowing or examining the contents of the administrative record. *See* J.A. 178 n.2. The APA requires courts reviewing agency action to either "review the whole record" or "those parts of it cited" once all parties have had the opportunity to review the complete administrative record. 5 U.S.C. § 706; *see Boswell*, 749 F.2d at 792 (restricting judicial review without the whole record to times when all parties have fully reviewed the complete administrative record and mutually agreed that the selected portions of the record included in

evidence are fair).[10] The full administrative record was not before the district court. And because the government neither submitted the administrative record nor provided Mr. Sluss with access to the documents in the administrative record, the district court erred in holding that there was no agency abuse of discretion.

Because the government did not file the complete administrative record, Mr. Sluss should have had access to the agency's decision-making documents. *See Boswell*, 749 F.2d at 793 (remanding for plenary review of the record because judicial review with a "partial [administrative] record" is only appropriate when the court is "convinced" the partial record is the "result of mutual agreement between the parties after both sides had fully reviewed the complete record."). But the government failed to comply with the district court's rules designed to ensure that Mr. Sluss (and the district court) knew the contents of the administrative record and could request them. In any case involving judicial review of an agency decision, the district court's local rules require the agency to

[10] This requirement applies equally to informal agency actions like the decision in this case. *See, e.g.*, *Center for Auto Safety v. Federal Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992) (citing *Overton Park*, 401 U.S. at 417–21).

"file a certified list of the contents of the administrative record with the Court . . . simultaneously with the filing of a dispositive motion[.]" D.D.C. R. 7(n)(1). Twice the government filed dispositive motions with the district court. J.A. 63, 131. Each time, it failed to file a certified list of the contents of the administrative record. The government's failure to file a certified list prevented both Mr. Sluss and the district court from knowing what was in the administrative record, and the district court thus erred in ruling on an incomplete record.

The only evidence before the district court pertinent to the Attorney General's denial were the letters the IPTU sent Mr. Sluss denying his two transfer requests and his request for reconsideration. J.A. 78, 87, 168. Even if those documents sufficiently explain the transfer denial, the district court nonetheless erred in reviewing the transfer denial under the APA without ensuring that Mr. Sluss knew the contents of and had access to the record underlying the agency's decision. *See Boswell*, 749 F.2d at 792 ("[T]he APA requires review of the whole record" because otherwise a party could "withhold evidence unfavorable to its case . . . courts may not look only to the case presented by one party, since other

evidence may weaken or even indisputably destroy that case.") (internal quotations and citations omitted).

Unlike in *Epsilon*, where this Court could examine evidence in the record contradicting the agency's decision, the district court had no way of knowing whether there was any evidence contradicting the IPTU letters' conclusions. If the Court in *Epsilon* had only the agency's conclusions before it, it would not have seen the contradictory email evidence. Without knowing the contents of the record, neither the district court nor Mr. Sluss could evaluate whether the Attorney General failed to consider evidence related to Mr. Sluss's best interests.

Similarly, without knowing the record underlying the Attorney General's conclusions, the district court could not assess whether that record supported its conclusions, including, for instance, that Mr. Sluss's Canadian contacts were "insufficient." *See Epsilon*, 857 F.3d at 928 (rejecting the agency's decision when it failed to provide a reasoned decision); *see also Flyers Rights Educ. Fund, Inc. v. Federal Aviation Admin.,* 864 F.3d 738, 746 (D.C. Cir. 2017) (rejecting the agency's decision when it relied on studies not in evidence because the court "cannot affirm the sufficiency of what [it] cannot see").

Ensuring all parties access to the administrative record also prevents the Attorney General from asserting that she considered whether transfer was in Mr. Sluss's best interests while instead making the decision for other reasons. For instance, if the Attorney General's explanation "runs counter to the evidence before the agency," the record would not adequately support the transfer denial. *State Farm*, 463 U.S. at 43. Without the administrative record before it, however, the district court had no ability to assess the sufficiency of the decision.

Because the full administrative record was not before the district court, *Overton Park* and *Boswell* make clear that the district court could not look at only some evidence—such as the IPTU's letters alone—for an adequate explanation of the Attorney General's denial of Mr. Sluss's transfer request. *See Overton Park*, 401 U.S. at 419–20 (finding the agency had not adequately explained its decision when it supported the decision with only litigation affidavits and not the administrative record); *Boswell*, 749 F.2d at 792–93 (finding the agency had not adequately explained its decision when it supported the decision with only an internal memorandum from the administrative record, and it was not clear this selection from the administrative record was with the mutual

agreement of the parties). In *Boswell*, the Secretary of the Department of Health and Human Services, ("HHS") submitted only an internal memorandum to the district court in support of the agency's rulemaking. 749 F.2d at 792. This Court held that the single internal memorandum was insufficient when there was an eleven-volume administrative record at the time of the Secretary's decision. *Id.* at 792–93. This Court therefore vacated and remanded to the district court for review with the benefit of the full administrative records. *Id.* at 793.

So too here. The IPTU letters do not constitute the full administrative record, as evidenced by Mr. Sluss's motion to augment the appellate record with two documents that were before the Attorney General when Mr. Sluss's transfer was denied. CA Doc. 36 at 7–13, 15–20. In the interest of efficiency and equity, this Court should consider the documents in Mr. Sluss's motion to augment the appellate record as evidence that the district court did not have the full administrative record before it. This Court can consider evidence that was not before the district court for equitable reasons, such as when remanding to the district court to supplement the record would only be a "ministerial task" and a "waste of judicial resources." *Colbert v. Potter*, 471 F.3d 158, 166

(D.C. Cir. 2006). Mr. Sluss has good reason for failing to provide this evidence to the district court; he only just received the documents through his FOIA litigation against the DOJ.[11] *Cf. Morgan Drexen, Inc. v. Consumer Fin. Protection Bureau*, 785 F.3d 684, 690 n.2 (D.C. Cir. 2015) (denying motion to supplement the appellate record because appellants offered no explanation for their failure to proffer the available evidence before the district court). It therefore is appropriate for this Court to consider the documents from Mr. Sluss's motion to augment the appellate record as evidence that the complete administrative record was not before the district court. Because the complete administrative record was not before the district court, the district court erred in concluding the Attorney General's transfer denial was not an abuse of discretion.

[11] Mr. Sluss obtained these documents through separate and ongoing FOIA litigation seeking documents related to his transfer denial and the government's processes for making transfer request decisions. *Sluss v. DOJ*, No. 1:17-cv-00064 (D.D.C. Jan. 11, 2017).

CONCLUSION

The U.S.-Canada Treaty's requirement that the Attorney General shall consider whether transfer is in the best interests of the transferee provides a manageable standard for judicial review. And because the government provided no record evidence that the agency considered Mr. Sluss's best interests in denying his transfer request, this Court should reverse the district court's judgment. On remand, the district court should require the government to either file the full administrative record or at least file a certified list of the contents of that record and provide Mr. Sluss with access to the record. Only then can the district court review the Attorney General's transfer decision under the APA. *See Overton Park*, 401 U.S. at 420 (reversing and remanding for the district court to conduct a plenary review of the administrative record at the time the decision was made); *see also Boswell*, 749 F.2d at 803 (remanding to the district court to review the administrative record).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7660 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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STATUTORY ADDENDUM

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The U.S.-Canada Treaty 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.[2] 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.

Senate Ratification Report

95th Congress, *1st Session*; SENATE; Executive Rept. No. 95 – 10
TREATY WITII MEXICO ON THE EXECUTION OF PENAL SENTENCES AND TREATY WITH CANADA ON THE EXECUTION OF PENAL SENTENCES

The Committee on Foreign Relations, to which was referred the Treaty with Mexico on the Execution of Penal Sentences, signed in Mexico City on November 25,1976 (Ex. D, 95-1), and the Treaty with Canada on the Execution of Penal Sentences, signed at Washington on March 2, 1977 (Ex. H, 95-1), having considered the same, reports favorably thereon with a declaration to each, and recommends that the Senate give its advice and consent to ratification thereof.

MAIN PURPOSES

The purposes of these treaties are: the social rehabilitation of prisoners held in foreign jails; improvement in the relationships between the United States and Mexico and Canada due to the removal of strain caused by the incarceration of the nationals of the States in the Jails of another; and, in the case of Canada, the improved supervision of foreign nationals on parole.

The treaties would provide authority for the transfer of convicted and sentenced individuals to their State of origin for completion of their sentences, subject to the penal and parole laws of the Receiving State. The Treaty with Canada also provides for the transfer of those individuals on parole or receiving a suspended sentence. Penal authorities of all three countries agree that effective social rehabilitation of foreign offenders is extremely difficult away from their native land and that the three nations have a definite interest in the rehabilitation of their citizens convicted of crimes abroad since eventually most of these individuals will return to their country of origin.

BACKGROUND ON THE TREATY WITH MEXICO

In large measure, the origin of this agreement is tied to the United States narcotics control assistance program in Mexico and U.S. efforts in the early seventies to encourage the Mexican Government to strengthen its drug enforcement program. These efforts were a reflection, on the international scene, of the Nixon Administration's "war on drugs."

From the drug enforcement standpoint, these efforts in Mexico eventually paid off. Not only were more drug offenders arrested and convicted, but tougher sentences were meted out and made still more

severe by the Mexican Government's amending its narcotics law to remove the possibility of parole for narcotics offenders.

The stricter Mexican drug enforcement effort program netted more and more U.S. citizens and subjected them to Mexican police tactics, legal procedures and penal institutions, most of which by U.S. standards leave much to be desired.

By late 1975, some 600 Americans were incarcerated in Mexico, the vast majority of them convicted on narcotics violations. As the number of Americans in Mexican jails increased, so too did the attention of the U.S. press. One press report after another began offering detailed allegations of abuse, mistreatment, and brutality: "Jailed Americans Complain of Abuse"; "Americans Tell of Torture in Mexican Jails"; and "U.S. Assails Mexico on Treatment in Jails."

As a result of these and a deluge of similar press accounts, the treatment of U.S. citizens jailed in Mexico became a major issue in United States-Mexico relations. As a reflection of this concern, Congress held hearings on the issue in 1975 and 1976 and subsequently approved a statutory provision requiring the Secretary of State to report quarterly to the Speaker of the House and the Committee on Foreign Relations " . . . on progress toward full respect for the human and legal rights of all United States citizens detained in Mexico."

In response to this situation, the Mexican Government headed by-, former President Luis Echeverria proposed the idea of a prisoner exchange agreement between the United States and Mexico The idea was presented initially in June 1976 to then Secretary of State Kissinger, who had stopped off in Mexico on his way home from the 1976 OAS General Assembly meeting in Santiago. Secretary Kissinger reportedly liked the idea and instructed the State Department to explore the matter.

Formal negotiations on an agreement began in September 1976, and were concluded November 25, when the agreement was initialed by Mexico and the United States. Mexico ratified it on December 30, 1976. President Carter submitted the agreement to the Senate on February 15, 1977.

BACKGROUND OF THE CANADIAN PRISONER TRANSFER TREATY

On the initiative of Canadian parole authorities discussions on an agreement to transfer parolees began in 1975. The Canadian initiative was an outgrowth of discussions under the auspices of the United Nations

dealing with the problems of supervision of parolees and rehabilitation of prisoners. In May, 1976, the Canadian parole committee forwarded a raft agreement which expanded the proposal to include incarcerated individuals in addition to parolees. Negotiations in person were resumed in Ottawa on January 7, 1977, and after some further correspondence, the treaty was signed in Washington by Attorney General Bell and Solicitor General Fox on March 2, 1977. At that time, about 275 Americans were in Canadian prisons and 90 Canadians were in American penitentiaries.

This Treaty, unlike the one with Mexico, did not come about as a result of drug enforcement efforts, adverse prison conditions or publicity. The Canadian authorities originated the idea in order to promote rehabilitation of parolees.

THE TREATY WITH MEXICO PRINCIPAL PROVISIONS

The Treaty authorizes the United States and Mexico to transfer custody of each other's nationals. [Article I] It will allow a convicted prisoner, a youthful offender or a mentally ill person accused of an offense to be returned to his native country to serve the sentence imposed by the other country. [Article II, VIII] The transfer arrangement will be limited to prisoners convicted of offenses which are criminal under the laws of both countries, who have no pending appeals, have at least six months remaining on their fixed sentences and are not domiciliaries of the nation where they are incarcerated. [Article II, Article IV(6)] The transfer is further conditioned on the offender having consented to the transfer (Article IV(2) }, and having been imprisoned on other than political, military or immigration offenses [Article 11(4)].

The country which holds the offender shall commence the transfer procedure, although the prisoner may submit a request for transfer to the authorities of the transferring state for their consideration. [Article IV(1)]. If the authorities find the transfer will contribute to the social rehabilitation of the offender, taking into consideration such factors as the nature of the offense committed, previous criminal record, medical condition, and family relationships at home, etc. [Article IV (4)], the Transferring State will send a request for transfer, together with the prisoners' express consent for transfer, to the Receiving State through diplomatic channels. [Article IV (2)] The Receiving State then must give its consent taking into consideration the same factors listed above. [Article IV (3)]. When the prisoner has been convicted by one of the

United States or by one of the Mexican states, the state's approval is also required, even though the federal authorities in the Receiving State shall be responsible for the custody of the transferred offender. [Article IV(5)].

Transferred prisoners serve the sentence imposed upon conviction but subject to the laws and procedures of the nations to which they are transferred including the application of parole or probation [Article V(2)]. However, only the Transferring State can grant pardon or amnesty, and access to the courts to challenge the sentence is limited to those of the Transferring State. [Article V(2), Vi].

Offenders are protected against double jeopardy [Article VII] and the Treaty explicitly states that an offender's civil rights shall not be prejudiced "beyond those ways in which the fact of his conviction in the Transferring State by itself affects such prejudice." [Article V (6)].

Entry into force.—Thirty days after ratification by both countries, the Treaty would be in force for an indefinite number of three year periods. Either nation would be permitted to terminate the Treaty upon 90 days notice prior to the completion of any three year period. [Article X].

DIFFERENCES IN THE TREATIES WITH MEXICO AND CANADA

There are semantic and substantive differences in the two treaties, but the terms of the treaties and the obligations of the United States are basically the same. The major differences are:

1. The use of the term “Sending State” in the Canadian treaty and “Transferring State” in the Mexican;

2. The use of the term “national” in the Mexican and “citizen” in the Canadian treaty;

3. Specific provision for the transfer of parolees and those persons receiving suspended sentences in the Canadian treaty.

4. The change in the Canadian treaty requiring the initiation of the process by the prisoner instead of the Transferring State;

5. The lack of a provision for the transfer of the mentally ill in the Canadian;

6. The inclusion of specific reference to offenders who may be transferred and who are serving life sentences or who are considered dangerous or habitual criminals in the treaty with Canada;

7. Article VII of the Canadian treaty providing for cooperation in the transit of prisoners exchanged by the U.S. or Canada in accord with a prisoner exchange treaty with another nation; and

8. Differences in the lives of the treaties and the methods of renunciation.

COMMITTEE ACTION

The Treaty with Mexico was submitted to the Senate on February 21, 1977 and the Treaty with Canada was submitted on April 18, 1977.

On June 15 and 16. the Committee held public hearings on the two treaties and received the testimony of representatives of the Executive Branch, two Members of the House of Representatives, legal scholars and a panel of former prisoners and families of Americans held in Mexican jails. The Committee also received written opinions of law professors and state law enforcement officials.

The Committee met on July 12, 1977, and ordered the Treaties reported favorably to the Senate for its advice and consent. The Committee ordered that both Treaties be reported subject to a declaration to the effect that the instruments of ratification not be deposited until the necessary implementing legislation has been enacted.

WITNESSES

The witnesses on June 15 were: Honorable Fortney H. Stark, Representative from California; Hon. Benjamin A. Gilman, Representative from New York; Hon. John L. Hill, Attorney General, State of Texas; Hon. Barbara Watson, Administrator, Bureau of Security and Consular Affairs, Department of State; Mr. Herbert Hansell, Legal Adviser, Department of State ; Hon. Peter Flaherty, Deputy Attorney General, Department of Justice; and Hon. Peter B. Bensinger, Administrator, Drug Enforcement Administration, Department of Justice.

On June 16, the Committee heard the following witnesses: Professor Herbert Wechsler, Columbia University; Professor Alan C. Swan, University of Miami; Messrs. Richard Petree and Michael Chertoff, "Harvard Law Review," Harvard University; and a panel composed of: Mrs. Mary Coulter, Torrance, California; Mr. and Mrs. Oscar Carter, Hawthorne, California; Miss Deborah Friedman, Healdsburg, California; Mr. Robert J. Smith, Torrance, California; Mr. Paul Di- Caro, Healdsburg, California; Mr. Patrick Balvin, Corona, California; and Mr. Glen Jones, Kansas City, Missouri.

TESTIMONY

Witnesses testifying before the Committee were unanimous in their support for the ratification of the Treaties. Although some witnesses

questioned particular sections of the Treaties or the implementing legislation, all agreed that the purposes of the Treaties were worthwhile and could be accomplished effectively through ratification of the Treaties and approval of the implementing legislation.

Testimony presented was concerned with three basic areas: the social rehabilitation purposes of the Treaties, the constitutional and legal questions involved, and the problems faced by Americans imprisoned in Mexico.

Ms. Barbara Watson of the Department of State stated, "The welfare of American prisoners in foreign jails is of great concern to the Department of State." The number of Americans imprisoned abroad has increased rapidly in recent years. The number in Mexico has reached more than 600 and nearly 300 are imprisoned in Canada. In addition, Ms. Watson testified:

> There are special hardships involved in being in a prison abroad. It is difficult or impossible to maintain contact with one's family. Dietary and living conditions are different than those in the United States. Ignorance of the language is a difficult obstacle to overcome, and basic cultural differences make adjustment extremely difficult.
>
> All of these factors make rehabilitation of prisoners in foreign prisons an exceptionally difficult task. Prisoners cannot be reintegrated into the civilian environment at the end of their term.

Other sound sociological and criminological reasons for transfer were presented by Deputy Attorney General Flaherty and by Professor M. Cherif Bassiouni, of DePaul University, in his written statement submitted to the Committee.

In expressing the position of the Department of Justice, Mr. Flaherty said, "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."

Professor Bassiouni, who is Secretary General of the International Association of Penal Law and a leading authority on international criminal law, stated:

> The "Treaties" provide an imaginative and valuable solution to the problems of U.S. citizens incarcerated in foreign states and promote greater international cooperation in penal matters

between states desirous of collaboration in the prevention and suppression of criminality. The laudable purposes of the "Treaties" and their innovative approach deserves full support. The ratification and entry into effect of these "Treaties" will put the United States in the forefront of the international community in this area of International Criminal Law. Hopefully, this will augur the opening of new initiatives by the United States in promoting greater international cooperation in penal matters for a more effective world-wide effort to prevent and suppress criminality.

The Committee heard considerable testimony regarding constitutional questions involved in the Treaties and the legal experts who appeared before the Committee were questioned extensively on these issues. The two major areas of constitutional concern were the authority of the United 'States to imprison individuals not convicted of a crime against the United States and the preclusion of a petition to an American court for a writ of *habeas corpus* by an offender transferred to the United States.

The witnesses addressing the first question expressed the view that the enforcement of a foreign sentence under the Treaties would not be an incorporation of the sentence as one imposed by the United States. Legal authority and precedent were said to come from decisions involving extradition and status of forces agreements. Professor Charles H. McLaughlin of the University of Minnesota, in his written opinion, stated:

> If it were thought necessary that imprisonment within the United States should be by judgment of an American court or even by a foreign court following standards equivalent to American due process standards, the treaties might be supposed by those who support a full incorporation theory of the Fourteenth Amendment to face serious obstacles. But the present view that only a selective incorporation of essential principles is required opens the way for courts to follow the approach they have traditionally taken in giving effect to foreign judgments in other classes of cases. This has been to give effect to a foreign judgment if it was reached by procedures not contrary to natural justice, i.e., to the most basic due process principles, even though these procedures are not identical to those followed by the court of the forum. I do not think the Constitution

prevents the extension of this practice to giving effect to foreign criminal judgments under the proposed treaties.

The Legal Adviser of the Department of State gave the consent of the transferee, which would act as a waiver, as the answer to the question of the denial of the U.S. courts as forums to hear challenges of the Mexican and Canadian convictions or sentences. Messrs. Petree and Chertoff had reservations about the consent approach but indicated these reservations could be resolved through appropriate provisions in the implementing legislation to insure the voluntary nature of consent to transfer. They said:

> We believe that if care is taken to satisfy these procedural requirements of a valid waiver of constitutional rights, the Committee may recommend the Senate's consent to the prisoner transfer treaty without fear that the treaty runs afoul of the constitutional command that some court be open to hear the constitutional claims of American citizens.

Procedures recommended to insure voluntary consent were: an expression by the Senate of the importance of consent to the constitutionality of the treaties; a formal hearing presided over by a magistrate at which consent is given; and the right to counsel before and during such a hearing and official recording of the consent process.

Professor Wechsler stated his conclusion that "the treaties are consistent with the Constitution and that neither on principle nor on authority is there any solid basis for doubting the validity of the proposals of both the treaties and the implementing legislation."

In summing up his statement of support for the Treaties, Professor Alan Swan dealt with the problems of consent and waiver by stating:

> What is the result of saying no? What if we did say that the American Government cannot accept this demand or pay the price the Mexican Government is demanding? The result would be the American prisoner would stay in Mexico. There is something rather anomalous, perhaps even foolish, about the idea that we stand to defend the rights of prisoners and don't let the government relinquish those rights when the total consequence of that is to leave the prisoners bereft of the very rights we are trying to secure for them.

Representatives Stark and Gilman gave accounts of abuse of human and legal rights under Mexican law, extortion by Mexican attorneys and

difficult and dangerous conditions in Mexican prisons. Both endorsed the Treaty with Mexico as a first step in protecting Americans incarcerated abroad. Representative Stark noted. however, that the Treaty with Mexico should not be considered a final solution of the situation of Americans in Mexico and urged the Committee and the Executive Branch to continue to pursue the matter of human rights in Mexico. Speaking in behalf of ratification, Representative Gilan stated:

> It is hoped that the consummation of this treaty will help relieve some of the special hardships which fall upon prisoners incarcerated far from home.
>
> In addition, it will help remove some of the strains on the diplomatic and law enforcement relations between our two countries that have surfaced as a result of the imprisonment of large numbers of each other's citizens.

The panel of former prisoners and families recounted from personal experiences the torture, legal manipulation and prejudice against Americans which they contend are rife in the criminal justice system of Mexico. All of the panel supported ratification and passage of the implementing legislation and indicated the prisoners in Mexican jails were anxiously awaiting such action. Speaking for the panel and from his personal knowledge as a recently released prisoner, Robert J. Smith said:

> I spoke to the arrest and detention officer in Mexico City and he asked me to urge you people to expedite this matter because the mental anguish of three years of waiting for this thing to happen or not to happen has become intolerable on these people [Americans in Mexican institutions]. We are inflicting our own pain upon them.

Mr. Smith said further:

> I have only been back for two months, so I was with the prisoners in Acapulco quite recently and I know their feelings. They would much rather take their chances here in the United States with our government than to rot in that spittoon down there.

This view was endorsed by Mrs. Carter and Mr. DiCaro based on their contacts with prisoners in Mexico City and Guadalajara, respectively.

The involvement of the Drug Enforcement Administration and its cooperation with Mexican authorities leading to the arrest of Americans was another major concern of the Committee and the panel. Mr. Bensinger. Administrator of the Drug Enforcement Administration, was questioned extensively on the subject of DEA's Mexican activities and

particularly on the charges made by some returned prisoners of DEA involvement in coercion and brutality. Mr. Bensinger said that DEA guidelines prevented any involvement of DEA agents abroad in the actual arrest of Americans and that DEA agents must report any abuse of prisoners to the Ambassador of the United States in the particular country. Also, Mr. Bensinger declared his willingness to pursue fully any charges against DEA agents brought to his attention. A number of witnesses, however, noted that pressure exerted by the United States on other nations to secure their cooperation in drug control activities had led to the arrest of large numbers of Americans in such nations as Mexico, Bolivia and Colombia.

Several witnesses were questioned about the effect of these treaties on drug control efforts and law enforcement. Mr. Bensinger and Miss Watson both stated that only a handful of the Americans in Mexico were arrested for involvement in the large traffic in Mexican heroin. Almost all were arrested for possession of marijuana or for acting as "mules" in the cocaine route from South America to the United States. These "mules" or couriers, acting usually on a one-time basis, are not major dealers or profiteers in cocaine trade. Mr. Bensinger stated:

> With respect to the treaty, I don't believe . . . that this will impede DEA and the Mexican Federal Judicial Police in being able to reduce the effectiveness of curbing the narcotics traffic, and in particular the heroin traffic.

In addition, the Committee takes note that the Treaty with Mexico has been endorsed by the Southwestern States Conference on Crime and the Border, which was organized by the Attorneys General of the Southwestern States. Attorney General Hill of Texas, a participant in the Conference and the Attorney General of one of the most affected States, gave his strong support for the Treaty with Mexico in his testimony.

COMMITTEE COMMENTS

Individuals imprisoned in a foreign nation face large obstacles to rehabilitation: language barriers; distance from family; differences in culture; inability to participate in educational, work-release or counseling programs; and difficulty in receiving parole. Parolees also have problems, such as securing suitable employment in a foreign nation, once they are paroled. The transfer of these prisoners or parolees to their home countries to finish out their sentences or to receive parole would greatly increase the prisoners' chances of making a successful reentry

into society. Taking the case of Mexico, for example, most of the U.S. prisoners in jail there are young Americans who are first-time offenders. Their ability to readjust would undoubtably be enhanced if they could participate in job training, counseling and other programs available in penal institutions in the United States.

Since most of the prisoners will eventually return to their home countries after completing their sentences all three nations have an interest in the penal conditions of their citizens incarcerated abroad. The Treaties would also have a beneficial effect in reducing the tension between the United States and Mexico and the United States and Canada arising from the imprisonment of each others' citizens.

These Treaties involve concepts and legal issues new to the criminal justice system of the United States. The Committee recognizes that legitimate constitutional issues are raised by these treaties and the implementing legislation. The ultimate test of constitutionality may, of course, come before the Supreme Court of the United States. But the Committee has carefully considered these issues and has concluded that a case for the constitutionality of the Treaties can be made.

All the legal opinions received by the Committee concur in the constitutionality of the treaties. Under the terms of the Treaties, collateral attacks on the sentences of the foreign nations can only be made in the courts of that nation. These provisions would have the effect of denying to an American citizen who is transferred to the United States an opportunity to petition for a writ of *habeas corpus* for the purpose of challenging the validity of his Mexican or Canadian sentence or conviction. The Committee has determined that any constitutional questions involved in this preclusion of a write of *habeas corpus* can be resolved by a valid waiver made at the time of the prisoners' consent to transfer. If the consent is to constitute a waiver, then the prisoner must be made fully aware of the consequences of his consent and the attendant waiver. The Committee understands that procedures will be established under the implementing legislation to provide full counseling, legal assistance and information to prisoners eligible for transfer. The families of prisoners, to the extent possible, should be informed of these conditions and of the status of their family member.

In considering the question of waiver, the Committee notes that the prisoner in a foreign jail would not have access to the courts of the United States to attack his conviction or sentence. It is only upon transfer to the

jurisdiction of the United States that a transferee could claim any access to U.S. courts. As a practical matter, the prisoner is thus not waiving a right held prior to transfer. It would place the United States in a paradoxical posture to insist that the writ of habeas corpus be available to transferees to contest the judgments of foreign courts when the result would be that the Americans would remain in foreign jails with no access to the courts of the United States for any purpose dealing with their confinement.

Although the implementation of the transfers will benefit several hundreds of Americans imprisoned in Mexico and Canada, the Treaties should not be viewed as a final solution to the problems of all U.S. citizens imprisoned in those countries. Some will not be eligible for transfer and others will not become eligible until they have been convicted, received definite sentences, and appealed these convictions and sentences. Therefore, the Committee feels that the Government of the United States should continue to assist fully those prisoners not transferred. Particularly important are improved consular services, including more consular offices where needed, and insistence, through appropriate diplomatic channels, on respect for the rights of the accused. These steps should not be confined to the two nations with which we have negotiated these treaties, but should be taken in all countries where significant numbers of Americans have been arrested and imprisoned.

The purposes of these Treaties are worthwhile. Their provisions are in accord with the Constitution. Their subject matter is within the area appropriate for a Treaty. Accordingly, the Committee on Foreign Relations recommends that the Senate give its advice and consent to their ratification.

SECTION-BY-SECTION ANALYSIS OF THE TREATY 'WITH MEXICO ON THE EXECUTION OF PENAL SENTENCES

Preamble

The Mexican treaty to transfer offenders to their native country to finish their sentences has for its purpose the goal of rendering mutual assistance to combat international crime, to provide better administration of justice and to further the social rehabilitation of offenders.

Article I

The first section of Article I gives authority for sentences imposed on U.S. nationals by Mexican courts to be served in the United States. The

second section provides the same authority as it relates to sentences of Mexican nationals imposed by U.S. courts.

Article II

This article imposes six conditions for a transfer as authorized in Article I:

(1) The crime must be one punishable under the laws of both states. The crime need not be identical in matters not affecting the character of the crime.

(2) The offender must be a national of the Receiving State and,

(3) Not a domiciliary of the Transferring State.

(4) The offense is not a political crime or an offense of the purely military or immigration laws of the parties.

(5) At least six months remain on the offender's sentence, and

(6) No appeal or other proceeding affecting the sentence be pending in the Transferring Nation and the time for appeal has expired.

Article III

This article states that each State designate an authority to perform the functions provided in the treaty.

Article IV

Section 1 provides that transfer shall be initiated by the Transferring State, but also allows the prisoner to petition the Transferring State.

Section 2 provides that if the prisoner, expressly consents, the request for transfer will be forwarded through diplomatic channels.

Section 3 establishes procedures for the acceptance of the request for transfer by the Receiving State.

Section 4 sets up the criteria to be used in determining the suitability of the transfer. The basic question is how will the social rehabilitation of the prisoner be best served.

Section 5 stipulates that if the offense involved was a state crime under the laws of either nation, the permission of the individual state is required before transfer.

Section 6 requires that the sentence of the transferee be a definite one.

Section 7 details the information to be supplied by the Transferring State to the Receiving State.

Section 8 allows the Receiving State to request additional information that may be required.

Section 9 requires the adoption of the necessary implementing legislation.

Article V

Section 1 provides that the place of exchange shall be mutually agreed upon. It also allows a Receiving State to verify the validity of a prisoner's consent.

Section 2 states the sentence shall be carried out according to the laws of the Receiving State, including those dealing with parole and reduction of sentence. Reserves to the Transferring State the power to grant amnesty or pardon.

Section 3 prevents a Receiving State from extending the sentence beyond time set by Transferring State.

Section 4 prevents reimbursement to Receiving State for costs of incarceration.

Section 5 provides for exchange of reports on transferred prisoners every six months.

Section 6 protects a transferred prisoner from the loss of any civil rights that would not have occurred as a result of his conviction in the Transferring State.

Article VI

This article gives to the Transferring State exclusive jurisdiction over any appeal or any other proceeding intending to challenge the sentences imposed by its courts. If a sentence is set aside or otherwise modified, the Transferring State will notify the Receiving State so it may take appropriate action.

Article VII

This article protects a transferred prisoner from double jeopardy, or in other words from being tried for the same offense in the Receiving State.

Article VIII

This article provides that youthful offenders and those determined to be mentally unsound may also be exchanged.

Article IX

This article gives definitions of terms used in the treaty.

Article X

This article sets Washington as the place of exchange of ratifications and sets the term of the treaty at three years. The treaty will automatically be renewed for additional three year periods unless either

Party gives notice 90 days prior to the termination of such a three year period.

SECTION-BY-SECTION ANALYSIS WITH CANADA ON THE EXECUTION OF PENAL SENTENCES

Statement of Purpose

The stated purpose is to facilitate the successful reintegration into society of American or Canadian prisoners, parolees and those under supervision in either foreign nation.

Article I

This article provides the definitions of the terms: "Sending State"; "Receiving State"; "offender" and "citizen" as used in the Treaty.

Article II

This article imposes the following conditions to the application of the Treaty:

1. That the crime for which the offender was convicted would be also punishable as an offense in the Receiving State;

2. That the offender is a citizen of the Receiving State;

3. That the ofa2nse is not one against the immigration or solely military laws; and

4. That no appeal or collateral attack is pending and that the time for appeal has expired.

Article III

This article deals with the mechanisms of the transfers and eligibility of transferees and provides that:

1. Each nation must designate an authority to perform the functions of the Treaty;

2. All subject offenders be informed of the terms of the Treaty;

3. The transfers will be initiated by. a written request of the offender and, if the Sending State approves, the request will be forwarded through diplomatic channels;

4. The Receiving State must a rove of the transfer;

5. If the offender was convicted ya state or province under its laws, that state or province must also consent to transfer;

6. The best interest of the prisoner will be the basis of any decision by the States on the suitability of transfer;

7. No offender can be transferred unless he is serving a definite sentence, a life sentence, is a juvenile offender or is serving an indefinite sentence as a dangerous or habitual criminal;

8. A report by the Sending State on the prisoner's status be submitted at the time of the transfer;

9. Each State shall adopt the necessary implementing legislation; and

10. The place of delivery of transferees will'be agreed to by both parties and that the Receiving State will be allowed to review protects the rights of the transferee.

Article IV

The article imposes certain conditions on the Receiving State and protects the rights of the transferee.

1. The laws and procedures of the. Receiving State, including parole laws, shall apply, except the power to grant pardons or amnesty is reserved to the Sending State;

2. The Receiving State's laws on youthful offenders shall apply regardless of the offender's status under the laws of the Sending State;

3. No sentence can be enforced by the Receiving State so as to extend its duration;

4. The expenses of the completion of the sentence will be borne by the Receiving State;

5. That each State will cooperate in the furnishing of requested reports on the status of a transferee; and

6. The transfer does not impose any loss of rights that would not have been imposed as a result of conviction in the foreign state.

Article V

This article allows each State to adopt legislation to regulate the extent to which its courts will entertain collateral attacks by offenders transferred to the other State. The Sending State must inform the other of any decision to modify or set aside a conviction or sentence and, once so informed, the Receiving State must take the appropriate action. Most importantly, this article prohibits collateral attacks appeals or of the sentence or conviction except in the courts of the Sending State.

Article VI

Article VI protects a transferred prisoner from double jeopardy by providing that the prosecution of the transferee would be barred on the same basis as if the conviction had been obtained at the federal or state level in the Receiving State.

Article VII

This article provides that either State will cooperate in facilitating the transfer through its territory of a prisoner transferred under

authority of a separate treaty between one of the signatories and a third state.

Article VIII

The terms of ratification and the duration of the Treaty are spelled out in this article. The exchange of instruments of ratification will take place at Ottawa. The initial term of the Treaty will be three years, and it will continue in force after the first three years until either party gives thirty days notice of intent to terminate.

. . .[12]

CHANGES IN EXISTING LAW

In compliance with paragraph 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law are to be reported. The. Treaties involve no such changes.

EVALUATION OF REGULATORY IMPACT

As required by rule XXIX of the Standing Rules of the Senate, the Committee has evaluated the regulatory impact of the Treaties and has determined that the Treaties, per se, provide for no new regulatory activity. Any actual regulatory impact will be as a result of the enactment of the implementing legislation, provided for in Article IV of the Treaty with Mexico and Article III of the Treaty with Canada. Both Treaties require the designation of a person to be responsible for the administration of the transfer programs. The implementing legislation as introduced in the Senate, S. 1682, designates the Attorney General of the United States as this administrative officer.

TEXT OF RESOLUTION OF RATIFICATION TREATY WITH MEXICO

Resolved (Two-thirds of the Senators concurring therein), That the Senate advise and consent to ratification of 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 (Ex. D, 95-1), subject to the following declaration: That the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in Article IV has been enacted.

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[12] Budget estimates for the treaties that were before the Committee are omitted here.

TEXT OF RESOLUTION OF RATIFICATION TREATY WITH CANADA

Resolved (Two-thirds of the Senators concurring therein), That the Senate advise and consent to the ratification of 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 (Ex. H1, 95-1), subject to the following declaration:

That the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in Article III has been enacted.

. . .[13]

[13] Statements on the constitutionality of the treaties related to the inability of United States courts to review the legality of transferred prisoners' confinement are omitted.

The Council of Europe's Convention on the Transfer of Sentenced Persons

The member States of the Council of Europe and the other States, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members;

Desirous of further developing international co-operation in the field of criminal law;

Considering that such co-operation should further the ends of justice and the social rehabilitation of sentenced persons;

Considering that these objectives require that foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the opportunity to serve their sentences within their own society; and

Considering that this aim can best be achieved by having them transferred to their own countries.

Have agreed as follows:

Article 1 Definitions

For the purposes of this Convention:

a. "sentence" means any punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time on account of a criminal offence;

b. "judgment" means a decision or order of a court imposing a sentence;

c. "sentencing State" means the State in which the sentence was imposed on the person who may be, or has been, transferred;

d. "administering State" means the State to which the sentenced person may be, or has been, transferred in order to serve his sentence.

Article 2 General principles

1. The Parties undertake to afford each other the widest measure of co-operation in respect of the transfer of sentenced persons in accordance with the provisions of this Convention.

2. A person sentenced in a Party may be transferred to another Party, in accordance with the provisions of this Convention, in order to serve the sentence imposed on him. To that end, he may express his interest to the sentencing State or to the administering State in being transferred under this Convention.

3. Transfer may be requested by either the sentencing State or the administering State.

Article 3 Conditions for transfer

1. A sentenced person may be transferred under this Convention only on the following conditions:

a. if that person is a national of the administering State;

b. if the judgment is final;

c. if, at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate;

d. if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative;

e. if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory; and

f. if the sentencing and administering States agree to the transfer.

2. In exceptional cases, Parties may agree to a transfer even if the time to be served by the sentenced person is less than that specified in paragraph 1.c.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it intends to exclude the application of one of the procedures provided in Article 9.1.a and b in its relations with other Parties.

4. Any State may, at any time, by a declaration addressed to the Secretary General of the Council of Europe, define, as far as it is concerned, the term "national" for the purposes of this Convention.

Article 4 Obligation to furnish information

1. Any sentenced person to whom this Convention may apply shall be informed by the sentencing State of the substance of this Convention.

2. If the sentenced person has expressed an interest to the sentencing State in being transferred under this Convention, that State shall so inform the administering State as soon as practicable after the judgment becomes final.

3. The information shall include:

a. the name, date and place of birth of the sentenced person;

b. his address, if any, in the administering State;

c. a statement of the facts upon which the sentence was based;

d. the nature, duration and date of commencement of the sentence.

4. If the sentenced person has expressed his interest to the administering State, the sentencing State shall, on request, communicate to that State the information referred to in paragraph 3 above.

5. The sentenced person shall be informed, in writing, of any action taken by the sentencing State or the administering State under the preceding paragraphs, as well as of any decision taken by either State on a request for transfer.

Article 5 Requests and replies

1. Requests for transfer and replies shall be made in writing.

2. Requests shall be addressed by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State. Replies shall be communicated through the same channels.

3. Any Party may, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it will use other channels of communication.

4. The requested State shall promptly inform the requesting State of its decision whether or not to agree to the requested transfer.

Article 6 Supporting documents

1. The administering State, if requested by the sentencing State, shall furnish it with:

a. a document or statement indicating that the sentenced person is a national of that State;

b. a copy of the relevant law of the administering State which provides that the acts or omissions on account of which the sentence has been imposed in the sentencing State constitute a criminal offence according to the law of the administering State, or would constitute a criminal offence if committed on its territory;

c. a statement containing the information mentioned in Article 9.2.

2. If a transfer is requested, the sentencing State shall provide the following documents to the administering State, unless either State has already indicated that it will not agree to the transfer:

a. a certified copy of the judgment and the law on which it is based;

b. a statement indicating how much of the sentence has already been served, including information on any pre-trial detention,

remission, and any other factor relevant to the enforcement of the sentence;

c. a declaration containing the consent to the transfer as referred to in Article 3.1.d; and

d. whenever appropriate, any medical or social reports on the sentenced person, information about his treatment in the sentencing State, and any recommendation for his further treatment in the administering State.

3. Either State may ask to be provided with any of the documents or statements referred to in paragraphs 1 or 2 above before making a request for transfer or taking a decision on whether or not to agree to the transfer.

Article 7 Consent and its verification

1. The sentencing State shall ensure that the person required to give consent to the transfer in accordance with Article 3.1.d does so voluntarily and with full knowledge of the legal consequences thereof. The procedure for giving such consent shall be governed by the law of the sentencing State.

2. The sentencing State shall afford an opportunity to the administering State to verify, through a consul or other official agreed upon with the administering State, that the consent is given in accordance with the conditions set out in paragraph 1 above.

Article 8 Effect of transfer for sentencing State

1. The taking into charge of the sentenced person by the authorities of the administering State shall have the effect of suspending the enforcement of the sentence in the sentencing State.

2. The sentencing State may no longer enforce the sentence if the administering State considers enforcement of the sentence to have been completed.

Article 9 Effect of transfer for administering State

1. The competent authorities of the administering State shall:

a. continue the enforcement of the sentence immediately or through a court or administrative order, under the conditions set out in Article 10, or

b. convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the

law of the administering State for the same offence, under the conditions set out in Article 11.

2. The administering State, if requested, shall inform the sentencing State before the transfer of the sentenced person as to which of these procedures it will follow.

3. The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions.

4. Any State which, according to its national law, cannot avail itself of one of the procedures referred to in paragraph 1 to enforce measures imposed in another Party on sentenced persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is prepared to receive such persons for further treatment may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate the procedures it will follow in such cases.

Article 10 Continued enforcement

1. In the case of continued enforcement, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State.

2. If, however, this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State.

Article 11 Conversion of sentence

1. In the case of conversion of sentence, the procedures provided for by the law of the administering State apply. When converting the sentence, the competent authority:

a. shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State;

b. may not convert a sanction involving deprivation of liberty to a pecuniary sanction;

c. shall deduct the full period of deprivation of liberty served by the sentenced person; and

d. shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed.

2. If the conversion procedure takes place after the transfer of the sentenced person, the administering State shall keep that person in custody or otherwise ensure his presence in the administering State pending the outcome of that procedure.

Article 12 Pardon, amnesty, commutation

Each Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws.

Article 13 Review of judgment

The sentencing State alone shall have the right to decide on any application for review of the judgment.

Article 14 Termination of enforcement

The administering State shall terminate enforcement of the sentence as soon as it is informed by the sentencing State of any decision or measure as a result of which the sentence ceases to be enforceable.

Article 15 Information on enforcement

The administering State shall provide information to the sentencing State concerning the enforcement of the sentence:

a. when it considers enforcement of the sentence to have been completed;

b. if the sentenced person has escaped from custody before enforcement of the sentence has been completed; or

c. if the sentencing State requests a special report.

Article 16 Transit

1. A Party shall, in accordance with its law, grant a request for transit of a sentenced person through its territory if such a request is made by another Party and that State has agreed with another Party or with a third State to the transfer of that person to or from its territory.

2. A Party may refuse to grant transit:

a. if the sentenced person is one of its nationals, or

b. if the offence for which the sentence was imposed is not an offence under its own law.

3. Requests for transit and replies shall be communicated through the channels referred to in the provisions of Article 5.2 and 3.

4. A Party may grant a request for transit of a sentenced person through its territory made by a third State if that State has agreed with another Party to the transfer to or from its territory.

5. The Party requested to grant transit may hold the sentenced person in custody only for such time as transit through its territory requires.

6. The Party requested to grant transit may be asked to give an assurance that the sentenced person will not be prosecuted, or, except as provided in the preceding paragraph, detained, or otherwise subjected to any restriction on his liberty in the territory of the transit State for any offence committed or sentence imposed prior to his departure from the territory of the sentencing State.

7. No request for transit shall be required if transport is by air over the territory of a Party and no landing there is scheduled. However, each State may, by a declaration addressed to the Secretary General of the Council of Europe at the time of signature or of deposit of its instrument of ratification, acceptance, approval or accession, require that it be notified of any such transit over its territory.

Article 17 Language and costs

1. Information under Article 4, paragraphs 2 to 4, shall be furnished in the language of the Party to which it is addressed or in one of the official languages of the Council of Europe.

2. Subject to paragraph 3 below, no translation of requests for transfer or of supporting documents shall be required.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, require that requests for transfer and supporting documents be accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of these languages as it shall indicate. It may on that occasion declare its readiness to accept translations in any other language in addition to the official language or languages of the Council of Europe.

4. Except as provided in Article 6.2.a, documents transmitted in application of this Convention need not be certified.

5. Any costs incurred in the application of this Convention shall be borne by the administering State, except costs incurred exclusively in the territory of the sentencing State.

Article 18 Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe and non-member States which have participated in its elaboration. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 1.

3. In respect of any signatory State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 19 Accession by non-member States

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Contracting States, may invite any State not a member of the Council and not mentioned in Article 18.1 to accede to this Convention, by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 20 Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect

of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 21 Temporal application

This Convention shall be applicable to the enforcement of sentences imposed either before or after its entry into force.

Article 22 Relationship to other Conventions and Agreements

1. This Convention does not affect the rights and undertakings derived from extradition treaties and other treaties on international co-operation in criminal matters providing for the transfer of detained persons for purposes of confrontation or testimony.

2. If two or more Parties have already concluded an agreement or treaty on the transfer of sentenced persons or otherwise have established their relations in this matter, or should they in future do so, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention.

3. The present Convention does not affect the right of States Party to the European Convention on the International Validity of Criminal Judgments to conclude bilateral or multilateral agreements with one another on matters dealt with in that Convention in order to supplement its provisions or facilitate the application of the principles embodied in it.

4. If a request for transfer falls within the scope of both the present Convention and the European Convention on the International Validity of Criminal Judgments or another agreement or treaty on the transfer of sentenced persons, the requesting State shall, when making the request, indicate on the basis of which instrument it is made.

Article 23 Friendly settlement

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Convention and shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of its application.

Article 24 Denunciation

1. Any Party may at any time denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

3. The present Convention shall, however, continue to apply to the enforcement of sentences of persons who have been transferred in conformity with the provisions of the Convention before the date on which such a denunciation takes effect.

Article 25 Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States which have participated in the elaboration of this Convention and any State which has acceded to this Convention of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance, approval or accession;

c. any date of entry into force of this Convention in accordance with Articles 18.2 and 3, 19.2 and 20.2 and 3;

d. any other act, declaration, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at ....., the ....., in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention, and to any State invited to accede to it.

5 U.S.C. § 701

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; [1] and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The

United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

D.D.C. R. 7(n)

(n) MOTIONS INVOLVING JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTIONS.

(1) In cases involving the judicial review of administrative agency actions, unless otherwise ordered by the Court, the agency must file a certified list of the contents of the administrative record with the Court within 30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion, whichever occurs first. Thereafter, counsel shall provide the Court with an appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon in any memorandum in support of or in opposition to any dispositive motion. Counsel shall not burden the appendix with excess material from the administrative record that does not relate to the issues raised in the motion or opposition. Unless so requested by the Court, the entire administrative record shall not be filed with the Court.

(2) The appendix shall be prepared jointly by the parties and filed within 14 days following the final memorandum on the subject motion. The parties are encouraged to agree on the contents of the appendix which shall be filed by plaintiff. In the absence of an agreement, the plaintiff must serve on all other parties an initial designation and provide all other parties the opportunity to designate additional portions of the administrative record. Plaintiff shall include all parts of the record designated by all parties in the appendix.

(3) In appropriate cases, the parties may request the option to submit separate appendices to be filed with any memorandum in support of, or in opposition to, the dispositive motion.