ejected appellant. Rather, the charge is that the evidence was false in attributing to the Mexican authorities any role at all in appellant's removal. The charge is that it was the prosecution which abducted appellant and then sought to hide its illegal action by imputing it to Mexico.

A. The files and records of the case conclusively establish that the challenged evidence served to prove legal deportation by Mexico.

This Court in its opinion affirming the original judgment of conviction held that Huggins' testimony and Government Exhibit 25A were "evidence of legal deportation", *United States* v. *Rosenberg, supra*, at 603.*

Significantly, the lower court's opinion avoids any reference to this Court's holding that the disputed evidence was proffered to establish that "Sobell had been legally deported from Mexico." *Id.*

Ignoring this Court's unequivocal finding, the lower court concludes that Huggins' testimony and Government Exhibit 25A were not false, contending that the evidence could not possibly suggest "legal deportation," but merely indicated that appellant was forcibly transported to the United States. The lower court's novel reconstruction of the trial and appeal would have us believe that when Huggins testified that appellant was "deported from Mexico," no one in the courtroom, including the jury, could understand this to be "evidence of legal deportation" by Mexico. But such a reconstruction of the trial reckons without this Court's reading of the record.

* This Court in its opinion enunciated the prosecution's purpose in introducing the evidence here at issue, stating: "When the government introduced evidence to show that Sobell had been legally deported * * *." See also footnote 20, p. 603.

The lower court categorically declares:

> "Patently, this does not show an attempt by the prosecution to create the impression of legal deportation as is now charged" (A. 218).

It is impossible to conceive how the record "patently" excludes the "impression of legal deportation" when three experienced jurists were left with precisely that impression. Thus it would appear that the lower court, in denying appellant's motion for a hearing, not only disregarded the evidence set forth for the first time in the moving papers. It also disregarded pertinent sections of the files and records of the case.

But even if the clear finding of this Court were to be disregarded, the holding below is erroneous and refuted by the record. Assistant Prosecutor Roy Cohn obviously referred to Mexican authorities in asking Rios when "Sobell was deported to the United States by the authorities" (R. 926). Mr. Cohn sought to introduce Government Exhibit 25 to establish "the circumstances of the departure of Sobell from Mexico to the United States" (R. 938). Defense counsel, recognizing that Mr. Cohn sought to prove action by the Mexican authorities, objected to its admissibility, in that the document was not competent to establish the act of another government (R. 938-940). Surely the prosecution was not trying to indicate by this document that appellant had been kidnapped by the prosecution's agents.

Seeking to support the prosecution's contention that appellant was deported by Mexico, Huggins testified that Mexican Secret Policemen acted in their official capacity in bringing appellant to Laredo.*

* "Q. And those persons were in an official capacity? A. Yes, sir" (R. 1026).

In addition, Huggins testified that the exhibit was prepared because "regulations" required it in the case of "any person who is being deported from Mexico" (R. 1036). This testimony from an official of the Immigration and Naturalization Service could only impress upon the jury that the Government of Mexico had deported appellant. Similarly, the jury would give great weight to the conclusions of such an official, based on his personal "observation" (R. 1027, 1028). Obviously this was the "other proof * * * of deportation" (R. 926) promised by Mr. Cohn.

The lower court's suggestion that the sole purpose of Government Exhibit 25 was merely to establish that the Mexican Security Police had brought appellant to Laredo, Texas, is clearly refuted by the record.

Appellant's counsel objected only to one portion of Government Exhibit 25, the three words "Deported from Mexico" (R. 1029). Defense counsel declared they would not object to the admission of that side of the manifest which contained appellant's signature *and* the entry "Brought to immigration office by Mexican police." But the prosecution refused this offer and insisted that the entry "Deported from Mexico" on the other side of the document be admitted and made available to the jury.

The prosecution's insistence that the words "Deported from Mexico" not be excluded removes any question as to the purpose of submitting the challenged exhibit and Huggins' testimony. It clearly sought to do more than establish that appellant was forcibly returned to the United States by Mexican police.

Once again, in the argument on appellant's motion in arrest of judgment, the prosecution represented unequivocally that "the final act of deportation was effected at Laredo" and that "literally he [appellant] was kicked out

as a deportee" (R. 1599). Finally, the prosecution's statements in its brief to this Court manifest a clear "attempt * * * to create the impression of legal deportation." See Appendix II.

All this was brought to the attention of the lower court in appellant's moving papers (A. 11-15, 69-71) and upon oral argument (A. 111-116, 124-125, 141, 142). Yet it chose to ignore these obviously pertinent portions of the record in rendering its opinion.

B. The prosecution knew that Huggins' testimony was perjured and intentionally misleading.

Huggins, in attempting to support the truth of the notation "Deported from Mexico" on Government Exhibits 25 and 25A, asserted under oath that the Mexican police, who brought appellant to Laredo, Texas, were acting in their "official capacity" (R. 1026).

Appellant's present motion demonstrates that this statement was false, as Huggins and the prosecution then and there well knew. The kidnappers of appellant were not acting as an "arm of the authorities of the Mexican Government" (A. 167), but solely as agents of the prosecution.

As has already been shown, Huggins' testimony and Government Exhibit 25A served to establish, in the context of the trial, that appellant had been legally deported by the Mexican authorities. This evidence indisputably impressed in the minds of all, including the jury, that appellant's ouster from Mexico was effected by Mexican, and not American, authorities.

The record of Huggins' examination is replete with references to "Mexican authorities" and "officials" on the strength of his testimony. Nowhere was an attempt

made by the prosecution or the witness to correct this impression.*

As the present motion proves, the prosecution consciously attributed appellant's removal to the Mexican Government in order to hide its own illegal role in the seizure and abduction.

In light of the averments of the motion, the lower court committed most grievous error in conclusively finding, without a hearing, that Huggins' testimony was not perjurious. At the core of the prosecution's fraud was the false imputation to the Government of Mexico of responsibility for appellant's seizure. Only thus could the prosecution obtain legal sanction for appellant's abduction and be able to introduce evidence of his "involuntary" return, as well as the other flight testimony which resulted from the illegal search and seizure. Huggins' perjured testimony was another step toward this fraudulent end.

The lower court, disregarding the totality of Huggins' testimony and other pertinent portions of the record, seeks to avoid the thrust of appellant's motion by relying on the witness' statement that the notation "deported from Mexico" was merely based upon his personal observation.

But the lower court's argument misses the point and ignores the uncontroverted facts. Assuming, *arguendo*, that Huggins, at the time of appellant's arrival in Laredo, honestly believed that appellant was deported by the Mexi-

* Indeed, the trial court felt that any suggestion that authorities other than Mexican were involved in appellant's removal was too remote for consideration. When defense counsel sought to probe this possibility, the prosecution's objection was sustained.

> "Q. Did you hear any of the FBI men say that they had gone into Mexico?
>
> Mr. Kilsheimer: I object to that.
>
> The Court: I will have to sustain that. We are getting very far afield" (R. 1036).

can authorities, within a day thereafter he knew the notation to be false.* He was so advised by representatives of the Mexican Government. But Huggins and the prosecution concealed and covered up this highly material fact which would have completely destroyed the significance of the testimony and Government Exhibit 25A.**

Huggins' testimony does not refute appellant's charge of perjury but rather establishes that there was a premeditated and carfully conceived plan to cause the court and jury to believe that the Mexican Government had legally deported or otherwise ejected appellant.

Moreover, it is self-evident that Huggins, by personal observation, knew that appellant was not "Deported from Mexico." The circumstances of appellant's arrival in Laredo rebutted any such conclusion. Appellant was delivered by persons other than Mexican immigration officials, at 3:45 in the morning (A. 37). He did not have the documents regularly given by Mexico immigration officials to deportees, nor were any of the normal deportation procedures followed. †

* The notation "Deported from Mexico" was not on the manifest at the time appellant signed it (A. 13).

** Cf. Title 18, U. S. C., Section 1001:

> "Whoever * * * conceals or covers up by any trick, scheme, or device a material fact * * * shall be * * * imprisoned not more than five years * * *."

† By treaty between the United States and Mexico (Article VII, Convention between the United States and Mexico to Prevent Smuggling and for Other Purposes, signed at Washington, December 23, 1925. U. S. Treaty Series No. 732) the United States Embassy is advised of deportations by the immigration officials of Mexico. Concurrently the Mexican consulate and the United States immigration officials at the point of entry are notified. In the instant case, none of these standard procedures was followed.

To suggest that Huggins, fully acquainted with these facts, believed as a result of his personal observation that the Mexican authorities had deported appellant, is patently incredible.

C. The lower court disregarded the significance of the false evidence and failed to apply the principles underlying *Mooney* v. *Holohan*.

On the basis of the record, it was impossible for the lower court conclusively to determine that the jurors could not consider the tainted evidence to be proof of legal deportation by the Government of Mexico. The lower court conceded that such an inference would have been highly prejudicial to appellant.

> "* * * indeed, it would hurt you if they established that there was a legal deportation because then it would rise to the heights of having a legal adjudication" (A. 121).

Clearly, such a conclusion would have given the jury the impression that Mexico had ordered appellant's expulsion after making a determination of wrongdoing on his part. In the context of the prosecution's attempt to prove guilty flight, the challenged evidence had even more significance. It could only mean that the Government of Mexico had decided to expel appellant and deliver him to the federal authorities because he had either (a) entered Mexico illegally in the course of flight, (b) while in Mexico violated its laws, or (c) been adjudged by Mexican authorities to be a fugitive from justice. The false evidence was pregnant with such prejudicial inferences, all of which bolstered the prosecution's theory of guilty flight.

As set forth in Point II, *supra*, the prosecution, in order to hide its illegal seizure of appellant, tendered evidence of deportation to avoid an inquiry into the circumstances of his removal. Otherwise the prosecution could not have used the illegally manufactured evidence of "involuntary"

return. Nor could it have used the evidence it secured as a result of its illegal search and seizure of appellant's residence and person.

Moreover the purpose of the prosecution's fraud was to use the contrived testimony as the "natural capstone" of its flight evidence. This evidence did more than negative a possible mistaken inference of voluntary return. It established that appellant did not want to return and was taken into custody only because he had been seized by the Mexican authorities and brought to Laredo, Texas.

The trial court, in its charge to the jury, recognized that such was the purpose of Government Exhibit 25A and the testimony in support thereof, saying that appellant:

> "was apprehended only after being delivered to the United States by the Mexican authorities" (R. 1559).

In its brief to this Court the prosecution stated (p. 66):

> "Thus, proof that his return was involuntary, in conjunction with proof of his activities in Mexico, tended strongly to show that his trip to Mexico was prompted by a desire to escape prosecution. As such it was persuasive evidence of his consciousness of guilt."

But the circumstances of appellant's return could be "persuasive evidence of his consciousness of guilt" only if they imported that he would not have voluntarily returned. It is obvious that such was the prosecution's purpose, and such was the effect of the false evidence.

The prosecution knew that appellant's trip to Mexico was not surreptitious and could not connote guilty flight. By adducing evidence that appellant would not voluntarily return and therefore had to be deported, the prosecution

distorted the innocent nature of his lawful departure from the United States. Cf. *United States* v. *Rosenberg*, *supra*, at 602. Absent the false evidence, the other "flight" testimony had little probative force and could not have established that appellant's trip to Mexico was *ab initio* for the purpose of flight.

Had the prosecution merely sought to negative any inference that appellant voluntarily returned to stand trial, it could have done so by telling the truth.

It would have been impossible then for the jury to conclude that there had been an adverse "legal adjudication" by Mexico. Had the truth been told, the jury would have known that appellant did not refuse to return voluntarily to stand trial. On the contrary, the truth would have disclosed that the prosecution had denied appellant the opportunity to return voluntarily.

The prejudicial nature of the false evidence underscores the fraudulent action of the prosecution. It makes even more necessary that the wrong be undone by granting appellant a hearing and the ultimate relief.

No court can conclusively resolve the impact of false evidence on a jury. For this reason, a court will not weigh the extent of prejudice when a prosecutor knowingly, wilfully and intentionally uses false evidence. As stated in *Coggins* v. *O'Brien*, 188 F. 2d 130, 139 (C.A. 1):

> "* * * the burden is not on the petitioner to show a probability that in the jury's deliberations the perjured evidence tipped the scales in favor of conviction. If the prosecutor is not content to rely on the untainted evidence, and chooses to 'button up' the case by the known use of perjured testimony, an ensuing conviction cannot stand, and there is no occasion to speculate upon what the jury would have done without the perjured testimony before it."

Commenting on this principle, Mr. Justice Douglas, in *Stein* v. *People of the State of New York*, 346 U. S. 156, 205, stated:

> "A similar rule prevails where the prosecution has made knowing use of perjured testimony to convict an accused. Mooney v. Holohan, 294 U. S. 103 * * *; Hysler v. State of Florida, 315 U. S. 411 * * *; Pyle v. State of Kansas, 317 U. S. 213 * * *. It has never been thought necessary to attempt to weed the perjured testimony from the non-perjured for the purpose of determining the degree of prejudice which resulted."

See also *Pyle* v. *Kansas*, 317 U. S. 213.

Our nation has a vital interest in guaranteeing that no prosecuting official may corrupt the judicial process or taint the administration of justice by contriving a conviction through the knowing use of false and perjudiced evidence. The corrupting effect on our democratic structure of law is so great that the courts have resolved, regardless of the guilt or innocence of a defendant, that the interests of society require the nullification of such a tainted conviction.

The lower court suggests that appellant may have known that he was not legally deported.* It therefore concludes that he is estopped from collaterally attacking his conviction after learning subsequently that the prosecution knew this evidence to be false. The lower court utterly failed to recognize the purpose or meaning of *Mooney* v. *Holohan*,

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* As set forth in appellant's moving papers (A. 20, 74), and discussed more fully in Point IV, *infra*, appellant did not know that he had not been removed by the Mexican authorities and that the prosecution was fully aware of the falsity of the evidence.

supra, or the concept of due process of law.* It disregarded the clear obligation of a prosecutor in a criminal proceeding. See *Berger* v. *United States*, 295 U. S. 78. How else can one explain the lower court's comment:

> "What difference would it have made at that point, whether it was knowing or not. You could have litigated perjury" (A. 164).**

One is constrained to conclude that the lower court did not give the necessary regard to the criteria of a fair trial and the decent and civilized norms of conduct encompassed within "due process of law." It failed to insist that the prosecution observe the principles enunciated in *Berger* v. *United States, supra*. Indeed the prosecutor in his summation referred to these principles to clothe the false evidence with the prestige and integrity of his office (R. 1510-1511):

> "* * * the United States Attorney is a representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such he is in a peculiar, a very peculiar and a very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor, indeed he should do, but while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. And this I emphasize: It is fair to say that the average jury in a greater or less degree has confidence that these obligations which so plainly rest upon the prosecuting attorney will be faithfully observed."

Justice demands that the United States Attorney consent to a hearing. Cf. *Mesarosh* v. *United States, supra*; *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115.*

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* Cf. *United States ex rel. Almeida* v. *Baldi, supra.*

** See also (A. 137):

> "Mr. Perlin: Your Honor, it doesn't make a bit of difference—talking about good faith, once the prosecution uses false testimony, knowing it to be false, the courts do not say 'This is a game of chance, that you can let them go unchallenged.'
>
> "The Court: That is right. The defense must challenge it."

And further (A. 165):

> "The Court: * * * What I am saying is that you sit at counsel table and you know that perjury is being committed, whether the government is a conspirator with the perjurer or not, but you know that perjury is being committed, can you sit back and permit that perjury to go to the jury unchallenged, then come back and show perjury?"

POINT IV

The allegations charging the prosecution suppressed evidence require that a hearing be granted pursuant to Title 28, U. S. C., Section 2255.

The petition alleges that the prosecution suppressed evidence which would have impeached a vital portion of its case against appellant. The prosecution suppressed evidence which would have established (1) that its agents illegally seized and abducted appellant; (2) that the Mexican Government in no way participated in or authorized this act; and (3) that representatives of the Mexican Gov-

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* In *Mesarosh*, the Solicitor-General had acquired information that cast doubt on the general credibility of one of the prosecution witnesses. He immediately moved the United States Supreme Court to remand the case to the district court for a hearing on the matter.

ernment on at least two occasions advised the prosecution that Mexico did not sanction its illegal actions (A. 26-39).

This suppressed evidence was unknown to appellant at the time of trial (A. 20, 74).

The suppressed evidence would have impeached the prosecution's testimony that appellant was legally deported or otherwise ousted by the Mexican authorities. It would have refuted the prosecution's contention that appellant intended to remain beyond the reach of the federal authorities. It would have shown that the prosecution knowingly deprived appellant of the opportunity to make his planned voluntary return to the United States.*

Regardless of whether the prosecution knowingly used perjured evidence, its suppression of such highly significant facts constitutes independent legal grounds for vacating and setting aside the judgment of conviction. For apart from the falsity of its evidence, the prosecution by such suppression distorted the meaning of appellant's trip to Mexico and intentionally misled the jury to draw erroneous conclusions concerning his removal.

The lower court contends that appellant must be denied a hearing on the ground that the record conclusively establishes that all the facts in the present petition were known to him at the time of trial, and that in any event the suppressed evidence was neither legally relevant nor helpful to appellant. Here, as elsewhere, the court's erroneous conclusion resulted from its failure to consider that it was the prosecution, and not the Mexican Government, that removed appellant.

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* Thus the nature of the suppressed evidence supports appellant's charge that the prosecution intended to prove legal deportation. It suppressed precisely those facts which would have refuted any inference of ouster by the Mexican authorities. The suppression was an integral part of the prosecution's knowing use of perjured evidence.

A. The present petition is based upon facts unknown to appellant at the time of the trial.

The lower court contends that appellant must have been fully aware of the suppressed evidence because he "knew that this alleged illegal seizure was highly irregular" (A. 219). The court further asserts that it is "hard to believe" that appellant did not know the "facts showing that the FBI had instigated this procedure as is charged now" in light of his assertion in his pre-sentence affidavit that "an FBI agent was waiting for him on the Mexican side" (A. 220).*

Patently, appellant's charge of suppression does not rest merely upon the irregularity of his seizure or FBI instigation. It is the suppression of the principal facts that the prosecution abducted appellant and that the Mexican authorities neither participated in, sanctioned or knew of his removal, which entitles appellant to relief. Appellant did not know, among other things, the total lack of Mexican association with the events described. Only by ignoring these operative facts could the court come to the erroneous conclusion that "the basic factual allegations set forth in Sobell's moving papers are not new * * *" (A. 200). Only thus could the court equate the present petition with

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* The court's conclusion here is contradicted by the prosecution in its original brief to this Court, which commented on this very point as follows:

> "From this it may be inferred that the Mexican authorities had alerted the FBI to expect Sobell's arrival, but it by no means follows that the Bureau was the instigator of Sobell's ouster" (Appendix II, p. ix).

appellant's affidavit in support of the motion in arrest of judgment.*

But that affidavit merely described how he was physically seized and transported to the International Bridge at Laredo, Texas, where he was met by an agent of the FBI (Appendix I). All the other facts set forth in the petition relating to appellant's seizure and the subsequent events (A. 24-31) were totally unknown to appellant at the time of trial. Clearly, appellant's pre-sentence affidavit did not establish that it was the prosecution which had abducted him without the consent of the Government of Mexico.

Moreover, the record refutes any suggestion that appellant had knowledge of the suppressed evidence. In the argument on the motion in arrest of judgment, appellant's counsel proceeded on the assumption that the Government of Mexico was a party to the seizure. He had no evidence to the contrary. Hence he asked for a hearing to obtain information concerning the circumstances of appellant's removal, and the respective roles of the prosecution and of the Mexican authorities (R. 1598). In appellant's brief to this Court he reiterated his request for a hearing to determine what had transpired, stating that "the facts are equivocal" (at p. 65).

A reading of the argument on the motion in arrest of judgment and of appellant's brief to this Court suggests no more than a conjecture on his part that the FBI had acted illegally in conjunction with the Mexican Government to

* The lower court in the course of argument stated (A. 118):

> "These facts substantially are the facts contained in a motion for arrest of judgment, were known to counsel, they said so, and in the motion for arrest of judgment substantially the same allegations were made as are being made now by you: that Sobell was kidnapped, he was abducted and he was brought over, taken by these authorities and brought over to Laredo, Texas—substantially."

obtain his expulsion. On their face, defense counsel's hesitant and equivocal manner in raising this suspicion in the final moments of the trial and his plea for the aid of the court to secure the facts, manifest appellant's ignorance.*

And this is not surprising. Appellant could not conceive that the prosecution would knowingly use perjured evidence and suppress the facts. The testimony was vouchsafed by the United States Attorney. Government Exhibit 25A was authenticated as a record of the United States Government. And evidence was presented by an employee of the Department of Justice.

Nor could appellant be expected to have obtained the full story of his removal from Mexico to rebut Huggins' testimony and Government Exhibit 25A. He was incarcerated continuously from the time of his arrival in Laredo and he had neither the facilities nor the funds to institute an investigation. Appellant could not foresee that the prosecution would use the circumstances of his removal as proof of flight or that it would contend that he had been legally deported by Mexico. The first inkling appellant had of this was during the examination of Rios and the very next day Huggins took the stand.

Appellant alleges in his petition that he did not have knowledge of the evidence suppressed by the prosecution. Appellee contests this fact. The files and records of the case support appellant's contention. They do not conclusively establish the contrary. Hence, it was error for the lower court to resolve this issue of fact without granting appellant a hearing. Where allegations that a conviction and sentence are void raise factual issues outside the record, a hearing must be granted. See *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy*, and cases cited in Point II, *supra*.

* In its brief to this Court, the prosecution made much of the fact that appellant could not produce "a scintilla of evidence" to show wrongdoing on its part (Appendix II, p. xii).

Even if it were to be assumed that appellant had some knowledge of the prosecution's role in the seizure, to sustain the lower court's decision one would be required conclusively to find that appellant obtained no new evidence since the time of the trial bearing on that matter or serving to establish the prosecution's misconduct at the trial. But there is no basis for such a finding and therefore appellant must be afforded the relief sought. Cf. *Price* v. *Johnston*, 334 U. S. 266, 288-291.*

The newly acquired evidence, unlike the affidavit supporting the motion in arrest of judgment, clearly establishes the falsity of Huggins' testimony and Government Exhibit 25A, as well as the prosecution's misconduct at the trial.

The lower court's suggestion that appellant's present contentions are belated and that therefore he is estopped by passage of time from obtaining relief has no foundation in law. The doctrine of laches or waiver has no application to a proceeding in the nature of a writ of habeas corpus. As Judge Fahy stated in *Farnsworth* v. *United States*, 232 F. 2d 59 (App. D. C.), relying in large part upon the decision of this Court in *United States* v. *Morgan*, 222 F. 2d 673:

> "If a defendant without good reason waits a long time before asserting his claimed right, with the consequence that many witnesses are dead, he might have difficulty maintaining his burden of proof, or a heavier burden of proof might be imposed upon him. See United States v. Morgan, 222 F. 2d at

* Obviously, the present charges of knowing use of perjured testimony and suppression of evidence were not litigated in the motion in arrest of judgment. In any event, appellant would not be precluded from obtaining relief pursuant to Section 2255 in light of the new evidence set forth in the petition. See *Chessman* v. *Teets*, 350 U. S. 3, reversing 221 F. 2d 276 (C. A. 9); *Hallowell* v. *United States*, 197 F. 2d 926 (C. A. 5); *Smith* v. *United States*, 223 F. 2d 750 (C. A. 5); *Martin* v. *United States; United States* v. *Wantland; Barrett* v. *Hunter; Hall* v. *Johnston*, all *supra*.

> page 675. But where the fundamental constitutional right has been denied, an accused should not be precluded from relief because he cannot satisfy a court that he had good cause for any delay in seeking it. 'To permit a defense of laches to the writ would, in effect, denude it of one of its essential characteristics—the power to hurdle a time factor.' Haywood v. United States, D. C., S. D., N. Y., 127 F. Supp. 485, 488."

See also *Brown* v. *Mississippi*, *United States* v. *Di Martini*, *McKinney* v. *United States*, all *supra*.

The lower court disregarded the basic principle that "men incarcerated in flagrant violation of their constitutional rights have a remedy." *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy*, *supra*, at 123.

To suggest that appellant may not now obtain relief after securing the evidence of the prosecution's wrongful actions pays scant regard to the concept of due process. The lower court might have been less concerned with the diligence of appellant and directed its attention to the reprehensible acts of the prosecution.*

* The lower court, in the course of argument, stated (A. 164, 165):

> "The Court: What difference would it have made at that point, whether it was knowing or not. You could have litigated perjury.
>
> "Mr. Perlin: No, your Honor, it makes a qualitative difference. And perhaps your Honor recalls better than I do the decision of the Supreme Court and all the courts, when a prosecution has to use false evidence, and they knew it to be false, that destroys the proceeding.
>
> "The Court: Does it excuse the conduct on the part of the defense where they sit back and know it is false and do not come forward during the course of the trial?
>
> * * *
>
> "What I am saying is that you sit at counsel table and you know that perjury is being committed, whether the government is a conspirator with the perjurer or not, but you known that perjury is being committed, can you sit back and permit that perjury to go to the jury unchallenged, then come back and show perjury?"

B. Appellant is not barred from relief because he did not testify or adduce evidence relative to his removal from Mexico.

The lower court holds that since appellant did not testify or adduce evidence to controvert the prosecution's proof of legal deportation, he is now precluded from collaterally attacking the judgment of conviction.

The error of the opinion is obvious. Since appellant was unaware of the suppressed evidence, he was plainly unable to present it.

Where the prosecution consciously suppresses relevant evidence which would have impeached its case, the trial is invalid. The mere fact that a defendant could have cast some doubt on the prosecution's case, does not validate the trial.

In this case, appellant could only testify to the facts set forth in his affidavit supporting the motion in arrest of judgment. His testimony could not have refuted the challenged evidence of deportation by the Mexican authorities, even if he had been convinced of its falsity. At most he could have suggested that the Mexican authorities in effecting his ouster did not comply with their internal laws and that the FBI knew of his ejection by the Government of Mexico. On the other hand, the suppressed evidence, known only to the prosecution, would have completely refuted the contention that appellant was legally deported.*

Had appellant characterized the testimony of Huggins, an official of the Department of Justice, as false, and Government Exhibit 25A, a certified document from the files of the Government, as inaccurate, without being able to present clear and convincing evidence in support thereof, the jury would not have believed him and disregarded the rest of

* Appellant's wife could say no more than appellant. Her testimony would have been attacked as biased and motivated by a desire to protect her husband.

his testimony. Undoubtedly his contention would have been characterized by the prosecution as "a figment of Sobell's imagination" (A. 220) and "fictional fantasies" (A. 222).

Appellant faced the choice of testifying without referring to this portion of the prosecution's case and therefore tacitly admitting its accuracy, or prejudicing his case by contending it was false. Hence the improper suppression of evidence substantially prejudiced appellant's defense.

The lower court, in support of its position that appellant's failure to take the stand defeats the present motion, cites as authority *Stein* v. *People of State of New York*, 346 U. S. 156. But in *Stein* there was no question of the prosecution's knowing use of perjured evidence or suppression. We are confident that if the prosecutor there had committed a fraud upon court, jury or defendant, the Supreme Court would not have held Stein entitled to no relief because he did not take the stand.*

As proof that appellant did not use available evidence, the lower court refers to his attempt to serve a subpoena *duces tecum* upon the Mexican Consulate in New York, directing it to produce appellant's application for his tourist card as evidence of lawful entry into that country (A. 221). The Mexican Government refused to submit to the jurisdiction of the court, relying upon its diplomatic immunity, but indicated that if "a proper request" were made it would attempt to comply therewith. Counsel for appellant did not object to having the subpoena vacated (A. 58).

The lower court's opinion once again ignores the reality of the situation. Appellant not only was barred by diplomatic immunity to call a consular official as a witness. But he presumed that Mexico had sanctioned his ouster. And he deemed it highly unlikely that the prosecution had not ob-

* This case involved a review of a state proceeding where the scope of review by the Supreme Court is more limited than in a case arising in the federal courts.

tained Mexico's consent before representing that Mexico had deported him. Hence he could not be expected to engage in a fishing expedition.

Indeed, the trial court by considering such matters as the degree of prejudice and the extent of appellant's diligence, applied standards which would be appropriate on a motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure, but not on a motion charging fraud and misconduct by the prosecution.

The lower court has equated the great responsibility of a prosecutor to conduct a fair trial with the non-existent obligation of a defendant to take the stand and refute fraudulent evidence. Such a concept has no sanction in law and cannot be reconciled with the most rudimentary concepts of due process. It would convert the search for truth and justice into a game of chance.

The allegations of suppression of material evidence are legally and factually sufficient and require that a hearing be granted pursuant to Section 2255. *Mooney* v. *Holohan*, *Pyle* v. *Kansas*, *United States ex rel. Almeida* v. *Baldi*, *Smith* v. *United States*, all *supra*, *United States* v. *Ragen*, 212 F. 2d 272 (C.A. 7).

C. The lower court erroneously concluded that the suppressed evidence was neither factually nor legally significant.

The lower court contends that (1) the suppressed evidence was of no value to appellant,* (2) that, it being of no legal significance, the prosecution had no duty to

* "Dealing next with the contention that the prosecution should have brought out the facts regarding the alleged kidnapping during the trial—I cannot see in what way this would have been beneficial to Sobell * * *" (A. 220).

disclose,* and (3) the question of the admissibility of the challenged evidence was waived by appellant.**

To deal with the last point first, it is *not* appellant's contention that he is entitled to relief because improper evidence was admitted or evidence improperly admitted. Rather, the basis of the collateral attack is that appellant was denied due process because the prosecution suppressed evidence which would have impeached its case. Admittedly, if the facts had been known at the time of trial, appellant might have successfully excluded certain contrived, false and prejudicial evidence. But we mention this fact solely to indicate a purpose of the prosecution in perpetrating the fraud and to demonstrate how it prejudiced appellant's defense. To paraphrase the lower court, "knowledge of facts which * * * established the impropriety of certain evidence [and] cast doubts upon its admissibility" was prevented by the prosecution's suppression.

We submit, further, that the prejudicial effect of the prosecution's suppression has been demonstrated. In addition to immunizing the fraud of Huggins' testimony and Government Exhibit 25A from attack, it led the jury to draw certain false inferences of flight and thereby corroborated Elitcher. It induced the jury to conclude that appellant was a member of the Rosenberg-Greenglass conspiracy.

* "Further there is no duty upon a prosecutor to present to the court a question which an intelligent and well-represented defendant sees fit not to raise on his own behalf, and which if raised, would be based necessarily on an argument that the Supreme Court should reverse a 70 year old rule of law [referring to *Ker* v. *Illinois*, 119 U. S. 436]" (A. 220).

** "* * * * whenever knowledge was in the possession of defense counsel during the trial of facts which either established the impropriety of certain evidence, or even cast doubts upon its admissibility, they are barred from raising this question on a motion to vacate judgment" (A. 223).

The prosecution may not arrogate to itself the right to determine what material evidence should be suppressed and what would be helpful to appellant. *United States ex rel. Almeida* v. *Baldi, supra.* Such a practice is fraught with danger of abuse. Nor is it proper to allow the prosecution to decide unilaterally that its seizure and abduction of appellant could not possibly affect the court's jurisdiction over the subject matter or his person. The prosecution's silence when the issue was raised, cannot be sanctioned.*

Were the lower court's decision to stand, it would grant license to an overreaching prosecutor to contrive a conviction by the artful selection of adverse evidence and the suppression of conflicting facts. The lower court's decision cannot be reconciled with the concept of due process enunciated by the courts.

POINT V

The prosecution practiced a deceit upon the trial and appellate courts.

A. The prosecution knowingly made false representations to the trial court.

In the last stages of the proceeding appellant submitted an affidavit in support of a motion in arrest of judgment, urging the court to hold a judicial inquiry to determine whether or not it had jurisdiction over his person (R. 1598).

The prosecution, taking advantage of appellant's limited knowledge of the circumstances, sought to prevent a hearing by asserting that the affidavit was false and hence should not be considered. Thus Mr. Saypol stated:

> "I submit to your Honor that the verity of what counsel has argued is as feigned as Sobell's defense, as counsel's seeming vehemence, as the nature of the defense, and the course that was pursued in an attack on the prosecutor. Two things I will concede: Mr. Phillips' statement that he is not familiar with the facts, and that is evident from my own experience in Mexico City * * *" (R. 1598).

Mr. Saypol vigorously rejected any suggestion that the FBI may have acted improperly and reaffirmed the false evidence of legal deportation by Mexico. He declared that appellant "literally * * * was kicked out as a deportee" and that "the final act of deportation was effected at Laredo" (R. 1599).

Seizing upon appellant's obviously innocent error of calling his tourist card a "visa",* Mr. Saypol attacked the credibility of his affidavit and sought to give the impression that appellant had entered Mexico illegally in the course of flight. Mr. Saypol stated:

> "This very affidavit contains a falsehood in the statement that there were exhibited amongst other things to the Mexican authorities visas" (R. 1598).

The prosecution knew just what appellant meant since his tourist card was in its possession, a fact it failed to mention to the court. Appellant's present motion demonstrates that his affidavit of April 4, 1951, was true, and that the prosecutor's statements were false and misleading.

The lower court maintains that the prosecutor's statement that appellant "literally * * * was kicked out as a deportee" was taken out of context (A. 225). This is

* The jurisdiction of the court could be successfully challenged only if appellant's seizure was effected by the prosecution without the consent of Mexico. The prosecution's suppression denied appellant this vital information.

* Appellant's counsel made the same unintentional error in the course of summation.

simply not so, as a reading of the whole statement will show. The lower court failed to relate this remark to Mr. Saypol's immediately preceding statement that "the final act of deportation was effected at Laredo." Moreover, the lower court again did not consider the many attempts of the prosecution throughout the trial to establish that the Government of Mexico effected appellant's ouster. See *supra*.

The lower court's decision rests essentially upon the contention that the prosecutor's statements did not influence its decision in ruling on appellant's pre-sentence motion.* But such an argument reckons without the record of the case. Even at that late stage of the trial, full disclosure of the facts may well have provided grounds for setting aside the jury verdict. See *supra*, Point II, C. Hence, the prosecution was impelled to make these false statements, even though it may have been confident that appellant could not successfully contest personal jurisdiction.

The present case more than adequately demonstrates why prosecution misconduct at any stage of a proceeding cannot be left unchallenged. A defendant is entitled to due process at every stage of a proceeding, and even after a jury verdict is returned. See *Smith* v. *United States*, 223 F. 2d 750 (C.A. 5). See also *United States ex rel. Almeida* v. *Baldi, supra*; *United States* v. *Ragen, supra*; *Robinson* v. *Johnston*, 50 F. Supp. 774 (D.C. Cal.); *Voigt* v. *Webb*, 47 F. Supp. 743 (D.C. Wash.). Cf. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238; *Townsend* v. *Burke*, 334 U. S. 736.

* The lower court declares that "any possible harm done was negatived by the fact that petitioner has here been given an opportunity to relitigate in full the questions he raised on that first motion" (A. 225). But one of the principal grounds tendered for denying both this and the companion motion is that the matter had been litigated and resolved before.

B. The prosecution's assertion that appellant was lawfully deported by Mexican authorities constituted a deceit upon this Court.

This Court in reviewing appellant's conviction concluded that Huggins' testimony and Government Exhibit 25A constituted "evidence of legal deportation" and established that appellant was "legally deported from Mexico." *United States* v. *Rosenberg, supra*, at 603.

The prosecution, to perpetrate its fraud and safeguard the conviction from judicial attack, sought to impress upon this Court that such was the meaning of the challenged evidence. A reading of the prosecution's brief (Appendix II, *infra*), conclusively demonstrates that it sought to establish in the minds of this Court that appellant had been legally deported by the Mexican authorities and that the agents of the prosecution had in no way unlawfully participated in or instigated his seizure and removal to the United States.

The undisputed allegations of appellant's present motion clearly establish that the prosecution knew such arguments to be false and spurious.

We suggest that the prosecution's wrongful actions estop the appellee from now maintaining that the tainted evidence did not serve to prove legal deportation.

We have already indicated the nature of the legal problems which the prosecution would have faced in the event that the true circumstances of appellant's removal had been disclosed. The prosecution misled this Court and sought to prevent consideration of those legal issues raised by appellant's conviction.

An examination of the decision of this Court affirming the conviction indicates the uniquely prejudicial effect of the prosecution's wrongdoing. In considering the admissibility of Government Exhibit 25A, the Court concluded that it was relevant to support the conclusion that appel-

lant's trip to Mexico was *ab initio* for the purpose of flight (at 602).

The prosecution used this evidence and the trial court recognized it as independent and corroborative proof to establish appellant's membership in the Rosenberg-Greenglass conspiracy.*

The trial court in charging the jury, stated:

> "To determine whether Morton Sobell was a member of the conspiracy you are only to consider the testimony of Max Elitcher, William Danziger and the testimony relating to the defendant Sobell's alleged attempt to flee the country" (R. 1560).**

The lower court conspicuously failed to note that the writer of the opinion on appeal, Judge Frank, dissented from the majority view on the grounds that the trial court erred in failing correctly to charge on the question of whether or not appellant was a member of the Rosenberg-Greenglass conspiracy.

The majority of this Court contended that the jury could find on the basis of the evidence that appellant was a member of the "one giant conspiracy" and that hence the trial court correctly charged the jury. Judge Frank, however, maintained that, "The jury should have had

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* The appellee in its answering affidavit concedes that the evidence of flight was used to establish appellant's membership in the charged conspiracy and that "His apprehension and return to the United States by the Mexican police prevented him from successfully perfecting his flight out of Mexico to points abroad" (A. 48-49).

** "I charge you that no inference is to be drawn against the defendants Julius and Ethel Rosenberg because of the incidents relating to Morton Sobell's journey to and trips in Mexico except that you may consider whether such journey or trips show a preconceived plan as part of the conspiracy to be followed by the conspirators in attempting to escape the country" (R. 1560).

the opportunity to choose between the inferences and to decide whether he actually joined the larger conspiracy" (at 601).

Evidence of flight to Mexico, in light of the trial court's charge, must have been considered by the reviewing court in determining the sufficiency of the evidence against appellant. It obviously related to the question of whether the jury should have been charged on the two conspiracy theory.

But whether or not in the absence of the prosecution's false argument, another judge would have associated himself with Judge Frank's dissent or reversed the judgment of conviction on other grounds, is besides the point. When a prosecutor practices a fraud or deceit upon an appellate court, the argument that it may not have adversely affected the defendant will be given no weight. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, *supra*.

In this case, Hartford-Empire had used contrived evidence in a patent infringement suit against Hazel-Atlas. The suit was dismissed, but the appellate court, referring *inter alia* to the challenged evidence, reversed the judgment. Upon subsequently learning the spurious nature of the evidence, Hazel-Atlas asked the Court of Appeals to vacate its judgment. The motion was denied on the grounds that this evidence was not basic to the decision. Mr. Justice Black, in reversing the decision of the Court of Appeals, stated (322 U. S. at 246-247):

> "Whether or not it was the primary basis for that ruling, the article did impress the Court, as shown by the Court's opinion. Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges."

Mr. Justice Black further held that the defrauding party was estopped from disputing the effectiveness of the evidence. One of the defenses was that the evidence may have been improperly contrived but nevertheless was true. The Supreme Court stated:

> "Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys and collaborators" (at 247).

The Supreme Court expressed the rationale underlying its decision in replying to the argument that the complaining party had failed to demonstrate sufficient diligence, stating (at 246):

> "But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. * * * Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

A fortiori, the public interest in not permitting the corruption of the administration of the criminal law requires in the instant case a judicial correction of the prosecution's abuse of process and office.

In the words of Mr. Chief Justice Warren, the prosecution by its action

> "has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. * * * If it [the Court] has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity." *

In accordance with the ideals of American justice and the demands of due process enunciated by Mr. Chief Justice Warren, the decision of the lower court should be reversed and a hearing granted or in the alternative this Court should vacate its order affirming appellant's conviction and direct that a judgment of acquittal be entered.

Conclusion

It is particularly true in this case that the ability of our courts to recognize and undo wrong, a characteristic of our democratic tradition, will do great service to our nation and further enhance the prestige of our courts. Mr. Justice Frankfurter has pointed out:

> "Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism."

Our heritage requires that questions concerning the corruption of justice be brought to the attention of the courts, where they will be accorded the most careful scrutiny with all of the protections of a judicial hearing. The fullest litigation of such questions is in the highest traditions of the bar and the courts.

By denying appellant a hearing on the present charges, the lower court does not do justice to our courts or our country. If appellant fails to prove the charges, his contention will fall. If he prevails, justice requires that his conviction be vacated.

As the Supreme Court recently held:

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. * * * Therefore, fastidious regard for the honor of the administration of justice requires the Court to make

certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."

Our nation cannot tolerate appellant's conviction based upon fraud. The strength and vitality of our country and its responsible role in the world require the repudiation of conduct inimical to the impartial administration of justice. In the words of Mr. Chief Justice Warren:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. * * *
>
> "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them."

The decision of the lower court should be reversed and appellant should be granted a hearing, or in the alternative, the order of affirmance of the original judgment of conviction should be vacated and a judgment of acquittal entered.

Respectfully submitted,

DONNER, KINOY & PERLIN,
by FRANK J. DONNER,
ARTHUR KINOY,
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APPENDIX I

Affidavit of Sobell in Arrest of Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MORTON SOBELL, being duly sworn, deposes and says:

I am one of the defendants herein and I make this affidavit in the interest of justice and in furtherance of my rights as an American born and brought up in this country.

On Wednesday, August 16, 1950 at about 8:00 P. M. we had just finished our dinner in our apartment in Mexico City in the United States of Mexico, and while my wife and I were lingering over our coffee there was a knock on the door. My older daughter opened the door and three men burst into the room with drawn guns and bodies poised for shooting; these men did not ask my name, did not say what they wanted. I demanded to see a warrant, or some other legal process. No reply, except some vague charge that I was one "Johnny Jones" and that I robbed a bank in Acapulco in the sum of $15,000.00 was made. Of course, I vehemently denied the charge and tried to show them my papers, visas, etc., to prove that I was no bank robber.

One of the men showed a piece of metal in his hand and said they were police. They were dressed in civilian clothes. A fourth man came later. He also was in civilian clothes.

Only about 10 minutes lapsed from the time that they came till they hustled me out, and that was after I insisted

on calling the American Embassy; but without being permitted to do so.

They picked me up bodily and carried me down from the fourth floor to the ground floor. In the street I kept shouting for the police. A taxi was hailed and they opened the door; tried to force me into the taxi; when two more men came in and beat me over the head with black jacks until I lost consciousness. I woke up in the taxi and I was stretched horizontally at the feet of the three men.

When the car stopped in front of a building, they ordered me to get up; they told me to get into the building, but not to make a scene or they would plug me. We walked to the elevator; we went upstairs, and, we went into an office. They sat me down and a slim, tall, dark man came over; he looked at me. I asked him what it was all about: He slapped me in the face and told me that *they* were the ones that were *asking* questions. At that point I discovered that my head was bloody and my shirt bespattered with blood.

However, they asked me no questions, but they photographed me in several poses. We spent in that building from approximately 8:30 P. M. till 4:00 A. M. At 12:00 midnight, they offered me something to eat; but I had no appetite for food. During all the time no one questioned me. Some persons who identified themselves as officers to guard me chatted with me but expressed ignorance of the reason I was there.

At 4:00 A. M. I was moved into a large four door Packard and seated in the rear with two armed men, one on each side of me. At that moment, the same tall thin man came to the door and spoke to my guards in *English* saying to them "if he makes any trouble, shoot him."

The driver of the car, who apparently was the leader of the expedition, and who answered to the name of "Julio" told me that they were taking me to the Chief of the Mexican police for further action. With a number of stops for

one reason or another, we drove on till about 6:00 P. M. At that time Julio tried to make a phone call, or he did make one, and he told me that he was trying to get the Chief of Police. The same thing happened at about 10:00 P. M., and at midnight, on August 17th, telling me that he was trying to make sure that the Chief of Police would be available.

At about 1:30 we arrived at Nueva Loredo, we stopped in front of a building, and Julio went into the building and returned in about ten minutes and told me that he had spoken to the Chief and that the Chief told him to take me across the border and let me go.

We stopped at the Mexican customs on the Mexican side of the bridge, across the Rio Grande marking the border. No examination was made of my baggage and then we waited around in the car for about ten minutes. Julio returned and we started onward. When we reached the bridge, which as heretofore stated marks the boundary between the U. S. A. and Mexico, our car was flagged. We stopped and the front door opened. A man entered with a badge in his hand and stated that he was a United States agent and he remained in the car. When we arrived at the United States Customs I was directed to sign a card after they searched my baggage and myself. They handcuffed me and placed me in jail where I remained for five days, after which time I was taken to New York City.

MORTON SOBELL.

(Sworn to before me this 4th day of April, 1951.)

SOL PARKIN
Commissioner of Deeds, New York City
Residing in Bronx Cty
New York County Clerk's No. 40
Commission expires Sept. 28, 1952

APPENDIX II

Excerpt from Prosecution's Brief on the Original Appeal to This Court

POINT V

APPELLANT SOBELL'S MOTION IN ARREST OF JUDGMENT, CHALLENGING THE TRIAL COURT'S JURISDICTION OF HIS PERSON, WAS NOT TIMELY, AND IN ANY EVENT HAD NO MERIT.

After the verdict was returned Sobell for the first time challenged the trial court's jurisdiction of his person by moving in arrest of judgment (2402). In support of the motion he filed an affidavit stating, in substance, that in August, 1950, the Mexican police had unlawfully arrested him in Mexico City, beaten him, and forcibly carried him across the American border, where he was met and taken into custody by United States agents (2410-14). The only trial testimony concerning Sobell's departure from Mexico had been provided by a United States Immigration Inspector, who testified that on August 18, 1950 Sobell was brought into his office at Laredo, Texas, by the Mexican Security Police (1525-26), that F. B. I. agents were present (1525, 1533), that he prepared a manifest card on Sobell, as in the case of every person deported from Mexico (1534), and that after signing the card Sobell was taken into custody by the F. B. I. (1526).

Sobell claims that this testimony and his affidavit were enough to require the trial court to hold a hearing to determine whether his arrest in Mexico and subsequent transportation to Texas were "acts done or participated in by officers of the United States," and that the court's refusal to do so was error. Sobell's Brief, p. 63. We maintain, *first*, that Sobell forfeited any right to question the court's jurisdiction of his person by going to trial on the merits without objection; *second*, that Mexico had every right to

expel Sobell without ceremony, and that even if United States agents requested such expulsion (of which there is no proof), it would not render it unlawful; and *finally*, that even assuming that Sobell was brought before the court below by unlawful means, the court did not lose jurisdiction.

A. *Sobell waived any right to question the trial court's jurisdiction of his person.*

Shortly after the Mexican Police turned Sobell over to the United States Immigration Service he was taken into custody by the F. B. I. under a warrant of arrest issued by the United States Commissioner for the Southern District of New York (Affidavit of Edward Kuntz in Support of Sobell's Motion to Dismiss Indictment C 133-293, p. 1.) Sobell waived a removal hearing in Texas (2411) and was taken to New York, where he was arraigned before the Commissioner. Affidavit of Edward Kuntz, *supra*, at p. 2. A number of pre-trial motions were made in the district court by Sobell, but none questioned its jurisdiction. At the trial neither Sobell nor his wife, who left Mexico with him (1526), took the stand to contradict the testimony of the Immigration Inspector or to explain the manner in which Sobell was apprehended by the Mexican Police. It was not until after the jury had spoken that Sobell raised the so-called jurisdictional question.

It is not contended that any irregularity occurred in arresting Sobell in Laredo, Texas, or in removing him to New York. What Sobell objects to is the manner in which he allegedly was ousted from Mexico in the first place. Since that objection concerns events antecedent to Sobell's arrival in Laredo, it is definitely arguable that Sobell waived it by consenting to his transfer from Laredo to New York. *Cf. Ker v. Illinois*, 119 U. S. 436, 441 (1886); *Chandler v. United States*, 171 F. 2d 921, 934 (1st Cir. 1948), cert. denied, 336 U. S. 918 (1949). Be that as it may, under

Appendix II

Rule 12(b)(2) of the Federal Rules of Criminal Procedure Sobell was required to raise the question before trial. *Pon* v. *United States*, 168 F. 2d 373, 374 (1st Cir. 1948), and cases there cited. Rule 12(b)(2) provides as follows:

> "*Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

The "lack of jurisdiction" referred to in the rule is jurisdiction of the subject matter, which a defendant has no power to waive, whereas "'. . . jurisdiction of the person, if not challenged upon appearance, is equivalent to consent.'" *Pon* v. *United States, supra,* at 374.* The rule simply restates the prior law on the subject. *Ford* v. *United*

* An application of this doctrine is found in cases holding that where a defect in venue is apparent from the indictment and the defendant stands trial without objecting thereto, he waives his constitutional right to be tried in the district where he committed the offense charged. *United States* v. *Jones*, 162 F. 2d 72, 73 (2nd Cir. 1947); see *United States* v. *Brothman*, 191 F. 2d 70, 72 (2nd Cir. 1951).

Appendix II

States, 273 U. S. 593, 606 (1927). In that case the Supreme Court held:

> "A plea to the jurisdiction must precede the plea of not guilty. Such a plea was not filed. The effect of the failure to file it was to waive the question of the jurisdiction of the presence of defendant." *

Nor did Sobell show any "cause" under Rule 12(b)(2) to excuse his delay. His is hardly a case of newly discovered evidence. On the contrary, every allegation in the affidavit on which he based his motion in arrest of judgment concerned matters of which he had full knowledge from the very moment of his arrest by the F. B. I.

Wholly apart from any question of waiver under Rule 12(b)(2), lack of personal jurisdiction is not an issue that can be raised by motion in arrest of judgment. Rule 34 of the Federal Rules of Criminal Procedure limits the granting of such a motion to two specific instances: (1) where the indictment does not charge an offense, and (2) where

* *Cook* v. *United States*, 288 U. S. 102 (1933), relied on by appellant, is distinguishable on two grounds. There the United States libeled a British vessel and its master to collect certain penalties for carrying undeclared liquor. The master "answered to the merits; and excepted to the jurisdiction on the ground that the 'vessel was not seized within the territorial limits of any jurisdiction of the United States, but, on the contrary, was captured and boarded at a point more than four (4) leagues from the coast . . .'" 288 U. S. at 108. In sustaining the jurisdictional objection, the Supreme Court held that because of a treaty with Great Britain the United States lacked the power to seize the vessel and hence to subject it to its laws, and that the point was not lost by the entry of an answer to the merits. 288 U. S. at 121-22. Thus the defect was treated as relating to jurisdiction of the *subject matter*, not merely of the person of the master. In this connection the court was careful to distinguish its decision in *Ker* v. *Illinois*, 119 U. S. 436 (1886). Moreover, the jurisdictional question was raised before trial in the answer itself, not by motion in arrest of judgment.

the court was "without *jurisdiction of the offense* charged" (emphasis added). Any objection the validity of which depends on evidence taken at the trial can not be raised by motion in arrest of judgment. See *United States* v. *Zisblatt*, 172 F. 2d 740, 741-42 (2nd Cir. 1949). Such a motion "is proper only where it appears upon the face of the record that judgment cannot legally be entered." *United States* v. *Lias*, 173 F. 2d, 685, 687 (4th Cir. 1949).* The trial record in this case simply disclosed that Sobell was ejected from Mexico by the Mexican authorities (with no suggestion of misconduct on their part) and delivered to the United States Immigration Service. Thus there is nothing in the evidence, much less on the face of the record, which could conceivably bar entry of the judgment of conviction.

Having failed to make timely objection to the trial court's jurisdiction of his person, indeed, having acquiesced therein throughout the trial, Sobell was precluded from raising the question after his conviction.

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* *United States* v. *Rauscher*, 119 U. S. 407 (1886), cited by appellant as permitting the jurisdictional question to be raised by a motion in arrest of judgment, does not actually pass upon the point. In that case the defendant moved for a new trial and in arrest of judgment on the ground that he had been tried and convicted of an offense other than the one for which he had been surrendered to the United States by Great Britain under an extradition treaty. The Supreme Court reversed the judgment because of the treaty violation. However, no issue as to the timeliness of the motion was raised, and the matter was not discussed by the Court. In any event, to whatever extent the case may be inconsistent with Rule 34, the latter, having been subsequently promulgated, naturally governs.

B. *Mexico had a right summarily to expel Sobell, and even if it be assumed,* arguendo, *that the United States requested his expulsion, such request did not render the action unlawful.*

Putting to one side the question of waiver, and turning to the merits of Sobell's motion, we find the evidence undisputed that his expulsion from Mexico was the act of the Mexican police (1525-26; 2410-14).* There is not a shred of evidence that any United States agent assisted the Mexicans in this act. Nor is there anything in the record to indicate that the United States Government procured the Mexican Government to deport Sobell. The most that appears is that the F. B. I. was waiting for Sobell in Laredo when he was delivered by Mexico into the hands of the United States Immigration Service. From this it may be inferred that the Mexican authorities had alerted the F. B. I. to expect Sobell's arrival, but it by no means follows that the Bureau was the instigator of Sobell's ouster.

That Mexico had a perfect right to expel Sobell, an alien fugitive from justice, is settled beyond permissible dispute:

> "It will not be for a moment contended that the government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. * * *
>
> "Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominion of Peru." *Ker* v. *Illinois*, 119 U. S. 436, 442 (1886). See also *Chandler* v. *United States*, 171 F. 2nd 921, 935 (1st Cir. 1948), cert. denied, 336 U. S. 918 (1949).

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* Under this and the next subheading we assume, *arguendo*, the truth of the allegations contained in Sobell's affidavit.

Mexico, of course, could exercise that right in any manner it desired, and we are referred to no provision of Mexican law which interdicts the summary procedure that was followed (as we are assuming) in the case of Sobell. While kidnapping may be a criminal offense in Mexico, summary deportation of a fugitive from justice is hardly tantamount to kidnapping.* Since Mexico acted lawfully in effecting Sobell's expulsion, even if we were to make the unproved assumption that the United States requested Mexico to surrender Sobell, it would not render Mexico's action any the less lawful. At worst, the United States would then be in a position of having counseled the commission of a lawful act. Surely a fugitive from justice who is willingly surrendered by the country of his asylum to the country where he is wanted derives no immunity from prosecution by reason of the latter's request for his surrender. Cf. *Ker* v. *Illinois, supra; Chandler* v. *United States, supra.*

C. *In any event, the jurisdiction of a federal court in a criminal case is not impaired by the manner in which the accused is brought before it.*

We sought to demonstrate above that there was nothing unlawful about the manner in which Mexico rid herself and the United States acquired custody, of Sobell. Here we shall show that even if Sobell was uprooted from his asylum and surrendered to the United States by unlawful means, the court below still had power to try him.

The authorities are virtually unanimous that jurisdiction of a defendant in a criminal case is not impaired by the manner in which he was brought before the court. See cases collected in 165 A. L. R. 947 (1946). Thus, it is no bar to prosecution that the defendant was illegally arrested

* Even if it is true, as Sobell alleges, that he was beaten by the Mexican police, such mistreatment would hardly invalidate his deportation.

[*In re Johnson*, 167 U. S. 120 (1897); see *Malone* v. *United States*, 67 F. 2d 339, 341 (9th Cir. 1933)], removed from another district in violation of the federal removal statute [*Ex parte Lamar*, 274 F. 160 (2nd Cir. 1921), aff'd 260 U. S. 711 (1923)], or forcibly abducted from his place of refuge. *Ker* v. *Illinois*, 119 U. S. 436 (1886); *Mahon* v. *Justice*, 127 U. S. 700 (1888); *United States ex rel. Voigt* v. *Toombs*, 67 F. 2d 744 (5th Cir. 1933); *United States* v. *Unverzagt*, 299 F. 1015 (W. D. Wash. 1924), aff'd 5 F. 2d 492 (9th Cir. 1925), cert. denied 269 U. S. 566 (1925); *United States* v. *Insull*, 8 F. Supp. 311 (N. D. Ill. 1931); *Ex parte Lopez*, 6 F. Supp. 342 (S. D. Tex. 1936); see *Gillars* v. *United States*, 182 F. 2d 962, 972 (App. D. C. 1950); *Chandler* v. *United States*, 171 F. 2d 921 (1st Cir. 1948), cert. denied, 336 U. S. 918 (1949).

In *Ker* v. *Illinois and Mahon* v. *Justice*, both *supra*, the Supreme Court held that there is nothing in the Constitution, laws or treaties of the United States to preclude a state from trying an accused who has been unlawfully abducted from another state or country. The Court did not decide whether a federal court would exercise jurisdiction under similar circumstances. Appellant stresses that the Supreme Court was concerned with state action, and urges that a contrary rule should be adopted in a federal prosecution where the defendant's presence is secured by the unlawful acts of federal officers. However, several United States Courts of Appeals and District Courts have refused to recognize any distinction in the case of federal action. *United States ex rel. Voigt* v. *Toombs; United States* v. *Unverzagt; United States* v. *Insull; Ex parte Lopez; see Gillars* v. *United States; Chandler* v. *United States*, all cited *supra*. In the *Chandler* case, 171 F. 2d at 933, the First Circuit specifically rejected the notion that a federal court in a criminal case, like a court of equity, may as a matter of discretion decline to exercise its jurisdiction.

And the Court of Appeals for the District of Columbia pointed out in the *Gillars* case that the exercise of jurisdiction where a defendant is brought before the court by unlawful means is not analogous to the use of the fruits of an illegal arrest to obtain a conviction, which would be proscribed by the *McNabb* rule. This is significant because much of Sobell's argument is based on the spirit of *McNabb*. Sobell's Brief, pp. 66, 67. Furthermore, the policy consideration which the Supreme Court said justified a state in trying an accused forcibly abducted from another jurisdiction—namely, the paramount interest of the public in criminal law enforcement (see *In re Johnson, supra,* at 126)—is equally applicable to the federal government. As the Supreme Court said in *Mahon* v. *Justice, supra,* at 712:

> "It would indeed be a strange conclusion, if a party charged with a criminal offence could be excused from answering to the government whose laws he had violated because other parties had done violence to him, and also committed an offence against the laws of another State."

In the last analysis, however, we do not think that this Court need pass on the question of law which the Supreme Court has left open. For even if the rule were as Sobell would like it, he would not be in a position to invoke it, since it presupposes wrongful conduct on the part of a federal officer and there is not a scintilla of evidence of any such conduct here.

It follows that even if timely, Sobell's motion in arrest of judgment was properly denied by the trial court.

United States Court of Appeals

For the Second Circuit

October Term, 1956

No. 24300

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORTON SOBELL,

Defendant-Appellant.

BRIEF FOR APPELLANT ON SUPPLEMENTARY MOTION

Jurisdictional Statement

This is an appeal from an opinion and order of the district court denying appellant's motion for a hearing pursuant to Title 28, U. S. C., Section 2255. The court's opinion and order was entered on June 20, 1956, and is reported at 142 F. Supp. 515. Notice of Appeal was filed on June 27, 1956 (A. 5*). Jurisdiction of this Court is conferred by Title 28, U. S. C., Section 1291.

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* We designate with the letter "A." references to the combined appendix to this brief and the brief in the companion appeal, No. 24299.

Statement of the Case

On May 25, 1956, appellant, pursuant to Title 28, U. S. C., Section 2255, moved for a hearing and, upon the hearing, for an order vacating and setting aside the sentence and judgment of conviction on the grounds that the sentence was imposed in violation of the Constitution and laws of the United States and that the trial court was without jurisdiction to render the judgment of conviction and to impose the sentence. This motion is a companion to appellant's motion of May 8, 1956, the denial of which is concurrently being appealed (No. 24299).

The present motion (A. 78) raises, essentially, the total want of national jurisdiction in the United States and its domestic courts to try appellant and to impose sentence, as a result of gross violations of the Treaty of Extradition between the Governments of the United States and Mexico (31 Stat. 1818).

Appellee's answering affidavit was submitted on June 4, 1956 (A. 88), and appellant's reply affidavit on June 6, 1956 (A. 107). Oral argument on this, as well as on the companion motion, was had on June 4, 1956 (A. 111).

A. The petition.

The appellee failed to controvert any of the facts contained in the petition and exhibits. Accordingly, for the purpose of this appeal these facts will be deemed to be true.

We summarize here the basic operative facts upon which the petition rests (A. 78 *et seq.*):

1. Appellant is unlawfully imprisoned in the Alcatraz Penitentiary by virtue of a judgment entered by the United States District Court for the Southern District of New York, filed April 5, 1951, on an indictment returned on January 31, 1951, which charged in a single count that

appellant had conspired with others to transmit certain materials to the Union of Soviet Socialist Republics in violation of Section 34 of Title 50 of the United States Code.

2. On appeal to this Court, the judgment of conviction was affirmed, Judge Frank dissenting, 195 F. 2d 583. A petition to the Supreme Court of the United States for a writ of certiorari was denied, 344 U. S. 838.

3. Appellant has not made prior application to the district court for relief pursuant to Title 28, U. S. C., Section 2255, on the grounds set forth in this petition.

4. Agents of the United States initiated, arranged, planned, directed and participated in the seizure of appellant in Mexico and his abduction and removal to the United States.

5. Local police of Mexico City, acting unlawfully as agents and representatives of the United States Government, and solely pursuant to the direction and control of the prosecution, were used by the United States in effecting appellant's seizure and removal.

6. Solely pursuant to these arrangements and subject to the direction and control of agents of the United States, appellant was forcibly taken to Nuevo Laredo, Mexico, where agents of the United States Government unlawfully seized him and brought him across the border to the United States.

7. The United States Embassy in Mexico City served as a place of interrogation and as a coordination center in connection with the planning and execution of the unlawful seizure and removal, and took custody of property and documents seized from appellant in Mexico City.

8. Appellant was not deported or expelled by the Government of Mexico, nor was his seizure in any way consented to by that Government. Representatives of the Government of Mexico objected to the proceedings and to the

invasion of its sovereignty. Agents of the United States Government were advised of these facts.

9. The Treaty of Extradition between the United States and Mexico excludes removal and proceedings in the United States in the case of a person located in the territory of Mexico on the charge of espionage or conspiracy to commit espionage. This treaty also excludes such removal and proceedings for crimes of a political nature.

10. Apprehension, removal and prosecution under the treaty are based on diplomatic requests, the transmission of various authenticated and attested documents and charges, and judicial and executive review in Mexico.

B. The treaty of extradition between the United States and Mexico.

This treaty was signed on February 22, 1899, at Mexico City, and supplemented in 1902, 1925 and 1939. 31 Stat. 1818.

Article II of the Treaty, as supplemented, limits the criminal jurisdiction of the contracting parties, in the case of alleged fugitives found in each other's territory, to the following enumerated offenses:

> "Persons shall be delivered up, according to the provisions of this convention, who shall have been charged with, or convicted of, any of the following crimes or offenses:
>
> 1. Murder, comprehending the crimes known as parricide, assassination, poisoning and infanticide.
>
> 2. Rape.
>
> 3. Bigamy.
>
> 4. Arson.
>
> 5. Crimes committed at sea:
>
> (a) Piracy, as commonly known and defined by the law of nations.

> (b) Destruction or loss of a vessel, caused intentionally; or conspiracy and attempt to bring about such destruction or loss, when committed by any person or persons on board of said vessel on the high seas.
>
> (c) Mutiny or conspiracy by two or more members of the crew or other persons on board of a vessel on the high seas, for the purpose of rebelling against the authority of the captain or commander of such vessel, or by fraud, or by violence, taking possession of such vessel.
>
> 6. Burglary, defined to be the act of breaking and entering into the house of another in the night time, with intent to commit a felony therein.
>
> 7. The act of breaking into and entering public offices, or the offices of banks, banking houses, savings banks, trust companies, or insurance companies, with intent to commit theft therein, and also the thefts resulting from such acts.
>
> 8. Robbery, defined to be the felonious and forcible taking from the person of another of goods or money, by violence or by putting the person in fear.
>
> 9. Forgery or the utterance of forged papers.
>
> 10. The forgery, or falsification of the official acts of the Government or public authority, including courts of justice, or the utterance or fraudulent use of any of the same.
>
> 11. The fabrication of counterfeit money, whether coin or paper, counterfeit titles or coupons of public debt, bank notes, or other instruments of public credit; of counterfeit seals, stamps, dies, and marks of State or public administration, and the utterance, circulation, or fraudulent use of any of the above-mentioned objects.
>
> 12. The introduction of instruments for the fabrication of counterfeit coin or bank notes or other paper current as money.

13. Embezzlement or criminal malversation of public funds committed within the jurisdiction of either party by public officers or depositories.

14. Embezzlement of funds of a bank of deposit or savings bank, or trust company chartered under Federal or State laws.

15. Embezzlement by any person or persons hired or salaried, to the detriment of their employers, when the crime is subject to punishment by the laws of the place where it was committed.

16. Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons in order to exact money from them or from their families, or for any other unlawful end.

17. Mayhem and any other willful mutilation causing disability or death.

18. The malicious and unlawful destruction or attempted destruction of railways, trains, bridges, vehicles, vessels, and other means of travel or of public edifices and private dwellings, when the act committed shall endanger human life.

19. Obtaining by threats of injury, or by false devices, money, valuables or other personal property, and the purchase of the same with the knowledge that they have been so obtained, when such crimes or offenses are punishable by imprisonment or other corporal punishment by the laws of both countries.

20. Larceny, defined to be the theft of effects, personal property, horses, cattle, or live stock, or money, of the value of twenty-five dollars or more, or receiving stolen property, of that value, knowing it to be stolen.

21. Extradition shall also be granted for the attempt to commit any of the crimes and offenses above enumerated, when such attempt is punishable as a felony by the laws of both contracting parties."

The 1902, 1925 and 1939 supplements to the Treaty added the offenses of bribery, smuggling, and crimes involving narcotics and injurious substances.

Article III bars proceedings for crimes or offenses of a political character.

Article VIII requires particular official arrangements; presentation, authentication and attestation of certain documents and evidence; and judicial examination and hearing, as follows:

"Requisitions for the surrender of fugitives from justice, under the present convention, shall be made by the respective diplomatic agents of the contracting parties, or, in the event of the absence of these from the country or from its seat of government, they may be made by superior consular officers.

"If a person whose extradition is asked for shall have been convicted of a crime or offense, a copy of the sentence of the court in which he was convicted, authenticated under its seal, with attestation of the official character of the Judge by the proper executive authority, and of the latter by the minister or consul of the respective contracting party, shall accompany the requisition.

"When, however, the fugitive shall have been merely charged with a crime or offense, a similarly authenticated and attested copy of the warrant for his arrest in the country where the crime or offense is charged to have been committed, and of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid.

"Whenever, in the schedule of crimes and offenses of article 2nd, it is provided that surrender shall depend on the fact of the crime or offense charged being punishable by imprisonment or other corporal punishment according to the laws of both contracting parties, the party making the demand for extradition shall furnish, in addition to the documents above stipulated, an authenticated copy of the law

of the demanding country defining the crime or offense, and prescribing a penalty therefor.

"The formalities being fulfilled, the proper executive authority of the United States of America, or of the United Mexican States, as the case may be, shall then cause the apprehension of the fugitive, in order that he or she may be brought before the proper judicial authority for examination. If it should then be decided that, according to the law and the evidence, the extradition is due pursuant to the terms of this convention, the fugitive may be given up according to the forms of law prescribed in such cases."

See also, Convention between the United States of America and other American Republics, signed at Montevideo, December 26, 1933. U. S. Treaty Series No. 882.

C. The applicable laws of the Government of Mexico.

In connection with the reception, review, and determination of requests for removal to the United States, of persons charged with the commission of crimes in the United States, the relevant Mexican laws include the Constitution of the United States of Mexico, the General Law of Population with Regulations, the Law on Extradition of Mexico, and the Regulations of the Preventive Police of the Federal District of Mexico (Appendices A, B, C, and D respectively, attached to the motion of May 8, 1956).

The Law on Extradition of Mexico provides that where treaties exist, "Extradition shall take place in the cases and form as determined by treaties." Chapter I, Article 1. Under Chapter I, Article 3, "The perpetrators of those crimes which are grounds for extradition * * * shall only be extradited in accordance with this law." Chapter II, Article 12, requires that "Extradition shall always proceed through diplomatic channels." Upon request for sequestration of papers, money or other objects in the possession of the accused, "they shall be taken and deposited under inventory by Government agents and shall be turned over to the state that seeks them if extradition be granted, or shall be returned to the detained when set free." Chapter II, Article 15.

Chapter II, Article 16 of the Law on Extradition of Mexico requires (a) proof of the *corpus delicti* and of probable guilt in such a way that "if the crime had been committed on its territory, his apprehension and judgment could have proceeded in conformity with the laws of the Republic," and (b) production of authenticated texts of the foreign law defining crime and punishment, and a declaration that the law is in effect.

The documents and proof are then referred for judicial hearing to the judge of the district in whose jurisdiction the person is located (Chapter II, Article 17), and apprehension is accomplished through order of the district judge "to the local political authorities of the district, territories or states of the Union" (Article 19).

Upon apprehension, the accused appears before the district judge, is informed of the request, charges and documents, and may present the objections, among others, that the proceeding is contrary to treaty requirements or that it violates an individual's guarantees under the Constitution of the Republic (Article 20). Then, following proof submitted by the district attorney, and after stipulated time limits (Articles 22 and 23), the adjudication is made. If the request is granted, the person is placed in the custody of the Secretariat of Foreign Relations (Article 24).

The final decision as to removal is that of the President of Mexico: "On the basis of the judicial proceedings, the Executive of the Union shall determine whether the extradition shall be agreed to or not, being able to separate himself from the decisions of the Judge, in any case" (Article 25).

Further review of any decision granting removal may be obtained under the writ of *amparo*, pursuant to Article

102, now Article 107, of the Constitution of the United States of Mexico (Articles 27, 28 and 29).

Among the related provisions of the Constitution of the United States of Mexico are those which declare that "Every person in the United Mexican States shall enjoy the guarantees that this Constitution grants, which may neither be restricted nor suspended, except in the cases and under the conditions herein established" (Article 1); "The negotiation of treaties for the extradition of political offenders * * * shall not be authorized; nor shall conventions or treaties be made by virtue of which guarantees and rights established for the individual and the citizen by this Constitution are altered" (Article 15); and no arrest or detention may be carried out without a warrant based on a written charge, and searches must be pursuant to a warrant in writing and are exclusively limited to the terms of the warrant (Article 16).

Under the General Law of Population, the Secretariat of *Gobernacion* administers all immigration and deportation matters.

According to the regulations of the Preventive Police of the Federal District, as well as under the General Law of Population, these police are not authorized to act in extradition and deportation matters; may not "detain without cause any individual whatever, lacking for such detention any legal foundation or * * * maltreat, detain persons without justification in the act of apprehension or in the prisons, no matter what be the offense or crime which is imputed to them" (Article 23); must "consign immediately to the disposition of the Public Ministry, of Courts of Justice and in general of competent authorities, persons who are detained by it as presumed responsible for the commission of crimes * * *"; and may not invade "the powers which belong to the aforementioned authorities * * *" (Article 26).

Questions Presented

1. Whether the seizure of appellant in the territory of the Republic of Mexico by agents and representatives of the United States without the consent of the Government of Mexico, and the subsequent trial of appellant in total disregard of the provisions of the existing Treaty of Extradition, constitute a violation of the Treaty?

2. Whether the United States, a sovereign party to the Treaty of Extradition with Mexico, may disregard at will the provisions of that Treaty and abduct an individual, residing in the territory of the other sovereign party to the compact, without the consent of that Government?

3. Whether the complete violation of the Treaty of Extradition by the United States deprived the United States and consequently its courts of any power to try appellant and to impose sentence?

4. Whether the fundamental lack of jurisdiction in the United States to proceed in the face of a violation of a binding Treaty of Extradition renders a sentence subject to attack under Title 28, U. S. C., Section 2255*?

5. Whether it was error for the lower court to deny appellant a hearing on his motion pursuant to Title 28, U. S. C., Section 2255, seeking to vacate the judgment of conviction in that the trial court lacked total jurisdiction to proceed as a result of the violation by the United States of the binding Treaty of Extradition with the Republic of Mexico?

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* The relevant portions of Title 28, U. S. C., Section 2255, are set out in full in appellant's brief in the companion appeal, No. 24299.

POINT I

The opinion of the lower court rests upon a misconception of the relevant facts and the governing principles of law.

A. Preliminary statement.

In the supplementary motion made pursuant to Title 28, U. S. C., Section 2255, appellant requested a hearing in open court based upon certain detailed factual allegations set forth in his petition. These factual allegations, which were required to be deemed as true in the conceded absence of denials from the prosecution or conclusive refutation from the files and records of the case, raised two ultimate propositions of fact. These may be summarized as follows:

1. The Government of the United States, through its agents and representatives, initiated, arranged, planned and participated in the unlawful seizure of appellant upon the sovereign territory of Mexico and his subsequent removal to, and prosecution in the United States; and

2. The Government of Mexico in no way consented to this removal, initiated, arranged, planned and participated in by agents of the Government of the United States. Appellant was neither deported nor expelled by the Government of Mexico, and agents of the United States were informed as to Mexico's objections to such occurrences and the invasion of its sovereignty.

These operative facts, only recently discovered by appellant, although known to the Government since the inception of the proceedings, reveal a total violation of the provisions

of the Treaty of Extradition of 1899 (31 Stat. 1818) entered into between the United States of America and Mexico.*

This flagrant violation of the treaty totally deprived the United States of national and consequently judicial power to try appellant or to impose a sentence. It is a fundamental principle of our jurisprudence that the United States lacks any national power to prosecute proceedings based upon extraterritorial action in violation of a binding treaty. *Cook* v. *United States*, 288 U. S. 102. Treaties are solemn contracts between sovereign nations, and by entering into the Treaty of 1899, the Government of the United States limited and circumscribed its national power to proceed judicially in circumstances involving alleged fugitives residing in the territory of the Government of Mexico. The jurisdiction of the domestic federal courts, deriving their fundamental power from the nation, is similarly circumscribed and limited by force of operation of the governing treaty. Accordingly, when representatives and agents of the Government of the United States violated the provisions of the governing treaty in their entirety, the domestic courts of the United States lacked national and thus judicial power to proceed against appellant.

This fundamental objection to national and, consequently, judicial power does not rest on the kidnapping or

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* The following facts are uncontested:

The United States failed, as required by treaty, to transmit to the Government of Mexico the request for removal as well as the authenticated documentation of the warrant, the charge, the offense and certain evidence of the commission of crime. Appellant was deprived of a hearing on probable guilt, and judicial and executive review, in Mexico, as the treaty requires. Moreover, the United States proceeded against appellant upon a crime for which the treaty precludes removal and prosecution.

abduction of appellant as such, but rather upon the violation of the treaty. The jurisdictional disability originates in the limitations which the treaty imposes upon the power of the United States to institute any proceeding against alleged fugitives found in Mexican territory.

These limitations, expressed in high treaty contract and embodied in the statutory law of the United States, constitute conditions precedent to such proceedings. That is to say, whether or not the accused ultimately is brought within reach of the national court's process, and the offense charged is of the type which the court may adjudicate, the whole proceeding—all governmental action—cannot even commence if the treaty is violated and its preconditions are not met. A court may have jurisdiction over the person of a defendant, as well as power to deal with the particular offense or cause, yet the exercise of judicial power in the proceeding will lack validity if specific treaty prescriptions for its inception are ignored and violated.

When governmental action is based extraterritorially, and the controlling statutory preconditions to valid prosecution and adjudication are found in a treaty, the courts are required to enforce rigorously the legislative limitations upon the judicial power to proceed. A treaty, such as the one here, has municipal constitutional status as a law of the land.

Sufficient as this status is to command compliance, additional considerations come into play. The treaty statute is a bilateral compact with another nation, requiring the highest responsibility and good faith—*uberrima fides*—of sovereign to sovereign. The Supreme Court, accordingly, has always construed treaties in the highest good faith as

international compacts to be faithfully observed by the United States and its courts.*

This appeal thus raises as a central issue the fundamental question as to whether one party to an international compact may unilaterally disregard and violate the treaty at will, and proceed to assert national jurisdiction based upon extraterritorial action in gross violation of the treaty. We suggest, in the words of the Supreme Court, that "No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them." *United States v. Rauscher,* 119 U. S. 407, 422.

The court below grounded its denial of a hearing upon a three-pronged rationale. Thus the court argued that (1) this issue was previously raised and decided adversely to appellant on the motion in arrest of judgment in the trial court, and in this Court on the affirmance of the judgment of conviction; (2) that even if the point were now

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* "In construing treaty provisions the [Supreme] Court has regarded treaties as international compacts to be faithfully observed by the United States. Any other view would have made it difficult for the United States to meet its international obligations. The tendency is for the Supreme Court to construe treaties in the highest good faith in so far as the other party is concerned, a principle of construction which the Court has consistently asserted."

Comment, *Treaties and the Supreme Court,* 1 University of Chicago L. R. 602, 617 (1934).

And Tennant, *The Judicial Process of Treaty Interpretation in the United States Supreme Court,* 30 Michigan L. R. 1016, 1019-1020 (1932), observes:

> "The most important consideration * * * to any body empowered to execute a treaty, is the duty to keep faith with the other contracting nation.
>
> * * *
>
> "Unquestionably, the duty of upholding the plighted faith of the United States has been the foremost consideration in the Supreme Court, and has been reflected in the language of the opinions of the Court on many occasions."

available, the facts alleged show no violation of treaty; and (3) that in any event, a violation of treaty creates only an issue of "personal" jurisdiction, which was waived by failure to raise the issue prior to trial. We suggest that each of these contentions rests upon a misconception of the relevant facts and the governing law.

The lower court states that the jurisdictional issue is foreclosed in that the "operative facts" upon which it rests were before this Court on the original appeal (A. 207). This is simply not so. The basic "operative facts" upon which the charge of treaty violation depends were *never* before the trial court or this Court on appeal. These are the facts revealing that (1) the United States Government initiated, arranged, planned and participated in the unlawful seizure of appellant on Mexican territory, and (2) that the Government of Mexico in no way consented to this seizure and removal of appellant. These are the facts which show in a striking fashion the violation by the United States of the binding Treaty of Extradition. These facts were not before the Court of Appeals at the time of the original appeal. They were only recently discovered by appellant, although the petition avers without contradiction that they were in fact known to the prosecution throughout the prior proceedings.*

Thus the motion in arrest of judgment raised no issue of treaty violation, and consequently no issue of want of total jurisdiction. This issue is here raised for the first time and presents a proper basis for a motion under 28 U. S. C. 2255. *Johnson* v. *Zerbst*, 304 U. S. 458.

The lower court declined to rest solely upon the contention that appellant is foreclosed on the jurisdictional issue.** Relying upon the general rule that illegal abduction

* More than this, these facts were not merely withheld from the defense and the courts; they were misrepresented to the trial court and more particularly to this Court on the appeal. See Point II, *infra*.

** This contention of the lower court is discussed more fully in Point II, *infra*.

will not affect the jurisdiction of a court except where there has been a violation of an existing treaty of extradition, the court below argued that despite the conceded failure to follow any of the provisions of the Treaty of Extradition, this did not constitute a violation of the Treaty. This position depends upon the assumption that an extradition treaty is a contract at will; that the United States Government could freely choose to disregard the treaty provisions and seize appellant in the territory of Mexico without the consent of the Mexican Government; that the sole obligation imposed by the high compact was to adhere to its provisions *only* after the demanding party chose itself to invoke its procedures.

But such an interpretation would make a mockery out of international obligations. An extradition treaty binds the signatory governments to obtain extraterritorial possession of alleged fugitives only through the procedures and under the circumstances delineated by the treaty, unless the consent of the government of asylum is obtained to alternative procedures. It is a compact between civilized nations to limit their own domestic sovereignty. It is exclusive in its terms and its concepts. It sanctions no marauding raids on the territory of a sovereign power. It places a positive injunction upon governments and their agents and officials to enforce the administration of justice extraterritorially according to the norms of civilized conduct as set forth in the treaty.

The power of the national sovereign ceases beyond its territorial limits, and especially within the territory of another nation. A treaty, such as the extradition compact, *creates* extraterritorial power; without the treaty there is no judicial basis for power. While internally the national sovereign is endowed with fundamental governing power apart from specific statute, externally the power exists only as granted by treaty or other agreement. As a result, the treaty demands fulfillment not merely because it preempts or occupies the field, but, more elementally, because it is the sole instrument for creation of the field. Looking to

the present matter, the United States initially has no power to proceed against an alleged fugitive in Mexico; if it desires so to proceed, it must resort to some authority which is capable of generating the power, in this case the Extradition Treaty. Otherwise, treaty status and purpose, and the universal doctrine of the territorial limitation of national sovereignty, are ignored.

As the United States Department of State itself has said,

> "The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and does not authorize either party, for any cause to deviate from these forms, or arbitrarily abduct in the territory of one party a person charged with crime for trial within the jurisdiction of the other." Quoted in 4 Moore, *Digest of International Law*, Section 603, p. 330.

The petition here charges that agents and representatives of the United States Government, a party to the treaty of extradition, did "arbitrarily abduct in the territory of one party a person charged with crime for trial within the jurisdiction of the other" without the consent of the Government of Mexico.* If this is not a violation of the extradition treaty, then words lose their meaning and solemn international compacts are reduced to meaningless gestures.**

Finally, the lower court argues that even if a violation of treaty were involved, this raises only a question of "personal" jurisdiction, which was waived by failure to raise the issue before trial. But such an appraisal seeks to solve a juridical problem by the convenient use of a

* The facts set forth in the petition are to be sharply distinguished from situations in which individuals are abducted and removed by *private* persons, or with the *consent* of the asylum state. Compare *Ker* v. *Illinois*, 119 U. S. 436.

** This contention of the lower court is discussed more fully in Point I, C, *infra*.

label, rather than by an objective analysis of concepts. Mr. Justice Brandeis disposed of a similar contention with characteristic incisiveness in *Cook* v. *United States*, 288 U. S. at pages 120-122. Holding that the United States lacked any national power to prosecute proceedings based upon extraterritorial action in disregard or violation of a treaty obligation, Mr. Justice Brandeis rejected an attempt to evade the consequences of this conclusion by labelling the problem one of "personal jurisdiction". He carefully pointed out that "Here, the objection is more fundamental. It is to the jurisdiction of the United States. The objection is not * * * lost by the entry of an answer to the merits."

Similarly, the violation of the Treaty of Extradition here cannot be dismissed merely as an issue of personal jurisdiction. The treaty has limited the national power to institute proceedings based upon extraterritorial action. Proceedings resting on violations of such treaty limitations are totally without national power. This is not an issue of "personal jurisdiction". In the words of Mr. Justice Brandeis, "Here, the objection is more fundamental. It is to the jurisdiction of the United States." *Cook* v. *United States, supra.**

B. The violation of the extradition treaty deprived the United States of national power to proceed against appellant and deprived the trial court of total jurisdiction to maintain the trial or impose the sentence.

Although the lower court relegates the argument to a last-line-of-defense position, perhaps the crux of its analysis of the substantive problems presented by this appeal, lies in its contention that a treaty violation raises, after all, only an issue of personal jurisdiction. Thus, the court argues that even if appellant is correct in his contention that he is not foreclosed because of a prior deter-

*This final contention of the lower court that a treaty violation raises only an issue of "personal jurisdiction" is discussed more fully in Point I, B, *infra*.

mination, he is foreclosed since a violation of the treaty would not have, in any event, deprived the trial court of total jurisdiction to proceed.

In order to arrive at this conclusion, the lower court was not only required to evade the impact of the principle of law enunciated by the Supreme Court in *Cook* v. *United States, supra*. It was forced to avoid any fundamental analysis of the juridical consequences flowing from a violation of a high international compact between sovereign nations. The solution of problems of this nature is not to be found in the resort to a convenient label. It is to be found only in an objective analysis of the juridical relationships generated by the consummation of such compacts and the subsequent breach of their obligations.

Every jurisdictional problem in the law requires this close analysis. A juridical controversy raises several jurisdictional considerations, each of which must be analyzed separately and distinctly to avoid utter confusion. Most frequently in our jurisprudence we deal with two heads of judicial jurisdiction, labelled "personal"—the physical reach of judicial process, and "subject matter"—judicial competency over the type or class of offense or cause. Defects in personal jurisdiction are only irregularities which may be waived, while lack of subject-matter jurisdiction goes to fundamental adjudicative power, is never waived, and may be raised at any stage to void the proceedings.

Less commonly confronted, but even more fundamental, is a third head of jurisdiction, which may be described as the genetic sovereign power to initiate and entertain the proceedings: to exercise the authority afforded by the presence of personal and subject-matter jurisdiction; to allow the jurisdictional incidents of personal and subject-matter competency to operate. This goes to power in the proceeding itself, and, accordingly, if defective, will render the proceeding void *ab initio*.

Since the national sovereign power essentially is terri-

in violation of treaty statutes, directly raise this fundamental jurisdictional issue.*

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* An analogous issue arises domestically in the case of a failure to satisfy statutory conditions precedent to the institution of proceedings, notwithstanding the fact that traditional "personal" and "subject-matter" jurisdiction otherwise exist. For example, in *Pugh* v. *United States*, 212 F. 2d 761 (C. A. 9), a petition pursuant to Section 2255, the federal trial court unquestionably had properly asserted jurisdiction over the defendant's person and it was empowered to deal with the particular offense. Further, the appeal from the judgment of conviction had been dismissed as untimely. The Court of Appeals held that a motion under Section 2255 was available, since the petition alleged that a statutory prerequisite to the prosecution had been ignored. Thus the court held (at 764):

> "The requirement of a grand jury is simply a statutory provision * * *. Yet we think the defect in this respect * * * is a matter which can be raised in a Section 2255 proceeding."

In *People ex rel. Laxton* v. *Snell*, 216 N. Y. 527, the defendant sued out a writ of *habeas corpus*, claiming that since he had been arrested in a county other than the one in which the warrant had been issued, the New York Code of Criminal Procedure required that he be taken first before a magistrate of the county of arrest and afforded an opportunity to give an undertaking so that trial might be had in the county court where the warrant had been issued. This had not been done. Faced with the opposing argument that settled principles of criminal jurisdiction (both federal and state) rendered immaterial objections to the manner in which the person charged is brought before a court competent as to the offense involved, the Court of Appeals nevertheless granted the writ, holding (at 533):

> "An invalidity of [the court's] determination or adjudication in the proceeding will result from its action in disobedience to or contravention of the statutory requirements, as well from its lack of power to take cognizance of the claim or accusation—want of jurisdiction of the subject matter—or to secure the constructive or actual appearance of the defendant or accused—want of jurisdiction of the person."

See also, *United States* v. *Zucca*, 351 U. S. 91. In this case while the trial court undoubtedly had "personal" jurisdiction over the defendant and "subject matter" jurisdiction over the cause (an action seeking denaturalization), the basic statutory pre-conditions to the maintenance of the action were violated by the failure to file the required affidavit of good cause. Accordingly, the Supreme Court upheld the decision of this Court in *United States* v. *Zucca*, 221 F. 2d 805, requiring a dismissal of the complaint.

In such cases, the Supreme Court has held that the failure to follow statutory treaty prerequisites serves to nullify a proceeding in its entirety, since the treaty is the very basis of power.*

1. The applicable decisions of the United States Supreme Court governing this appeal.

(a) *The Principle of Cook* v. *United States*

The leading modern decision governing this appeal is *Cook* v. *United States*, 288 U. S. 102. The essential facts of *Cook* are as follows:

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* The universal doctrine that sovereign jurisdiction is essentially territorial is a settled proposition in the United States. As Chief Justice Marshall wrote in *Rose* v. *Himely*, 4 Cranch. 241, 279:

> "A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power * * *."

See, also, 1 *Beale, Treatise on the Conflict of Laws, Section* 56.1, p. 306.

Especially as applied in the field of international removal and extradition, it has been observed of the United States and England:

> "Of both of these countries it may be said that jurisdiction is based primarily, it may almost be said solely, on territory. Exceptions are comparatively few." Robert W. Rafuse, *The Extradition of Nationals* (1939), p. 142.

And Hawley, *The Law and Practice of International Extradition* (1893), states (at p. 1):

> "[The refugee] is no longer subject to the law of the country which he has left, nor can he be required to answer to it except by consent of the nation to whose law he has made himself subject by coming within the territory. This is a necessary consequence of the exclusive sovereignty of every nation in its own territories."

See also, 1 *Moore on Extradition* (1891), Section 158, p. 281.

A ship of British registry, the *Mazel Tov*, cruising some eleven and a half miles off our coast with a cargo of unmanifested liquor, was seized by United States agents and brought into port. A penalty was assessed against the master, and ship and cargo libelled, upon the charge of hovering for smuggling purposes in violation of the Custom Law (Section 581 of the Tariff Act of 1830). This was a federal offense admittedly cognizable by the federal district court, and the cargo, the vessel and its master actually were brought within reach of that court's process.

After answering to the merits, the respondent objected that the seizure which initiated the proceedings was not in conformity with the treaty of 1924 between the United States and Great Britain (43 Stat. 1761). That treaty granted to the United States authority to board and search ships of British registry at certain distances beyond the territorial waters of the United States, but did not grant such authority in the case of vessels found at a greater distance from the United States coast than they could travel in one hour. The maximum speed of the vessel in the *Cook* case was ten miles per hour. However, it was seized eleven and a half miles off the coast. Accordingly, the respondent argued that the court lacked total jurisdiction to proceed as a result of the extraterritorial action in violation of the binding treaty.

In response to this contention, the government argued that (1) the illegal seizure was immaterial since the court had "subject-matter jurisdiction", and "personal jurisdiction" over the master, ship and cargo, (2) the judicial proceedings initiated by the United States served to validate and ratify the prior acts of its agents, if wrongful, and (3) in any event, the answer to the merits waived any objections to jurisdiction. Mr. Justice Brandeis, writing for the Court, characterized these arguments as "misconceptions."

In an analysis which applies inexorably to the treaty violation at bar, Mr. Justice Brandeis held, 288 U. S. at 120-122:

> "As the *Mazel Tov* was seized without warrant of law, the libels were properly dismissed. The government contends that the alleged illegality of the seizure is immaterial. It argues that the facts proved show a violation of our law for which the penalty of forfeiture is prescribed; that the United States may, by filing a libel for forfeiture, ratify what otherwise would have been an illegal seizure; that the seized vessel having been brought into the port of Providence, the federal court * * * acquired jurisdiction; and that, moreover, the claimant by answering to the merits waived any right to object to enforcement of the penalties. The argument rests upon misconceptions.
>
> "It is true that where the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial. *Dodge* v. *United States*, 272 U. S. 530, 532 * * *. Compare *Ker* v. *Illinois*, 119 U. S. 436. * * * *The doctrine is not applicable here.* The objection to the seizure is not that it was wrongful merely because made by one upon whom the government had not conferred authority to seize at the place where the seizure was made. *The objection is that the government itself lacked power to seize, since by the treaty it had imposed a territorial limitation upon its own authority.* * * * *Our government, lacking power to seize, lacked power, because of the treaty, to subject the vessel to our laws.* To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the treaty. Compare *United States* v. *Rauscher*, 119 U. S. 407 * * *." (Emphasis added.)

Distinguishing some of the older cases involving extraterritorial actions in the absence of treaties, the Court continued (at 122):

> "In those cases it was held that the illegality of the seizures did not effect the venue of the action or the process of the court. *Here, the objection is more fundamental. It is to the jurisdiction of the United States.* The objection is not * * * lost by the entry of an answer to the merits. The ordinary incidents of possession of the vessel and the cargo yield to the international agreement." (Emphasis added.)

Such is the mandate of the Supreme Court. It stands today with controlling vigor.

Nor is there any significant basis on which to distinguish the case at bar. So compelling is the similarity that one need only substitute the identification of the present matter for the vessel involved in the *Cook* case.

Appellant's personal subjection to the process of the District Court for the Southern District of New York on the charge contained in the indictment and his answer to the charge, could no more waive the nullifying effect of his seizure in violation of the requirements of the controlling extradition treaty, than could the existence of "personal" and "subject-matter" jurisdiction in the *Cook* case overcome the fundamental jurisdictional consequences of disregard of that treaty. The operative effect of the treaty limitations here is identical with that in the *Cook* case.*

In *Cook*, the treaty with Great Britain limited the jurisdiction of the United States to search and seize vessels of British registry to specified extraterritorial distances and for particular purposes. Here, the Treaty of Extradi-

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* If there is any difference, it is one which emphasizes rather than minimizes the conclusion of total want of jurisdiction. In *Cook*, the nullifying treaty trespass took place in open international waters, whereas in the present case it occurred not merely outside the territorial limits of the United States, but within the territory of an independent sovereign.

tion with Mexico limits the jurisdiction of the United States to obtain, remove and proceed criminally against alleged fugitives, to instances of specified crimes, pursuant to arrangements officially instituted and consummated between the two governments.

In *Cook*, United States agents seized the master, vessel and cargo outside the limits of authority granted by treaty. Here, United States agents arranged and participated in the extraterritorial seizure and removal of appellant for an alleged crime excluded by treaty. In addition, they completely violated all of the other treaty requirements relating to such removal and proceedings.

In *Cook*, the British Government did not consent to the treaty violation. Here, there was no such consent by the Government of Mexico. In fact, the proper governmental authorities of Mexico later expressed objection to the unlawful measures taken by the United States.

Accordingly, the conclusion must be, as it was in *Cook*, that "the objection is * * * fundamental. It is to the jurisdiction of the United States. * * * The ordinary incidents of possession * * * yield to the international agreement." *

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* Earlier, a similar question had arisen in *United States* v. *Ferris*, 19 F. 2d 925 (D. C. Cal.). There a ship of Panamanian registry was seized by agents of the United States at a point some 270 miles off our coast, in violation of a similar treaty between the Governments of the United States and of Panama. Noting a transgression of jurisdiction, the district court held (at 926):

> "In and by [the treaty] the right is 'conferred', Panama concedes it, in consideration thereof the United States accepts and agrees to it as therein limited, abandons all claim of right exceeding it, and promises to comply with it. Hence, as the instant seizure was far outside the limit, it is sheer aggression and trespass * * * contrary to the treaty, not to be sanctioned by any court, and cannot be the basis of any proceeding adverse to defendants. * * * The prosecution contends * * * that courts will try those before it, regardless of the methods employed to bring them there. There are many cases generally so holding, but none of authority wherein a treaty or other federal law was violated. [The court then discussed *United States* v. *Rauscher*, 119 U. S. 407]. And this is in no wise modified by *Ker* v. *Illinois*, 119 U. S. 436, for in the latter was no violation of treaty or other federal law. It seems clear that if one legally before the court cannot be tried because therein a treaty is violated, for greater reason one illegally before the court, in violation of a treaty, likewise cannot be subjected to trial. Equally, in both cases is there absence of jurisdiction."

The fundamental theory underlying the holding in *Cook* is clear. By entering into an international treaty, a solemn compact between sovereign powers, the United States limited and circumscribed its national power to proceed extraterritorially in certain circumstances. It follows, therefore, that the total jurisdiction and competence of the American domestic courts, deriving their fundamental power from the nation, are similarly limited and circumscribed. Accordingly, where the governing treaty which creates and circumscribes the national power is violated, there is no national power to proceed. And finally, since this is not a question of personal rights but sovereign power, the defect in jurisdiction, caused by a breach of the international treaty obligations, is not "waived" by an answer to the merits.

Since the lower court dismisses the impact of *Cook* upon the present petition by stating that this case is not "even remotely similar to that of the British ship seized in *Cook*" (A. 213), we discuss this contention here in detail.

In so concluding, the lower court wrote that in *Cook* "jurisdiction over a 'person' was not involved as the case concerned the court's jurisdiction to forfeit a British vessel, illegally seized on the high seas, and it was clear that the sole question was the court's power over the specific vessel" (A. 208). Apart from a brief summary of the *Cook*

facts, the opinion below makes no further analysis of the applicability of this leading Supreme Court decision to the present petition.

The basis upon which the district court attempts to distinguish *Cook*, is first of all ambiguous. If by the quoted language, the court is making a distinction between *things* and *persons* as they relate to the jurisdictional issue, the analysis is purely mechanical and untenable.* The fact that a vessel is seized extraterritorially in violation of treaty, is no more a violation than similar action against a person. The issue in *Cook*, as here, goes to treaty limitation and its jurisdictional consequences, not to the character of the *res*. Moreover, in *Cook* the penalty was assessed against the master of the ship, the vessel and cargo having been libelled in aid of this assessment. See 288 U. S. at 108.

If, on the other hand, the lower court is saying that the impropriety in *Cook* resulted in a jurisdictional failing in the nature of "personal" jurisdiction, but not so labelled because a vessel and not a person was involved,** then the court is wrong. The *Cook* opinion, could not be more precise or direct on this point. Noting that the government urged waiver as a result of the respondent's answer to the merits, the Supreme Court pointed out that it was not personal jurisdiction that was involved, but rather that "the government itself lacked power * * * since by the treaty it had imposed a territorial limitation upon its own authority."

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* Walter Wheeler Cook, *Jurisdiction of Sovereign States*, 31 Columbia L. R. 368, 381 (1931), observes that there is no basis for such distinctions:

> "Since all legislation, all judicial action, creates (and destroys) the rights of persons, even though these have relation to things, there is no logical basis upon which to classify laws as those which affect persons and those which affect things."

** This is suggested by the court's statement that in *Cook* the jurisdictional issue "was timely raised" (A. 208).

Thus, the effect of the treaty violation was that the government had no power whatever to conduct the proceeding. No party to the proceeding could create or ratify that power. Such a lack of power voids the proceeding *ab initio*. It is far more profound than anything in the nature of personal jurisdiction, and may be raised at any stage of the proceeding.*

Apart from these clearly untenable grounds, the lower court's opinion presents no basis for distinguishing *Cook* from the present case. Both involved a total disregard of treaties governing extraterritorial seizure and action. The jurisdictional consequences in both must be as the Supreme Court said they were in *Cook*. The proceedings based upon such violations are totally void for want of jurisdiction. They are void *ab initio*.**

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* The government itself did not argue that *Cook* raises solely an issue of "personal" jurisdiction. In its brief on the original appeal (at p. 36) the government sought to distinguish away *Cook* precisely because it did *not* involve a challenge to "personal" jurisdiction, but rather raised issues going to the total jurisdiction of the court.

** Similarly, the lower court's classification of *Johnson v. Browne*, 205 U. S. 309, *Cosgrove v. Winney*, 174 U. S. 64, *United States v. Mulligan*, 74 F. 2d 220 (C. A. 2), and *United States v. Ferris*, 19 F. 2d 925 (D. C. Cal.) as "personal jurisdiction" decisions (A. 208) is misleading. The fact that the jurisdictional objections may have been "timely raised" in these cases, does not mean that the treaty violations were held to create only an issue of jurisdiction over the person.

In each case, the court analyzed the substance of the treaty issue in terms of taint to the whole proceeding, to the fundamental treaty obligations of the United States. For example, as to the critical point, in *Browne*, the Court stressed that "it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith" (at 321); in *Mulligan*, that "* * * treaties, as special compacts, are self-imposed limitations on the rights of Government" and that, apart from treaty compliance, "there is no jurisdiction for any purpose" (at 222); and in *Ferris*, that seizure in disregard of treaty "is sheer aggression and trespass, * * * contrary to the treaty, not to be sanctioned by any court, and cannot be the basis of any proceeding adverse to defendants" (at 926).

If the entire proceeding in each of these cases was so fundamentally tained, the court could not, of course, exercise its jurisdiction over

(b) *United States* v. *Rauscher*

The decision in *Cook* rested in part on concepts enunciated many years previously in *United States* v. *Rauscher*, 119 U. S. 407.

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the person of the defendant. Accordingly, when the various alleged fugitives or defendants preliminarily raised the treaty objections, the courts did not have to decide whether the objections would have been available at later stages in the proceedings. The fact that relief is granted in the posture of a preliminary objection, does not restrict the operative effect of the substance of the objection to that posture. This is sharply illustrated in *Cook*, where there had been an answer to the merits. The Supreme Court necessarily had to decide whether the treaty objection was such that it contained basic jurisdictional questions which could be raised after waiver of any questions concerning personal jurisdiction alone. And, of course, the Supreme Court held that such basic issues were not waived.

Finally, the lower court is completely wrong in saying that "in the case of *Ford* v. *United States*, 273 U. S. 593 (1927)—a case on all fours with *Cook*—petitioners were denied relief because the jurisdictional question had not been raised on time" (A. 208). There was no such jurisdictional issue in *Ford*, precisely because there was no extraterritorial action or seizure in violation of the treaty. The treaty in *Ford*, like that in *Cook*, expressly permitted the United States to seize and prosecute British vessels at points on the high seas no farther from our coast than the vessels could travel in one hour. But the seizures in *Ford* were made within those limits and strictly in accordance with treaty. The Supreme Court said (at 603):

> "The testimony for the government tended to show that the Quadra when seized was 5.7 nautical miles from the Farallon Islands, and that the motor boat C-55 could have traversed that distance in less than an hour."

See also 273 U. S. at 605.

Harvard Research in International Law, *Apprehension In Violation of International Law*, 29 Am. J. Int'l Law, Supplement, July, 1935, at p. 625, also refers to *Ford* as a decision

> "in which it was held that an extraterritorial arrest was within the limits prescribed by treaty."

Six years later, confronted with a seizure and prosecution not within the positive terms of the same treaty, the Supreme Court held in the *Cook* case that there was a total lack of national and judicial jurisdiction—not just defective "personal jurisdiction"—which could not be waived or cured by the defendants.

The opinion in *Cook* cites *Rauscher* in support of the principle that no valid adjudication may follow a seizure or other assertion of national power in disregard of applicable treaty provisions, and that such fundamental defects neither can be waived nor ratified.

The statute in the *Rauscher* case was an extradition treaty with Great Britain, which, like the treaty here, limited proceedings against alleged fugitives to specifically enumerated crimes, and only after the completion of designated official removal arrangements, including hearings and review in the country of refuge. While adhering to the treaty requirements preliminarily in obtaining the removal of Rauscher from England to the United States to face a murder charge, the United States proceeded to prosecute him for the crime of inflicting cruel and unusual punishment, a crime not specified in the treaty as one warranting removal.

Rauscher complained that this departure from treaty nullified the proceedings. The government insisted that Rauscher's presence before the trial court upon an offense substantively cognizable by the court, was sufficient to establish both personal and subject-matter jurisdiction, even if there had been some technical treaty inconsistency. Accordingly, this case raised the issue whether disregard of a treaty prerequisite affected the fundamental power to proceed, or whether it was merely a question of impropriety in apprehending a defendant, waived when the court has otherwise jurisdiction over the person of the defendant and the subject matter of the cause.

The Supreme Court in *Rauscher* ruled that it was a question of fundamental power. For, absent the treaty (or equivalent mutual agreement between the two nations), the United States would possess no power to remove and proceed criminally against such alleged fugitives located in another land. As to the fact that this basic power origi-

nates in and rests upon treaty, the Supreme Court stated (at 411-412):

> "Prior to these treaties, and apart from them * * * there was no well-defined obligation on one country to deliver up such fugitives to another; and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked * * *."*

For this reason, the Supreme Court explained (at 419-421), the national power to proceed against the alleged fugitive rests upon full treaty compliance:

> "It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party. * * * the enumeration of offenses in most of these treaties, and especially in the treaty now under consideration, is so specific, * * * that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others. * * * This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject."

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* See also, the cases and authorities cited and discussed in *United States* v. *Mulligan*, 74 F. 2d 220, 221 (C. A. 2), as well as 4 Hackworth, *Digest of International Law*, Section 306, pp. 11-12, and 1 *Moore on Extradition*, Section 16, p. 21. Fenwick, *International Law* (1934) states (at p. 237):

> "So strictly is the independence and sovereignty of states interpreted that not even the repression of the most outrageous crimes will warrant the exercise by one state of the slightest act of jurisdictional authority within the territory of another state. Under these circumstances a mutual interest in the maintenance of law and order and the administration of justice has led nations to cooperate with one another by surrendering fugitive criminals to the state in which the crime was committed."

The Court repeatedly stressed that such fugitives could be removed and proceeded against *only* through the treaty. Thus it analyzed the status in the nation of refuge to be one "from which he [i.e., the alleged fugitive] can only be taken under a very limited form of procedure * * *" (at 422).*

The treaty in this case is of similar content, purpose and status as that in *Rauscher*. In both cases national prosecution was based upon extraterritorial removal. The offense in *Rauscher*, as here, was substantively cognizable by the trial court. In each instance, the defendant actually was brought within reach of, and subjected to, judicial process. If the *Rauscher* proceeding was nullified by the treaty violation issue, so must the present conviction and sentence be vacated. The treaty violation here was even more complete than in *Rauscher*. Not only was the offense charged to appellant excluded by treaty, but, in addition, all of the treaty requirements and limitations were flouted.

Like *Cook* v. *United States*, *supra*, *Rauscher* underscores the nullity of the proceedings against appellant. If it was "impossible to conceive" of the exercise of criminal jurisdiction by the United States against Rauscher, because of the violation of the limitations of the treaty of extradition with Great Britain, then it is equally impossible to conceive of the valid exercise of jurisdiction by the United States in the criminal proceedings against appellant because of the total disregard and breach of the provisions of the treaty of extradition with Mexico.

The lower court seeks to minimize the effect of *Rauscher* by characterizing the decision as merely an exception to

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* To the same effect are *United States* v. *Ferris*, *supra*, and *United States* v. *Mulligan*, *supra*, where the Court stated (at 222):

> "* * * treaties, as special compacts, are self-imposed limitations on the rights of government. * * * This country had no right to the appellant apart from the right secured by the treaty."

See also, *Cosgrove* v. *Winney*, 174 U. S. 64.

the general rule relating to prior wrongful seizure in a criminal case. But there was no wrongful seizure, as such, in *Rauscher*; the defendant had been removed from England by proper process, but he objected that all provisions of the extradition treaty had not been complied with.

From this error flows a twofold misconception developed by the court below: (1) as an "exception," *Rauscher* is limited to its facts; that is, there is impropriety only if the United States prosecutes a fugitive for a crime other than the one for which extradition is invoked and granted, and (2) as an "exception" to the "wrongful seizure" rule, only personal jurisdiction is involved, since that is what wrongful seizure deals with.

As we have explained above, *Rauscher* was concerned directly with the nature and function of an extradition treaty and the consequences of a treaty violation, in terms of the national power to proceed against an alleged fugitive. The Supreme Court in *Rauscher* reasoned that this power was created by treaty; that the purpose of the treaty was to govern international removal of alleged fugitives; that removals and related proceedings may only take place in accordance with treaty prescription; and that failure so to comply with the treaty constitutes a breach of duty owed to the other treaty sovereign.

This reasoning covers *all* treaty failures without distinction as to type, and surely without restriction to a particular violation, contrary to the conclusion of the lower court. Nowhere does the *Rauscher* opinion suggest such distinction or restriction. On the contrary, the Supreme Court there spoke of the controlling force of *all* treaty provisions when it said that the "provisions are obligatory"; that the fugitive "can only be taken under a very limited form of procedure"; and that "it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty * * *".

Put another way, why was it improper to prosecute Rauscher for a crime other than the one for which he was

removed? Obviously, because it violated a treaty provision. *A fortiori,* other actions violating treaty provisions must be similarly tainted. These include, as here, removal and prosecution for a crime excluded by treaty; failure to submit charges and requests to the authorized agencies of the asylum state; and failure to provide for hearings of probable guilt and judicial and executive review. Without this reasoning, there is nothing in the *Rauscher* opinion to support the *Rauscher* result.

Nor does *Rauscher* admit of the conclusion of the lower court, that in the case of a treaty violation "the courts will find themselves to be without jurisdiction over the defendant, unless he waives this issue" (A. 212). That is to say, only a "personal jurisdiction" issue is raised.

The Supreme Court opinion in *Rauscher* relates that the questions raised by the challenge to the validity of the trial proceedings were brought on by a motion in arrest of judgment after the trial verdict. There is no mention of preliminary defects in the process by which the person of the defendant stood before the court. Thus, the Supreme Court said (at 409):

> "This case comes before us on a certificate of division of opinion between the judges holding the Circuit Court of the United States for the Southern District of New York, arising after verdict of guilty, and before judgment, on a motion in arrest of judgment."

Further, as we have pointed out above, the rationale upon which the Supreme Court based its holding in *Rauscher* deals entirely and exclusively with the controlling effect of the treaty limitations on the entire national proceeding against the alleged fugitive. The holding is in no way concerned with the narrow issue of specific process over person. Since, in fact, the defendant did stand before the trial court under proper judicial process, no issue of personal process or jurisdiction presented itself for decision. The question was whether the government could

prosecute the proceedings in conflict with treaty provisions, given proper personal process and jurisdiction over the particular crime. In denying validity to the proceedings, the Supreme Court left no doubt that it was dealing with the question of the basic power to conduct the case or proceeding, rather than process over the person of the defendant (at 422):

> "* * * it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty * * *."

In addition, a defendant may waive a defect in personal jurisdiction. But the obligation breached in *Rauscher* was not directed to the defendant individually. It was a duty flowing from the United States to Great Britain. The defendant had no personal competency or standing to waive rights and duties on behalf of Great Britain. See McNair, *The Law of Treaties* (1938) p. 334, and Garcia-Mora, *International Law and Asylum As a Human Right* (1956), pp. 132-133. On the other hand, Great Britain might consent to waive or modify the treaty requirements, and the defendant would have no standing to complain. Thus, the treaty is concerned primarily with national duty and national power, and not with personal jurisdiction.*

Finally, some fifty years later, the Supreme Court in *Cook* v. *United States*, *supra*, at 122, so read *Rauscher*, citing it for the proposition that non-compliance with a treaty defeats all sovereign power in the proceeding, not

* The commentators agree that the *Rauscher* ruling, as applied in the *Cook* decision, nullifies proceedings in disregard of treaty as a result of a fundamental jurisdictional defect. And they approve of this principle strongly. Indeed, substantial authority would apply the principle unhesitatingly to violations of the general international law, as well as to violations of a specific treaty. Garcia-Mora, *International Law and Asylum as a Human Right* (1956), observes (at p. 135) that removal of fugitives in violation of treaty renders "the proceedings held against such fugitives by the capturing state * * * null and void *ab initio* * * *." See also, Lauterpacht, *Recognition in International Law* (1947), p. 420 and p. 425, and Harvard Research in International Law, *Apprehension In Violation of International Law*, 29 Am. J. Int'l Law, Supplement, July, 1935.

Professor Dickinson writes, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 27 Am. J. Int'l Law, 231, 244 (1933):

> "If the person or thing which is the subject of controversy has been brought within reach of the court process by a breach of treaty or international law, the court should approve no arbitrary or face-saving distinctions. The court is an arm of the nation and its jurisdiction can rise no higher, by virtue of process served within the territory, than the jurisdiction of the nation which it represents. If there was no jurisdiction in the nation, to make the original seizure or arrest, there should be no jurisdiction in the court to subject to the nation's law. In terms of American precedents, this means that the underlying principle of *United States* v. *Rauscher* is correct * * * that the principle of the *Mazel Tov* [*Cook* v. *United States*], is unimpeachable * * *."

Beale, *Jurisdiction of a Sovereign State*, 36 Harvard L. R. 241, 242-243 (1923), agrees that the national power fails even when there is conflict with the general principles of international law:

> "It cannot be doubted that all countries governed by the common law in fact accepted international law as part of the common law; and that the principles of that law which give or withhold jurisdiction are therefore principles of our common law.
>
> * * *
>
> "It is clear, then, that the sovereign cannot confer legal jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law."

merely personal jurisdiction over the individual defendant.

We suggest, therefore, that to describe *Rauscher* as a "personal jurisdiction" case, is to overlook the entire rationale for the holding. More than this, it ignores the present, controlling effect of the Supreme Court decision in *Cook*, which holds that such treaty limitations affect total jurisdiction in the proceeding itself, and so reads and cites *Rauscher* in support of this principle.

Perhaps the fundamental error of the lower court in ignoring the treaty violation, is revealed in its confusion

between wrongful seizure as such, and removal and proceedings in violation of treaty. The major discussion in the opinion relates to the "wrongful seizure rule" or seizure in violation of general international law, inapplicable concepts in the face of the existence of a specific treaty.

We have many times stressed that appellant's objection to jurisdiction is not based upon the mere seizure, or seizure contrary to general principles of international law. As the *Cook* opinion points out, it is a different legal issue with different jurisdictional consequences when the seizure violates a treaty. In such cases there is a total failure of all national and judicial power.

C. The seizure of appellant, initiated and arranged by agents of the United States Government on Mexican territory without consent of the Government of Mexico, violated the binding treaty of extradition.

The lower court further argued that, in any event, the conceded failure to follow any of the provisions of the Treaty of Extradition does not constitute a violation of the treaty. This conclusion rests upon an assumption that an extradition treaty is a contract at will; that the United States Government could freely choose to disregard the treaty provisions in their entirety and seize appellant in the territory of Mexico without the consent of the Mexican Government and in the face of its opposition; and that the sole obligation imposed upon the United States Government was to adhere to the high compact when it chose to invoke its provisions.

But this analysis of an extradition treaty would reduce international obligations incorporated in the law of the land to meaningless formalities. It is contrary to the spirit of the determinative decisions of the Supreme Court, the controlling interpretations of the Department of State, as well as the most fundamental principles of international law and morality.

The necessary corollary to the doctrine enunciated in *Rauscher* and *Cook* that the treaty generates the national power to proceed extraterritorially, is that the treaty binds the contracting parties to resort to its provisions, except as modified by mutual consent. Thus, an extradition treaty binds the signatory governments to exercise extraterritorial power with respect to alleged fugitives only through the procedures and under the circumstances delineated by the treaty, unless the consent of the government of asylum is obtained to other procedures. It is a compact between civilized nations which limits their own domestic sovereignty. It is exclusive in its terms and concepts. As a leading authority in the field explains (Spear, *The Law of Extradition*, 2d Ed. (1884), at p. 221):

> "* * * where a treaty has been made, giving the right and creating the obligation, it is to be assumed that the treaty was intended to cover all the cases in which, and to embrace all the conditions and terms upon which, the respective parties will either make a demand or grant a surrender. They enter into the compact for this purpose, and exhaust the purpose in the compact. The compact is the whole law for their government on the subject. * * * The treaties and laws furnish the basis of the proceedings, and are hence the test of their validity and regularity."

See also, Biron and Chalmers, *The Law and Practice of Extradition* (1903), page 3.*

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* Garcia-Mora, *International Law and Asylum As A Human Right*, analyzes the controlling status of a treaty of extradition as follows (at p. 138):

> "From the standpoint of international law, when two or more states enter into an extradition treaty stipulating the ways in which asylum will be waived, this conventional stipulation certainly acts as a limit on the absolute exercise of national jurisdiction. This is even more so in countries where treaties are considered as the law of the land and thus, binding on the courts. Hence, to by-pass the requirements of an extradition treaty would amount to refusing to apply a legislation which, though originating in a treaty, became a domestic act through the doctrine of incorporation."

1. THE RELEVANT DECISIONS HOLD THAT THE PROVISIONS OF A TREATY OF EXTRADITION MUST BE ADHERED TO IN OBTAINING EXTRATERRITORIAL POSSESSION OF AN ALLEGED FUGITIVE.

In *Rauscher* and *Cook*, the Supreme Court made explicit the binding nature of the treaty obligations. It rejected any concept that an extradition treaty may be unilaterally disregarded at will by one sovereign party to the contract.

Thus, after stating that a fugitive "can only be taken under a very limited form of procedure [*i.e.*, the treaty] * * *", the Supreme Court, in *Rauscher*, left no doubt that only treaty compliance could establish the power to proceed (at 422):

> "* * * as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose * * * it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty * * *."

The Court's phrase, "impossible to conceive", could not be stronger or more unequivocal.

Moreover, the Supreme Court also stressed that the obligation to keep faith with the other treaty nation limits removal to the treaty structure itself. The view that the prosecuting nation may, in its discretion, bypass the treaty was rejected in *Rauscher* (at 422):

> "No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them."

Again, referring to the extradition treaties of the United States and related domestic legislation, the Court concluded (at 415):

> "These treaties are also supplemented by Acts of Congress, and both are in their nature exclusive."

Thus, the reasoning of *Rauscher* is in sharp conflict with the conclusion of the court below that the treaty operates only if invoked by the demanding state. The reverse is true. Removal and prosecution may be had legally only by invoking the treaty, or by equivalent mutual agreement between the nations.

The lower court's conclusions are unfounded. They rest upon the view that the treaty has force only if and when one party desires to acknowledge or invoke it. This is a weak unilateral reed for a bilateral compact. It destroys all treaty purpose. The terms of the treaty do not authorize any such unilateral authority to invoke or bypass—to recognize or repudiate—at will.

The exclusive nature of the treaty obligation flows in part from the fact the treaty alone creates national power to maintain proceedings based upon extraterritorial action.

From *Rauscher* to *Cook*, and from *Cook* to the present day, the federal decisions recognize with a sweeping unanimity that proceedings against alleged fugitives located in other treaty nations can only derive basic jurisdictional validity through treaty sanction or the mutual accord of nations.

Thus, Chief Justice Hughes wrote in *Valentine v. United States*, 299 U. S. 5, 7, 9:

> "The question is not one of policy, but of legal authority. * * * Proceedings * * * must be authorized by law. There is no * * * discretion * * * unless that discretion is granted by law. * * *
>
> "Whatever may be the power of the Congress to provide for extradition independent of treaty, that

> power has not been exercised save in our relation to a foreign country or territory 'occupied by or under the control of the United States'."

The extradition power is not only strictly controlled by treaty. It must be found expressly in the treaty. It cannot be merely implied. Hence the Supreme Court in *Valentine* stated that ordinary methods of constructional inference afford:

> "* * * at the best an extremely tenuous basis for implying a power which in order to exist must be affirmatively granted" (at 12).

For the exercise of jurisdiction in criminal proceedings against individuals found in foreign territories covered by extradition treaties with the United States,

> "* * * legal authority does not exist save as it is given by act of Congress or by the terms of a treaty; it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power" (at 9).

And in *Factor* v. *Laubenheimer*, 290 U. S. 276, the Court pointed out (at 287):

> "* * * the principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled * * * the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.
>
> "* * * To determine the nature and extent of the right we must look to the treaty which created it."

Nor can the assumption or exercise of jurisdiction, contrary to and without positive sanction of treaty, be justified by considerations of national policy or security. As Chief Justice Hughes wrote in *Valentine* (at 18):

> "However regrettable such a lack of authority may be, the remedy lies with the Congress, or with the treaty-making power * * * and not with the courts." *

The lower courts have followed the principle that the disregard of an extradition treaty by agents of the United States without the consent of the other Government, constitutes a treaty violation depriving the courts of total jurisdiction to proceed.

In *Collier* v. *Vaccaro*, 51 F. 2d 17 (C. A. 4), an alleged narcotics dealer was arrested and forcibly taken from Canada to the United States through the activities of an informer working with United States narcotics agents, without any resort to our extradition treaty with Canada. Judge Parker held that there was no authority for such proceedings apart from the existing treaty, stating (at 19):

> "A person may be carried out of the country to answer for crime * * * only by the authority of the highest executive officials and in accordance with treaty provisions governing extradition."

To the same effect see *Villareal* v. *Hammond*, 74 F. 2d 503, 505 (C. A. 5), involving a removal from Mexico to the United States. The court held:

> "Extradition proceedings * * * must of course be taken in conformity with law, and no one may be detained under them unless for an offense denounced as a crime by the law of the detaining state, and covered by the treaty."

One of the most vivid expressions of this principle is found in *Ex Parte Coy*, 32 Fed. 911 (D. C. Tex.). Dealing

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* See also *Johnson* v. *Browne*, 205 U. S. 309, a *habeas corpus* proceeding, where the petitioner, after removal from Canada, had been sentenced and imprisoned in violation of an existing extradition treaty. In granting the writ, the Supreme Court stated (at 321):

> "While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith * * *."

with a claim of impropriety in a removal from Mexico to the United States, the court explained (at 917):

> "This government has entered into solemn treaty stipulations with Mexico with reference to refugees from justice. These stipulations are, by a declaration of the Constitution of the United States, the supreme law of the land, state constitutions and laws to the contrary notwithstanding. These stipulations this government cannot forget, nor can it justify their violation, without justly incurring the contempt of the civilized world; and yet we are seriously told that Mr. Coy has waived this binding obligation on the part of the United States, and has conceded the right of Mexico to expect the government of the United States to keep its plighted faith * * *.
>
> * * *
>
> "* * * Was Mr. Coy a part of the treaty stipulations with Mexico? Is Mr. Coy able to bind and unbind the government from its duties and obligations towards other nations by any act that he can perform? The statement of the proposition discloses its absurdity."

Not infrequently, criminal proceedings by the United States against alleged fugitives located in Mexico have come before the state courts of Texas. The Texas courts have reflected a singular sensitivity to the weighty jurisdictional limitations imposed on the Governments of the United States and of Mexico by the treaty of extradition. They have recognized, as has the Supreme Court of the United States in the *Cook, Rauscher, Valentine, Laubenheimer* and *Browne* decisions, *supra*, that, apart from treaty, the contracting governments fundamentally lacked unilateral power to remove and to proceed criminally against alleged fugitives. Correlatively, proceedings in disregard or violation of the treaty are void for want of total jurisdiction.

In *Dominguez* v. *State*, 234 S. W. 79 (Ct. of Crim. Appeals of Texas), the defendant was seized in Mexico just

across the Texas border by a company of United States soldiers who had crossed over into Mexico in pursuit of a "hot trail" of bandits.* During the course of the pursuit, the soldiers seized the defendant, brought him to Texas where he was tried for a murder allegedly committed by him in Texas, and convicted. Despite the "hot trail" circumstance, the conviction was set aside, the court holding that a prosecution after seizure in disregard of or in conflict with an existing treaty of extradition would be void for lack of jurisdiction in the United States and in its governmental branches and subdivisions. The court stated (at 82-83):

> "He, having sought an asylum in Mexico could be removed to the United States only in accord with the treaty of extradition.
>
> * * *
>
> "This treaty, like others, is a part of the supreme law of the land, binding upon courts * * * and may be set up as a defense to a criminal prosecution established in disregard thereof."

Then, quoting from *Blandford* v. *State*, 10 Tex. App. 627, 640 (Ct. of Appeals of Texas), the court emphasized the solemn considerations underlying such treaty limitations on national power (at 83):

> "'If the federal constitution, or a treaty, inhibits the doing of a certain thing, no legislative or executive action is required to authorize the courts to decline to override these limitations or restrictions, for the palpable and all-sufficient reason that to do so would be not only to violate the public faith but to transgress the supreme law of the land.
>
> "'In view of these principles of law, we hold then that it is the duty of the courts of the state to take

* Such "hot pursuit" generally is recognized in the law of nations as an exception to the ordinary territorial limits of national jurisdiction.

cognizance of, construe and give effect to the treaties of the federal government made with other nations * * *.'" *

2. THE EXECUTIVE BRANCH OF THE GOVERNMENT HAS CONSISTENTLY INTERPRETED THE TREATY AS PROHIBITING UNILATERAL DEVIATION FROM ITS REQUIREMENTS.

National policy and executive administrative practice under treaties of extradition support the foregoing analysis of the cases and authorities.** It has been the substantial pattern of our policy and practice that removal of alleged fugitives from one treaty nation to another may be accomplished only through treaty. Professor Moore states, "To this position the Government of the United States has adhered." 1 *Moore on Extradition*, Section 135, p. 167. Professor Moore also quotes the following declaration of Secretary of State Blaine as to our policy and practice under the treaty of extradition with Mexico involved here (4 *Digest of International Law*, Section 603, p. 330):

> "The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into

* See, also, *Benavidez* v. *State*, 154 S. W. 2d 260 (Ct. of Crim. Appeals of Texas), cert. den. 315 U. S. 811:

> "* * * We of course recognize the full right of sovereignty of Mexico under the lands that lie south of the Rio Grande river boundary, and fully agree * * * that not only is that sovereignty supreme in that territory, but also that neither this state nor nation has any right to exercise any sovereignty nor powers below the boundary * * *. From the evidence it is clear that * * * officers of this state or country are shown to have had no connection with such conduct [i.e., an alleged abduction and removal from Mexico to the United States] * * *. *If it had been shown that the officers of this country were parties to the illegal conduct of the citizens of Mexico, a different question might be presented.*" (Emphasis added.)

** Practice under the construction of a treaty by the executive or political department of the government is "of much weight". *Charlton* v. *Kelly*, 229 U. S. 447, 468.

> effect, and does not authorize either party, for any cause, to deviate from those forms, or arbitrarily abduct in the territory of one party a person charged with crime for trial within the jurisdiction of the other."

And again Secretary of State Frelinghuysen has declared:

> "The treaty between the United States and Mexico creates an obligation on the part of the respective governments * * * and where the obligation ceases the power falls. * * * It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify an usurpation of power." (1 *Moore on Extradition*, Section 135, pp. 166-168) *

In his treatise on *Extradition and Interstate Rendition*, Professor Moore further observes (Vol. 1, Section 32, p. 40):

> "Since the government of the United States does not grant extradition in the absence of a treaty, it refrains from demanding it under the same circumstances."

And H. N. Grooms, *International Extradition*, 15 Kentucky L. J. 30, 33-34 (1926), writes:

> "The United States has always declined to surrender criminals unless bound by treaty to do so * * *.
>
> * * *
>
> "In the instructions from Mr. Monroe, Secretary of State, to our plenipotentiaries * * * the following passage may be noted: 'Offenders, even conspirators, cannot be pursued by one power, into the territory of the other, nor are they to be delivered up by the latter, except in the compliance with treaties, or by favor'."

* See also, 4 Hackworth, *Digest of International Law*, Section 306, pp. 11-12, Section 307, p. 15, and Section 345, p. 224, stating that this policy has been uniformly followed.

Throughout its history, the United States has held that such extraterritorial removal without treaty warrant or the proper consent of the asylum sovereign, cannot form the basis for valid national prosecution. Referring to a removal from the United States outside of treaty, Secretary of State Fish stated (as quoted in 1 *Moore on Extradition,* Section 192, p. 286):

> "* * * a violation of the sovereignty of the United States has been committed, and the recapture and removal of the prisoner from the jurisdiction of the United States to British soil was an illegal, violent, and forcible act, which cannot justify the subsequent proceedings whereby he has been, is, or may be restrained of his liberty." *

The inadequacy of the lower court's analysis of the extradition treaty must be contrasted to these forthright statements on the part of the United States Department of State. The executive arm of the government has consistently repudiated any concept that a treaty of extradition permits a unilateral disregard of its provisions. In the words of the Department of State, neither party may for any cause "deviate from those forms or arbitrarily abduct in the territory of one party a person charged with crime for trial within the jurisdiction of the other." In the opinion of the Department of State, charged with the administra-

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* See Moore, *Ibid.*, Section 42, p. 49:

> "From the doctrine that the executive is not authorized to surrender fugitives in the absence of a treaty, it follows that, where conventional authority is conferred, it can be exercised only in the cases which the treaty specifies."

See, also, *Terlinden* v. *Ames,* 184 U. S. 270:

> "In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision. [Citing Moore, *op. cit.*, and *United States* v. *Rauscher, supra*]."

See, also, Hawley, *The Law and Practice of International Extradition* (1893), pp. 2-3, and 1 *Moore on Extradition,* Section 10, pp. 14-15, Section 16, p. 21, and Section 25, pp. 31-33.

tion of international treaties, an arbitrary abduction by one party to an extradition treaty, in the territory of another, without the consent of that party, would be a gross violation of the governing treaty.

And yet this is precisely what the present petition charges. The facts brought before the court on the motion under Section 2255 reveal without denial that agents and representatives of the United States Government, a party to the treaty of extradition, arbitrarily abducted appellant in the territory of the Government of Mexico, the other party to the treaty, for trial within the jurisdiction of the United States, without the consent, and indeed, in the face of the opposition of the Government of Mexico. Under the persuasive interpretation of the executive branch of our Government, the petition clearly charges a violation of the binding extradition treaty.*

3. The lower court's reliance on *Ker* v. *Illinois* is inapposite.

The lower court relies heavily upon *Ker* v. *Illinois,* 119 U. S. 436, in support of its contention that utter disregard of an existing extradition treaty by the United States is not a violation of that treaty. *Ker* does not support this proposition.

The removal of Ker from Lima, Peru, to the United States, and his trial and conviction for larceny in the

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* A major object of the treaty of extradition between the United States and Mexico is to insure *reciprocity* of removal power. See 1 *Moore on Extradition,* Section 33, p. 41 and Section 71, p. 82. The Treaty itself declares, in its preamble, "* * * that persons charged with or convicted of the crimes and offenses hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up * * *."

Since the United States will not and, indeed, may not, grant removal to Mexico save under, and in compliance with, the treaty of extradition, removal *from* Mexico in disregard of the treaty violates the basic reciprocity premise and consideration of the treaty.

Illinois state court, involved neither the violation of a treaty, nor the transgression of Peru's sovereignty.

The defendant Ker only argued that his forcible abduction violated due process and interfered with an asserted personal right of asylum in Peru. He did not urge that the Illinois criminal proceedings lacked basic jurisdictional sanction as the result of a failure to comply with any applicable treaty conditions precedent to the exercise of judicial power.*

The Supreme Court held that in the review of state criminal proceedings the due process clause of the Fourteenth Amendment could not be construed to protect a defendant in a criminal case against prior wrongful seizure as such. It said (at 440):

> "It is contended * * * that the proceedings in the arrest in Peru, and the extradition and delivery to the authorities of Cook County, were not 'due process of law'; and we may suppose, although it is not so alleged, that this reference is to that clause of Article 14 of the amendments to the Constitution of the United States which declares that no state shall deprive any person of life, liberty or property 'without due process of law.' The 'due process of law' here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescibed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled."

* The entire presentation on the part of Ker was confused. As the Supreme Court noted (at 439):

> "The grounds upon which the jurisdiction of this court is invoked may be said to be three, though from the briefs and arguments of counsel it is doubtful whether, in point of fact, more than one is relied upon [i.e., the personal right to asylum]."

See, also, Fairman, *Ker v. Illinois Revisited*, 47 Am. J. of Int'l Law 678 (1953).

Clearly this holding has no bearing here. The present case does not involve review of state criminal proceedings and no such due process issue has been raised.*

Finally, the Supreme Court rejected Ker's contention as to his personal right of asylum, stating:

> "There is no language in this treaty, or in any other treaty made by this country on the subject of extradition * * * which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he had fled. * * * It will not be for a moment contended that the government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum?
>
> "Nor can it be doubted that the government of Peru could, of its own accord * * * have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. * * * The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty * * * is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice; so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed."

This final holding in *Ker* does not conflict with, but supports appellant's argument. There is no conflict because appellant does not rely upon any theory of personal right

* As to the claimed impropriety in the rendition of Ker from California to Illinois, the Supreme Court found none. Again it is apparent that this holding on the interstate rendition issue is of no relevance here.

to asylum. Appellant does not assert that some personal right to asylum protected him against any involuntary removal from Mexico. Rather, appellant objects that the United States could not exercise any power in the territory of Mexico in disregard of governing treaty, absent the mutual assent of the Government of Mexico.

Appellant's contention does not conflict with the holding of the Supreme Court in *Ker* that the country of asylum may expel, or assent to removal without regard to a personal right to asylum, or that the demanding government may proceed against the fugitive "who is proved to be a criminal fleeing from justice * * * on proper demand and proceedings had" in the asylum state. The issues here presented are the limitations imposed by treaty on the national power to remove extraterritorially and to proceed against the alleged fugitive. It is apparent that the treaty nation is competent to deny asylum or to agree to removal from its territory. In the present case, however, there was *objection* rather than assent by Mexico to the removal and proceedings in disregard of treaty, and to the transgression of Mexican sovereignty. Mexico did *not* order appellant out of the country nor did it, of its own accord, surrender appellant to the United States. Moreover, there were no proceedings in Mexico to prove criminality and to remove pursuant to the requirements of the extradition treaty.

Ker therefore relates solely to a claim of an absolute "personal right to asylum." The *Ker* opinion points out, in rejecting this claim, that there are three ways in which "personal asylum" will yield properly to governmental power: (1) Expulsion by the asylum state, (2) assent by the asylum state to the surrender of the alleged fugitive, and (3) treaty conformity and proceedings had within the asylum state. In the absence of assent by the asylum state to the surrender, or expulsion by the asylum state, only treaty conformity will ground extraterritorial action to obtain an

alleged fugitive. In the present case, Mexico neither assented to the surrender nor expelled appellant. This petition thus squarely raises the issue of treaty violation absent in *Ker*.

Careful examination of the *Ker* opinion as well as the record of the case before the United States Supreme Court,* discloses the fundamental reasons why Ker, unlike appellant here, could not and did not raise the basic jurisdictional issue stemming from a treaty violation. Although an official governmental request for removal had been prepared, it was not consummated, and Ker was seized in Lima by a private individual, a Pinkerton detective. There was no allegation or showing in the record that the United States or its officers and agents in any way participated in the abduction. Governmental action by state authorities of California and Illinois in seizing and proceeding against Ker commenced only after he had been brought within the territory of the United States.

The Supreme Court emphasized the fact that this was a kidnapping "without any pretense of authority * * * from the government of the United States" (at 443). See also, Spear, *The Law of Extradition*, at p. 185: "He [i.e., Ker] was simply captured by private parties without any authority of law, and brought into this country * * *."

This eliminated from *Ker* the central issue which appellant raises here; namely, the assertion of power by the United States itself, in contravention of treaty and of the sovereignty of the other treaty nation. The only exercise of power by the state governments of California and Illinois in the *Ker* case occurred entirely within territorial limits where governmental power was fully grounded.

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* See especially, Brief for Defendant in Error, presented by Attorney General Hunt of Illinois, at pp. 19-21, excerpts from which are printed as an appendix to this brief.

Furthermore, at the time of the private seizure in and removal from Peru, that country was under military occupation by Chile. The Chilean military occupation force was the duly constituted governing authority. *Gillars* v. *United States*, 182 F. 2d 962, 972-973. The military governor, General Lynch, at the request of the Pinkerton detective, agreed to the seizure and removal of Ker, and actually assigned some of his forces to seize Ker and place him on board a vessel bound for the United States. * The duly constituted governing authority, of course, is fully competent and empowered to agree to such expulsion or removal.

It was, therefore, a fundamental error for the court below to conclude that appellant's argument on the present petition, is the "same argument * * * made by *Ker* who was kidnapped from Peru by a United States emissary despite the existence of an extradition treaty" (A. 212).

The very formulation of the issue by the lower court discloses the fallacy in its analogy. In *Ker*, the United States did not assert power where no power existed, since no agent of the United States participated or acted in the removal from Peru. Moreover, the state authorities of California and Illinois in no way proceeded against the defendant until he was present within their respective territorial jurisdictions.

The lower court misstates the crucial element in *Ker* when it says that the defendant "was kidnapped from Peru by a United States emissary". The United States was not at all connected with the kidnapping or the criminal proceedings against Ker. The removal was by a private party without governmental warrant. This is so stated in the Supreme Court opinion, in the record of the case, and by the writers and authorities. That is the basic

* These detailed facts appear in the record of the case cited above. See Appendix, *infra*. See also *Papers Relating to the Foreign Relations of the United States for 1881*, p. 938.

reason why Ker could not argue, and the case did not raise, the present claim that the United States usurped power in contravention of treaty.

Second, in *Ker* the *de facto* government of asylum consented to and participated in the removal. No issue of treaty violation was before the Supreme Court. If the seizure was solely the work of a private party, violation of treaty obligations on the part of the United States could not be claimed. And furthermore, the consent of the asylum state negates any suggestion of treaty violation, even if United States agents had been involved in the seizure.

These errors are compounded when the lower court continues the misuse of *Ker* with the following observations: (1) Under *Ker*, the sole obligation of the demanding state is that, if it invokes formal extradition proceedings, it will try the fugitive only for the specific crime charged; (2) informal expulsion procedures are available to the surrendering state, and if the demanding state proceeds through illegal channels, that only creates a political, and not a justiciable question; and (3) since appellant's own allegations show that Mexican police were the "chief actors" in the abduction, not even a diplomatic demand for return need be honored (A. 209-213).

We have seen that in *Ker*, the Supreme Court explained that in addition to expulsion or assent to removal on the part of the asylum state, "personal asylum" rights properly could be defeated if treaty extradition proceedings were had in that state. This underscores the obligation of the demanding state to follow the treaty system where removal assent by the surrendering state is absent. After so holding, the Supreme Court noted that the United States violated no such duties, nor did it transgress the bounds of its national power, since it was not involved in the removal action in *Ker*.

The Court contrasted *United States* v. *Rauscher*, *supra*—a decision handed down the same day as *Ker*—where

governmental action *was* involved, thus raising justiciable federal questions of treaty rights and obligations.

Of course, the surrendering state may at any time expel. And violation by the demanding state of another nation's sovereignty in illegal recovery affords the latter a diplomatic issue. But the opportunity to resort to diplomatic procedures in no way eliminates the justiciable issue caused by a treaty violation.

If the United States, lacking mutual consent, proceeds against the alleged fugitive in disregard of treaty, it transgresses the sovereignty of the asylum state, and consequently proceeds without national power. Apart from diplomatic issues, this raises the justiciable question whether the United States has jurisdiction to prosecute despite the limitations of a treaty compact which, under the federal constitution, is an integral part of the law of the land.

As the Supreme Court held in *United States* v. *Rauscher, supra*, at 417 (citing *Foster* v. *Neilson*, 2 Pet. 253, 314 and the *Head Money Cases*, 112 U. S. 580, 598-599), when a treaty like an extradition compact is part of the law of the land, the judiciary resorts to the treaty to determine rights, obligations and rules of decision as it would to a statute. The district court's view of justiciability is squarely rejected by all of the decisions. It reflects the formulation found in the *dissenting* opinion in *Rauscher* (at 434-436).*

* The authority cited by the district court, Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 Am. J. of Int'l Law 502, 507 (1935), on this point, supports appellant's claim that there is a total lack of power to proceed contrary to treaty. In fact, Preuss goes further, finding such jurisdictional void also in the case of violation of international law generally. Referring to Dickinson's analysis, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, op. cit., Preuss states (at 505, footnote 15):

> "Professor Dickinson has argued forcibly that there is a total lack of national, and hence of judicial, competence in cases of seizure or arrest in violation of international law. * * * This view is accepted in the present note. * * * "

The lower court concludes that even diplomatic remedy would have been unavailable since "Mexican police," the court asserts, were the "chief actors" in the seizure. This is a misstatement. Appellant's Section 2255 petition alleges that the United States and its agents, not the Mexican police were the chief planners, participants and actors in the abduction. The local police of the Federal District of Mexico were used by United States authorities and agents to help carry out the unlawful scheme. See, especially, Paragraphs 9, 12, 13, 14, 15, 16 and 17 of appellant's petition of May 25, 1956 (A. 81-84). Moreover, even in their limited functions, the local police of the Federal District of Mexico could not act as "officials of the asylum state", since the laws of Mexico (Constitution, General Law of Population, and Law of Extradition of Mexico, as well as the Regulations of the Preventive Police of the Federal District of Mexico) clearly deny to them any such powers or authority in all matters involving extradition, expulsion and deportation. See Moore, *Report on Extradition* (1890), pages 129-130, and 1 *Moore on Extradition*, Sections 499-503, pages 781-789.

The activities of the local police in aid and under the direction of United States authorities scarcely could establish the Mexican Government's consent to the proceedings and to the exercise of power by the United States in the territory of Mexico. Moreover, the petition alleges without contradiction that the Government of Mexico protested this transgression of sovereignty (A. 86).

* * *

Unlike the facts in *Ker*, the petition here charges action by the United States Government totally repugnant to the treaty of extradition and without the consent of the Mexican Government. The operative facts set forth in the

petition bring to light the following violations of the governing international compact:

The actions of the United States' agents in initiating, planning and participating in the seizure of appellant without the consent of the Government of Mexico violated, in their totality, the procedures set forth in Article VIII of the treaty (see Statement of the Case, *supra*). Article VIII sets forth in the most specific detail five steps which must be taken procedurally in order to obtain possession of an alleged fugitive in the territory of the other signatory power. It is conceded that none of these steps were here followed. The treaty then provides that Mexican law shall govern procedures testing the legality of the extradition demand. These procedures, enunciated in the Mexican statutes, are set forth in full, *supra*, pp. 8-10. It is conceded that none of these procedures were available to appellant. Instead of following the detailed procedures established by this treaty, the United States, through its agents, although fully aware of its obligations under the treaty, instigated, arranged and participated in the forcible removal and prosecution of appellant without the consent of the Mexican Government.

This gross violation of the treaty was further compounded. Appellant was tried and convicted by the trial court for an offense not subject to extradition, in complete violation of Articles II and III of the treaty. It is conceded that espionage, or conspiracy to commit espionage, is not included in the specific offenses enumerated in Article II, *supra*, at p. 4. Had appellant been properly extradited to the United States, the trial court would have been totally without jurisdiction to try him for espionage or conspiracy to commit espionage without formal consent

of the Mexican government. *Cook* v. *United States, supra; United States* v. *Rauscher, supra.**

It is not contested that the Mexican Government did not consent to these violations of treaty. More than this, its objection to the illegal action by agents of the United States was made known to the United States Government. These detailed allegations of fact, none of which have been denied by the government, present a lawless violation of the provisions of the governing international treaty by agents and representatives of the United States Government.

D. Cases involving international removal absent treaty existence, or pursuant to *ad hoc* agreement and consent are inapposite.

The lower court relies on a series of cases which are wholly inapposite, including *United States* v. *Diron*, 73 F. Supp. 683 (D. C. N. Y.); *United States* v. *Insall*, 8 F. Supp. 310 (D. C. Ill.); *Ex Parte Lopez*, 6 F. Supp. 342 (D. C. Tex.); and *United States* v. *Unverzagt*, 299 Fed. 1015 (D. C. Wash.), aff'd 5 F. 2d 492 (C. A. 9), cert. den. 269 U. S. 566.

None of these cases is applicable here. Were these decisions in conflict with *Cook* v. *United States, supra*, they

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* More than this Article VII of the treaty provides specific exemption from extradition for any "political offense" or "on account of any act connected with such a political crime or offense". In this connection should be noted the lower court's concession that evidence as to alleged membership in the Communist Party was admitted in the trial as proof of motivation. It is of some significance that the exemption of political offenses in extradition treaties was originally at the request of the United States Government. See *Factor* v. *Laubenheimer*, 290 U. S. 276, 299:

> "President Tyler, in his message transmitting the Treaty of 1842 to the Senate for consideration, referred to article 10 as 'carefully confined to such offenses as all mankind agreed to regard as heinous and as destructive to the security of life and property. In this careful and specific enumeration of crimes, the object has been to exclude all political offenses, or criminal charges, arising from wars or intestine commotions.' Executive Documents, vol. 1, 1842-43, Doc. No. 2, p. 22."

would of course yield to the Supreme Court ruling. But they are not. In these cases the United States variously had jurisdiction to proceed consistent with the *Cook* holding due to the fact that there were no treaties; special lawful authority existed; the specific agreement or consent of the duly constituted foreign government was obtained; or neither the United States nor its agents had participated in the unlawful extraterritorial action.

Thus, the *Dixon* case relied upon by the lower court, involved a prosecution for manslaughter and assault allegedly committed by a crew member on board a United States merchant vessel on the high seas. Neither a treaty nor the principle of territorial limits on national jurisdiction applied. The national jurisdiction of the United States to proceed with respect to crimes committed on its own vessels on the high seas is settled. As the district court stated in *Dixon* (at 684):

> "The alleged crimes having been committed on the high seas or elsewhere out of the jurisdiction of any particular state or district, trial is proper in the district where the offender is found, or into which he is first brought * * *
>
> * * *
>
> "* * * no necessity for extradition arose, as the defendant never sought asylum in any country."

The only aspect of the *Dixon* ruling which is relevant here supports appellant's present position. For, the court held that there was no necessity to proceed through extradition removal because the defendant had not sought asylum in another country. The corollary of this reasoning is that in the case of a defendant located within the territory of another treaty nation, the necessity for extradition arises.

In *Insull*, the defendant was removed by duly constituted Turkish authorities without participation by agents of the United States. Moreover, there was no applicable treaty then in force. 8 F. Supp. at 311.

In *Lopez*, the district court stressed the fact that there was no participation by agents of the United States in the extraterritorial action, stating (at 344):

> "The only person who petitioner was able to identify as being connected with these transactions was one Hernandez, a citizen of Mexico, and one Montorola, a captain in the Mexican Army and a citizen of Mexico."

The petition for the writ of habeas corpus in *Unverzagt* merely raised the objection that the United States Attorney in the State of Washington planned to return petitioner to the Western District of New York and thus to deny him an opportunity to present his case. It was solely on this basis that the Circuit Court affirmed the denial of the petition, since, as it stated (at 493):

> "If the petition stated any grounds for the issuance of the writ in the first instance, the writ had fully accomplished its purpose at the time of the hearing in the court below."*

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* *Gillars* v. *United States*, 182 F. 2d 962 (App. D. C.) does not involve a treaty violation. The defendant in *Gillars*, charged with treason committed in Germany, was seized in Germany by the United States Army of Occupation. Unquestionably this was lawful authority affirmatively granted by statute and recognized by international law. Moreover, the claim which the defendant raised relating to a treaty of extradition between the United States and Germany was to no avail. In the first place, the war situation and the fact of occupation would have rendered any such treaty inoperative. Second, that treaty would have operated, if at all, in proceedings involving persons who fled the country where the alleged crime was committed. But the crime charged to Gillars was committed in Germany, where he was found. As to the lawful authority to seize, the court stated (at 972-973):

> "* * * Our army of occupation in Germany * * * was the law enforcement agency in Germany at the time of appellant's arrest. * * * The right to arrest being part of the right to govern, it cannot be doubted that our army of occupation was authorized to arrest * * *."

To the same effect is *Chandler* v. *United States*, 171 F. 2d 921 (C. A. 1), cert. den. 336 U. S. 918.

E. Cases involving interstate abduction and rendition are inapposite.

The interstate abduction and rendition cases cited in the opinion below, *In re Johnson,* 167 U. S. 120, *Pettibone* v. *Nichols,* 203 U. S. 192, *Mahon* v. *Justice,* 127 U. S. 700, and *Frisbie* v. *Collins,* 342 U. S. 519, have no bearing upon the treaty issue in the present matter.

The lower court ignores the holding of the Supreme Court in *Lascelles* v. *Georgia,* 148 U. S. 537, 546, where the Court said:

> "To apply the rule of international or foreign extradition, as announced in *United States* v. *Rauscher* * * * to interstate rendition, involves the confusion of two essentially different things which rest upon entirely different principles. In the former, the extradition depends upon treaty contract or stipulation * * *. In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned."

See also:

2 *Moore on Extradition,* Section 516, pp. 819-820.

The opinion below quotes from *In re Johnson, supra,* to explain that wrongful seizure is immaterial because "in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest" (A. 211).

But in international removal where extradition treaties exist, the policy rationale is precisely the opposite. In *Lascelles* as well as in such holdings as *Rauscher* and *Cook,* the Supreme Court explains that the key considerations are the rights and duties of sovereigns under high compact, as well as the territorial limitations of national power, rather than some individual privilege or immunity which

is only derivative. And these considerations override domestic policies for protection against crime. As Chief Justice Hughes wrote in *Valentine, supra,* in holding that even the most vital demands of national security and the apprehension of criminals yield to treaty limitations:

> "However regrettable such a lack of authority may be, the remedy lies with the Congress, or with the treaty making power * * * and not with the courts."

See also, the cases and materials discussed above in Point I, C.

For these reasons also, the emphasis put by the court below on *Frisbie* v. *Collins, supra,* is misplaced. That case, like *Ker,* held only that unlawful seizure, in itself, affords no due process objection to a subsequent conviction "when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards" (342 U. S. at 522). *Frisbie,* an interstate abduction case, did not at all deal with the present issues of treaty limitation and extraterritorial authority. Although the defendant in the *Frisbie* case argued that his abduction violated the Federal Kidnapping Act (thus attempting to raise a federal issue), it was clear that neither the terms nor history and purpose of that statute covered the acts of public law enforcement officers in the apprehension of those accused of crime. Obviously, the Kidnapping Act was not intended to regulate the rendition of fugitives. As the Supreme Court said (at 522-523):

> "This act prescribes in some detail the severe sanctions Congress wanted it to have. Persons who have violated it can be imprisoned for a term of years or for life; under some circumstances violators can be given the death sentence. We think the act cannot fairly be construed so as to add to the list of sanctions detailed a sanction barring a state from prose-

> cuting persons wrongfully brought to it by its officers. It may be that Congress could add such a sanction. We cannot."

The principles involved in interstate situations have no relationship whatever to the jurisdictional problems raised by a treaty violation.

As the Supreme Court held in *Lascelles* v. *Georgia, supra,* in rejecting the application of the treaty rule to an interstate rendition (at 542 and 545-546):

> "* * * the fallacy of the argument lies in the assumption that the states of the Union occupy towards each other, in respect to fugitives from justice, the relation of foreign nations, in the same sense in which the general government stands towards independent sovereignties on that subject. * * * The case of United States v. Rauscher * * * has no application * * * because it proceeded upon a * * * a treaty between the United States and Great Britain * * *."

This appeal raises an issue of international treaty violation. Citation of *Frisbie* and other interstate cases merely confuses two fundamentally different situations.

POINT II

The contention of lack of total jurisdiction of the court raised by this petition is not foreclosed by prior litigation.

The lower court seeks to avoid the entire impact of appellant's petition by arguing that the jurisdictional issue is foreclosed. Thus the court finds that the issue here raised was previously litigated adversely to appellant in the motion in arrest of judgment in the trial court, and in this Court on the affirmance of the judgment of conviction.

After the verdict, on April 5, 1951, the day of sentencing, appellant made a motion in arrest of judgment challenging the jurisdiction of the court over his person. The lower court rests its conclusion that this prior litigation forecloses appellant from pressing his present contention upon the assumption that the essential "operative facts" were thus before this Court on the original appeal.

The lower court charges that appellant is playing with labels. It suggests that appellant is merely replacing the label of "personal jurisdiction" with the label of "national jurisdiction". And the court suggests that since the "operative facts" remain the same, it is presumptuous of appellant to imply that the extremely able and experienced judges of this Court rested their prior decision solely upon the jurisdictional label rather than the operative facts (A. 207).

But we suggest that the lower court's analysis exposes its own infirmity. Its rationale rests upon the assumption that the essential "operative facts" which are determinative in this petition were presented to the trial court and to this Court in the original proceeding. This rationale collapses, however, upon an examination of the petition. The simple fact of the matter is that the essential facts upon which the charge of treaty violation depends were never before the trial court nor before this Court on appeal.

We have adverted to these operative facts several times during the course of this argument. However, the singular failure of the lower court to even mention these facts in its opinion, despite its obligation under the law to accept the facts as true in the absence of denial, requires their restatement here.

The essential operative facts which expose a violation of the binding treaty of extradition presented in this petition for the first time are: (1) The facts revealing that the United States Government initiated, arranged, planned

and participated in the unlawful seizure of appellant on Mexican territory; and (2) the facts revealing that the Government of Mexico neither deported nor expelled appellant nor consented in any way to his seizure and removal.

When this Court heard the case, these facts were not before it. They were not contained in the motion in arrest of judgment. They were not in the trial record and they were not raised before this Court. They were not before this Court for the simple reason that they were not known to the defense. But more than this, the petition charges in great detail that these facts were known to the prosecution and withheld from the defense, the trial court and this Court during the pendency of the entire proceedings.

This situation must be deemed to be true for the purpose of this appeal, and the conclusion which flows from it is striking. The operative facts upon which the present challenge to jurisdiction is based were not merely absent from the litigation below. They were consciously suppressed and kept from the court by a party to the litigation which had these facts in its possession. The prosecution was not content with merely suppressing these facts from the court. On the oral argument it totally foreclosed consideration of the issue by misrepresenting the facts to the court.*

The opinion of the court below is thus an example of bootstrap reasoning. Having once assumed that the operative facts contained in the present petition were all litigated before the Court of Appeals on the original appeal, the lower court then proceeds to erect an edifice of reasoning which has a surface plausibility. But this is the central fallacy of the lower court's opinion. The original assumption is too easily made. The essential "operative facts" are here presented for the first time.

A careful reading of the opinion of this Court on the original appeal fully confirms this analysis. The motion in arrest of judgment and the affidavit submitted in its support could in their very nature only raise questions relating to the court's jurisdiction over the person of the defendant. The basic facts were not presented which could lead the court to an examination of the want of total national jurisdiction caused by a breach of the governing treaty of extradition. The facts averred in the motion in arrest of judgment revolved solely around an alleged violent seizure of the defendant while residing in the territory of Mexico. No facts were brought forward to show either (1) the initiation, planning and participation in the abduction by agents of the United States Government, or (2) any lack of consent by the Mexican Government.* In the absence of such facts, no treaty violation could be shown. It is, of course, elementary law that however irregular the expulsion, the consent of the high contracting parties nullifies any claim of treaty violation (see Point I, C, *supra*). The only legal issue posed by the facts submitted to the trial court and to this Court on appeal was the question whether the personal rights of the defendant to be immune from arbitrary seizure were violated in such a manner as to negate the court's jurisdiction over his person.

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* Thus in respect to the key operative facts, the existence of which would have exposed a violation of the governing treaty to the court, the prosecution stated (1) that the appellant had been legally deported by the Mexican authorities, although the prosecution then knew that this was not the fact, (2) the prosecution represented to the Court of Appeals that the Mexican Government had consented to the appellant's "expulsion", although the prosecution then knew that this was not the fact, and (3) the prosecution broadly inferred that there was no participation by United States agents in the seizure of appellant, although the prosecution then knew that this was not the fact. See Appendix II in brief in companion appeal.

* As a matter of fact it would appear from the motion in arrest of judgment and the argument in the Court of Appeals that appellant and his counsel were under the impression that the Mexican Government participated in and consented to the seizure.

The forced kidnapping of appellant raised in the first place questions involving the jurisdiction of the court over the person of the defendant. These questions were analogous to problems raised by an arrest without a warrant. See, for example, *United States* v. *Coplon,* 185 F. 2d 629 (C. A. 2). They called for a consideration as to whether personal rights of the defendant to be immune from arbitrary seizure were violated. Such questions do not raise the competency of the court to hear the controversy. They are questions which, revolving around personal rights of the individual, may be waived by the individual. See, for example, *Johnson* v. *United States,* 318 U. S. 189; *Adams* v. *United States ex rel. McCann,* 317 U. S. 269. They are questions which consequently must be timely raised. See, for example, Rule 12(b)(2) of the Federal Rules of Criminal Procedure. This was the type of question raised by appellant in the motion in arrest of judgment. As Judge Frank pointed out in this Court's opinion, appellant's contention at that stage rested upon his assertion of "his right to be free from unlawful molestation or assault by his own Government; and his right not to be convicted by an admission wrested from him by a violent act" (at 603, footnote 20). Thus the affidavit in support of the motion in arrest of judgment complained that appellant's kidnapping violated his personal rights in such a manner as to defeat personal jurisdiction. Appellant so presented his argument to the Court of Appeals.

Perhaps the most striking support for this analysis comes from the government itself.* Appellant in his original brief on appeal cited *Cook* v. *United States, supra,* in support of his contention that his motion in arrest of judgment was timely. The government responded that the rationale and holding in *Cook* did not apply to the issues raised in the motion in arrest of judgment because in *Cook*

* See Appendix II in brief in companion appeal.

it was a violation of an international treaty which created a defect "relating to jurisdiction over the subject matter, not merely of the person of the master." Hence the government concluded and so urged upon this Court that the *only* issue presented by the facts raised in the motion in arrest of judgment was one of personal jurisdiction, unlike the loss of total jurisdiction resulting from a treaty violation.

The careful opinion of Judge Frank makes it crystal clear that as far as this Court was concerned the only question raised by the facts then before the Court related to the impact of a violation of personal rights upon jurisdiction over the person. No issue of treaty violation was before the Court, nor could it be, since the Court assumed from the record and the representations of the government that the Mexican Government had consented to the "expulsion".

If the fact of United States initiation of and participation in the abduction, as well as the lack of Mexican governmental consent, had been presented, then a totally different situation, legally and factually, would have been before the Court. Only, at this point, the issue of lack of national jurisdiction generated by a treaty violation would have been ripe for adjudication. But these crucial facts, while known to the prosecution during the appeal, were unknown to appellant and to this Court. To urge now that appellant is foreclosed from litigating this issue is not merely to disregard logic and governing rules of law. It would sanction and condone conduct on the part of the prosecutors inconsistent with their obligations as officers of the Court and impartial administrators of justice.

Thus, the fundamental question of want of total national jurisdiction raised in this petition is not foreclosed by the prior litigation. In the original appeal, this Court held that issues of personal jurisdiction were waived by

the failure to raise them prior to trial. We do not seek to relitigate this issue.

The petition now before the Court raises issues of a fundamentally different character. Based upon operative facts only recently discovered by appellant, although known to the prosecution throughout the entire prior proceeding, the petition raises for the first time the total judicial competency of the trial court—a want of national jurisdiction flowing from a flagrant and complete violation of a binding international treaty of extradition.

This is an issue which raises the total and complete competency of the court to entertain the litigation. The violation of the treaty rendered the proceeding void *ab initio*. All jurisdictional authority was lacking. A motion directed to a judgment so rendered without jurisdiction and thus subject to collateral attack "may be made at any time." Title 28, U. S. C., Section 2255. A defendant has no power to waive such a defect. *Pon* v. *United States*, 168 F. 2d 373 (C. A. 1). It is a fundamental purpose of the writ of *habeas corpus* and thus a motion under Section 2255 to provide for relief from a judgment lacking in total jurisdiction. *Johnson* v. *Zerbst*, 304 U. S. 458; *Bowen* v. *Johnston*, 306 U. S. 19; *Smith* v. *United States*, 187 F. 2d 192 (App. D. C.); *Pugh* v. *United States*, 212 F. 2d 761 (C. A. 9).* The jurisdictional issue raised by this petition

* The undisputed availability of motions under Title 28, U. S. C., Section 2255, to attack the lack of subject-matter jurisdiction or other fundamental defects in the conviction and sentence, was stressed in *Smith* v. *United States, supra*, at 197-198, as follows:

> "Where * * * there is lack of jurisdiction or some other fundamental weakness in the judicial process which has resulted in a conviction, collateral attack is at hand, now under Section 2255."

In *Pugh* v. *United States, supra*, there was objection in a motion under Section 2255 that petitioner had not been indicted by a grand jury. But petitioner's appeal on this point from the trial court's judgment had been dismissed as untimely. Yet, upon the Section 2255 proceeding, the Court of Appeals held that the objection could be raised (at 764):

> "The requirement of a grand jury is simply a statutory provision * * *. Yet we think the defect in this respect * * * is a matter which can be raised in a Section 2255 proceeding."

It is, of course, clear that the doctrine of *res judicata* as applied to a court's determination of its own jurisdiction over the subject matter of a proceeding, does not apply to the present situation. See, for example, *Kalb* v. *Feuerstein*, 308 U. S. 433. In this case, Mr. Justice Black pointed out that despite the tendency in *Stoll* v. *Gottlieb*, 305 U. S. 165, to apply liberally the doctrine of *res judicata* to an original adjudication of subject matter jurisdiction, this approach would not apply where a countervailing public policy more important than the doctrine of *res judicata* comes into play, such as the principle underlying the writ of *habeas corpus*. See also Boskey and Braucher, *Jurisdiction and Collateral Attack*, 40 Columbia L. R., 4006.

This approach is embodied in the provisions of 28 U. S. C. 2255, permitting collateral attack on a claim of want of jurisdiction in the original sentencing court. A mechanical application of the principle developed in *Stoll* v. *Gottlieb*, *supra*, would destroy the entire foundation of the writ of *habeas corpus*, and would, in effect, erase from the statute books, Section 2255.

The fact, as the lower court said, that "a court is duty bound to raise the question of jurisdiction over subject matter on its own motion" (A. 207), does not foreclose consideration of the basic jurisdictional issue raised by the petition. Indeed, it is only after conviction and affirmance after the courts have, expressly or impliedly, upheld jurisdiction that Section 2255 ordinarily comes into play in order to permit an attack on jurisdiction. Section 2255 assumes that the trial and appellate courts found proper jurisdiction, else there would be no sentence to attack collaterally under the statute.

is of such a nature. The violation of fundamental treaty obligations entered into by two sovereign nations deprived the courts of the United States of total and absolute jurisdiction to proceed against appellant. "Here the objection is more fundamental. It is to the jurisdiction of the United States." *Cook* v. *United States, supra.* This "fundamental" objection to the jurisdiction of the trial court has never

been litigated in this proceeding. The operative facts upon which it is based are now presented to the Court for the first time. Justice to appellant and a decent respect for the international obligations of sovereign nations, as incorporated in the law of our land, require that these facts be now given their day in court.

CONCLUSION

The opinion and order of the lower court must be reversed. Under the principles of law which govern Title 28, U. S. C., Section 2255, the court was required to grant a hearing on the facts set forth in appellant's petition.

Respectfully submitted,

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APPENDIX

Excerpts from Brief for Defendant in Error, *Ker v. United States, supra*—quoted in 47 American Journal of International Law, pp. 684-685

Having passed upon the law questions raised by this hearing, the Court may have interest enough in the man and the crime which these questions are put forward to shield, to read another page concerning them. In the month of January, 1883, Frederick M. Ker, having been for many years the confidential clerk for Preston, Kean & Co., bankers of Chicago, asked permission to go to New Orleans for a rest from his labors. When the time for his vacation expired, the bankers instead of *receiving* their clerk, received a letter from him postmarked at Chicago, in which he generously informed them that there were deficits in his accounts, and the amount of embezzlement would be found to be about $21,000 of the moneys of the bank, and $35,000 of United States bonds belonging to his patrons. The letter contained an intimation that if allowed to take his journey unmolested, the bank would be let alone, but if pursued and brought back, a run would be organized and the bank ruined, and concluded with the cool remark that if successful in future life, he would endeavor to refund the money to those entitled to receive it. Preston, Kean & Co. were not alarmed by the threats, and inaugurated such measures that by the next steamer there went to Aspinwall one of Pinkerton's men, who at Panama found a Chicago overcoat which had been shed and given to a porter. Precaution had been taken to cut the tailor's name from the neck of the coat, but the name of Ker in one of the lappels [sic] of the side pocket remained untouched. Learning from the porter that the owner of the overcoat had sailed for Callao, the detective, armed with photograph alone, followed by the next steamer. Arriving there, he

went to Lima, and in a few days thereafter, while in a public square, recognized Ker sitting under the shade of a tropical tree, regaling himself with a cigar. An acquaintance followed. Ker could speak French and so could the detective. Becoming interested in each other, a friendship arose. Together they did the city, the theatre and the fandango. Investments were discussed; Ker had money, the detective had more, and thus dreaming and scheming, days passed into weeks and time wore happily away. In the meantime, at Chicago, the victimized bankers obtained the proper demand from the federal Secretary of State, which came by the next steamer to the friend in Lima. At this time, a state of things existed in Peru which rendered the treaty between the United States and that government inoperative. There was no Peru. The government had a nominal existence at Ariquipeo, back in the mountains, eighty-five miles from Lima, but General Lynch of the Chilian forces was in military occupation of the capital. Pinkerton's man had no passport to go through the lines to present our demand at the mountain camp of the Peruvian government, but did what was perhaps the next best thing, applied to General Lynch. This officer, doubtless thinking that security to criminals was not part of his mission in Peru, dispatched an officer to aid the detective in putting Ker on his way back to the United States. On board the man-of-war Essex, then in the harbor at Callao, on her way to China, he was conducted to a state-room and transported to Honolulu, where it was expected to intercept the departure of a vessel to San Francisco. It happened, however, that this vessel had sailed when the Essex arrived outside the harbor, and Ker enjoyed the sea breezes on board his country's man-of-war for nearly a month, when the next steamer took him aboard for San Francisco. Having been brought to Chicago, Ker, in the course of time, was placed upon his trial. He interposed no denial of the charges and the theft and embezzlement,

but relied upon his ability to persuade the United States to take him back to Peru. The Court below was not susceptible to these persuasions and gave him ten years' tuition in Joliet to improve his notions of business integrity. With what success his appeal will meet here, remains to be seen.

GEO. HUNT
Attorney General
State of Illinois

FBI

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☐ Information pertained only to a third party. Your name is listed in the title only.

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____ Pages contain information furnished by another Government agency(ies). You will be advised by the FBI as to the releasability of this information following our consultation with the other agency(ies).

____ Page(s) withheld for the following reason(s):

_____

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☐ For your information: _____

_____

☑ The following number is to be used for reference regarding these pages:
101-2483-1351 pg 1

XXXXXXXXXXXXXXXXXXX
X DELETED PAGE(S) X
X NO DUPLICATION FEE X
X FOR THIS PAGE X
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XXXXXX
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FBI/DOJ

SECRET

Assistant Attorney General
William P. Tompkins (orig. & 1)

January 17, 1957

4-24-87

Director, FBI

CLASSIFIED BY: 3042/PWT/cls
DECLASSIFY ON: OADR

MORTON SOBELL, with aliases
ESPIONAGE - R

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

Reference is made to our letter of November 8, 1956.

[redacted] b1

This is furnished to you for your information.

RECORDED-16 101-2489-1351

EX-108 cc - 100-387835 (National Committee to Secure Justice in the Rosenberg Case)

JPL:jdb (5)

[redacted] b1

APPROPRIATE AGENCIES AND FIELD OFFICES ADVISED BY ROUTING SLIP(S) OF Clerk DATE 4-20-78 pc

MAILED 3
JAN 17 1957
COMM-FBI

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Boardman
Belmont
Mason
Mohr
Parsons
Rosen
Tamm
Nease
Winterrowd
Tele. Room
Holloman
Gandy

SECRET

307 gr

64 JAN 28 1957

FBI - JUSTICE

UPGRADED 10/20/75 WAO/MR

Classified by 2455 10/20/75 WAO/WDF
Exempt from: GDS Category 2 AND 3
Date of declassification Indefinite

FBI

Date: 1/15/57

Transmit the following message via AIRTEL

(Priority or Method of Mailing)

Mr. Belmont
Mr. Mohr
Mr. Parsons
Mr. Rosen
Mr. Tamm
Mr. Trotter
Mr. Nease
Tele. Room
Mr. Holloman
Miss Gandy

TO: DIRECTOR, FBI (101-2483)

FROM: SAC, NEW YORK (100-37158)

RE: MORTON SOBELL, was
ESPIONAGE - R

On 1/14/57, AUSA, SDNY MAURICE NESSON, advised that by agreement with subject's counsel, filing of government's answer to subject's appeal of 12/5/56, has been put over to week of 1/21/57. NESSON advised that he has sent proofs to printer and upon return in a few days, he will examine for corrections and approve for printing.

Bureau will be kept advised.

KELLY

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4-22-87 BY 3047 RJT/ALS

(3) Bureau (101-2483) (RM)
1- New York (100-37158)

RTH:ald (#6)
(5)

RECORDED-16
EX-127 101-2483-1352
18 JAN 16 1957

Mr. Belmont

66 JAN 23 1957

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

Report Form 2-8a
FD-263 (5-12-49)

FEDERAL BUREAU OF INVESTIGATION

TOP SECRET

REPORTING OFFICE	OFFICE OF ORIGIN	DATE	INVESTIGATIVE PERIOD
NEW YORK	NEW YORK	JAN 17 1957	11/28,30;12/3,7,13,14/56; 1/3/57

TITLE OF CASE	REPORT MADE BY	TYPED BY
MORTON SOBELL, was 4-22-87 CLASSIFIED BY: 3042/PLOT/CLS DECLASSIFY ON: OADR	RICHARD T. HRADSKY	FJM

CHARACTER OF CASE

ESPIONAGE - R

SYNOPSIS:

(TS) T-1 advised that [redacted] b1

T-2 advised that no employment record was available for PAULA ZIMMERING between 1930-1937. Records of NYC Board of Health reflect that PAUL ZIMMERING died in NYC, on 10/16/56.

- P -

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

DETAILS:

BACKGROUND BRIEF

T-1, a confidential source abroad, advised under date of [redacted] b1

APPROVED JJK/orb SPECIAL AGENT IN CHARGE

DO NOT WRITE IN SPACES BELOW

COPIES MADE:

7 - Bureau (101-2483) (RM)
3 - New York (100-37158)

101-2483-1353

17 JAN 22 1957

RECORDED - 4

INDEXED - 4

EX-126

APPROPRIATE AGENCIES AND FIELD OFFICES ADVISED BY ROUTING SLIP(S) OF 1-28-57

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621 MAR 10 1961

AGENCY RAB
REQ. REC'D
DATE FORW. 1-28-57
HOW FORW. by P/S
BY

TOP SECRET

10/20/75 WA4/WDF

Classified by 2355

Exempt from GDS, Category 2, 3

Date of declassification Indefinite

PROPERTY OF FBI—This report is loaned to you by the FBI, and neither it nor its contents are to be distributed outside the agency to which loaned.

67 JAN 28 1957

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 O—355707

[redacted] b1

(TS)

KLAUS JULIUS KLAUS FUCHS, British atomic scientist, was arrested by British authorities on February 2, 1950, following his admission that he had passed information regarding the atomic bomb to Soviet agents in England, 1941-1943 and 1946-1949, and to an individual whose identity he did not know in the United States in 1944-1945. On March 1, 1950, FUCHS was arraigned on the charge of violating the British Official Secrets Act of 1911. FUCHS pled guilty to passing atomic secrets and was sentenced on March 1, 1950, to fourteen years in prison. (TS)(U)

Investigation developed that Dr. PAUL ZIMMERING received his BA degree at the University of Minnesota in 1930 and his medical education at the University of Bristol England, graduating in 1937; that his wife, PAULA attended the University of Minnesota in 1928-1929 and that a transcript of her credits at North High School, Minneapolis, Minnesota was sent to Columbia University, New York City, in 1947. The whereabouts of PAULA ZIMMERING (whose maiden name was RUBEN or RUBENS) during 1930-1937 was unknown to T-1. Records of Marriage License Bureau, Brooklyn, New York, reflect PAUL ZIMMERING and PAULA RUBENS were married on October 1, 1938 at Brooklyn, New York. Dr. PAUL ZIMMERING maintained an office at 300 East 57th Street, New York City. Investigation to determine if information is available indicating that PAULA (RUBENS) ZIMMERING attended the University of Bristol with her husband is being conducted. (TS)(U)

[redacted] b1

[redacted]

INFORMATION FROM T-2

On December 14, 1956, T-2, who has furnished reliable information in the past advised that no employment record of PAULA ETHEL RUBENS was available indicating her employment between 1930 and 1937.(U)

DEATH OF PAUL ZIMMERING ON OCTOBER 16, 1956

The records of the New York City Board of Health, checked by SA RICHARD J. KMIECIK on December 13, 1956, reflected that Death Certificate number 21814 was issued for PAUL ZIMMERING, 300 East 57th Street, New York City, age 47, occupation, Physician, born in Poland, who died October 16, 1956 at 4:30 PM at Mount Sinai Hospital, Manhattan, New York. Cause of death was noted as liver failure. His wife's name was PAULA ZIMMERING, 300 East 57th Street, New York City. The funeral was conducted from the Riverside Memorial Chapel, 180 West 76th Street, New York City, and interment was in Westchester Hills Cemetery, Westchester County, New York, on October 18, 1956.(U)

[redacted]

Identity of Source	Date of Activity And/or Description of Information	Date Received	Agent to whom Furnished	File Number where Located
[redacted] (T-1)			Bureau	100-37158-1702
[redacted]			Bureau	1785
T-2 is [redacted]	Check for employment of PAULA ZIMMERING		Baltimore	100-37158-1799

b1 b2 b7D

Careful consideration has been given to each source concealed and T symbols were used in the report only in those instances where the identities of the sources must be concealed. (U)

ADMINISTRATIVE

[redacted]

b1

LEAD

NEW YORK

Lead continued on 1391

At New York, New York

1. Will follow and report the pending appeal filed by attorneys for subject. (U)

REFERENCE

Bulet to NY, 11/30/56. Ser 1334
Report of SA RICHARD T. HRADSKY, 11/28/56, at New York. Ser 1333
Bulet to NY, 12/7/56. Ser 1333
(U)

ADMINISTRATIVE PAGE (cont'd)

FD-36 (Rev. 3-13-56)

FBI

Date: 1/21/57

Transmit the following message via AIRTEL

(Priority or Method of Mailing)

Mr. Tolson
Mr. Nichols
Mr. Boardman
Mr. Belmont
Mr. Mohr
Mr. Parsons
Mr. Rosen
Mr. Tamm
Mr. Trotter
Mr. Nease
Tele. Room
Mr. Holloman
Miss Gandy

TO: DIRECTOR, FBI (101-2483)

FROM: SAC, NEW YORK (100-37158)

RE: MORTON SOBELL, was
ESPIONAGE - R

ReBulet, 12/14/56, advising "Daily Worker" article reflecting book of poetry entitled "You Who Love Life" written by HELEN SOBELL, being available at Sydmer Press, 30 Charleston Street, NYC. "The National Guardian" of 11/26/56, reflects book available at Sydmar Press, 39 Charlton Street, NYC, at $1.00 per copy.

[redacted] and Credit Bureau of Greater NY have no record of this business. No record of firm name registered with NY County Clerk's Office, or with NYC Department of Licenses. Inquiry of [redacted] negative. NY street directory reflects no Charleston Street in Manhattan. Investigation at 30 Charlton Street, NYC, reflects apartment 5-D occupied by HELEN SOBELL. Mail box at this address reflects HELEN SOBELL and Sydmar Press. Mail Carrier advised HELEN SOBELL told him in December, 1956, she would add name Sydmar Press to her mail box and accept mail addressed thereto. Had no other info other than that name of GURWITZ is inside mail box. (GURWITZ is maiden name of HELEN SOBELL). Superintendent of apartment house advised HELEN SOBELL is wife of prisoner in Alcatraz and resides here with her son, MARK, and that her daughter, SYDNEY, is away at college. Had no info re Sydmar Press other than noting it was posted on mail box. Name Sydmar indicates it is combination of first syllables of HELEN SOBELL's children's names.

KELLY

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4-22-87 BY 3042 AUT

3- Bureau (101-2483) (RM)
1- New York (100-109849)
1- New York (100-37158)

RTH:ald (#6)
(6)

RECORDED - 9 101-2483-1354

10 JAN 22 1957

EX-125

Mr. Belmont

Approved: 52 JAN 30 1957 Sent _____ M Per _____
Special Agent in Charge

ESP SEC

10:14 AM

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4-22-87 BY 3042 FOT/ds

January 23, 1957

MEMORANDUM FOR MR. TOLSON
MR. BOARDMAN
MR. BELMONT
MR. NICHOLS

Morton Sobell

The Attorney General called to advise that the Reader's Digest is being pressed by several people concerning the book on Sobell and he had told them sometime ago that he thought he could have an analysis prepared of this book. He wondered if this could be done. I inquired if they intended to print this analysis and the Attorney General stated they did not; that Alfred S. Dashiell of the Reader's Digest would look the analysis over, if this was satisfactory, and perhaps later they might prepare an article for our approval. I voiced my doubts as to this and commented that though the top man at Reader's Digest was all right many of the lower echelon had left-wing tendencies. However, I told the Attorney General that I would immediately have an analysis made of the Sobell book which he could show to Dashiell as he desired.

Very truly yours,

cc Morton Sobell
101-2483

John Edgar Hoover
Director

cc-Mr. Holloman

Expedite

JEH:KE (7)

101-3487
NOT RECORDED
140 JAN 25 1957

RT JAN 24 1957

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51 JAN 25 1957

ORIGINAL COPY FILED IN 94-4-22-4-46

8:24 PM

January 23, 1957

MEMORANDUM FOR MR. TOLSON
MR. BOARDMAN
MR. BELMONT
MR. NICHOLS

Morton Sobell

The Attorney General returned my earlier call to him and I advised him that we did not find anything in our files on Alfred S. Dashiell of Reader's Digest. I also told him that we would have the analysis of the Sobell book ready by tomorrow afternoon.

Very truly yours,

John Edgar Hoover
Director

cc-Mr. Holloman

JEH:EE (7)

101-2483-4
NOT RECORDED
140 JAN 25 1957

SENT FROM D. O.
TIME 6:40 P.M.
DATE 1-23-57
BY

66 JAN 29 1957

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4-22-87 BY 3042 RUT/cls

ORIGINAL COPY FILED IN 94-4-22-484

Office Memorandum • UNITED STATES GOVERNMENT

TO : L. V. Boardman

DATE: January 24, 1957

Tic: Mr. Boardman
Mr. Nichols
Mr. Belmont
Mr. Branigan
Mr. Ivey

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FROM : A. H. Belmont

SUBJECT: MORTON SOBELL, WAS.
ESPIONAGE - R

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4-22-87 BY 3042 PUI/CLS

On 1-23-57, Attorney General telephonically advised the Director that Reader's Digest is being pressed by several people concerning the book on Sobell and he told them sometime ago he thought he could have an analysis prepared of this book. The Attorney General asked if he could have an analysis of the book and stated that Alfred S. Dashiell of Reader's Digest would look it over and perhaps might later prepare an article for our approval. The Director advised the Attorney General an analysis would be prepared which he could show Dashiell.

There is attached a letter to the Attorney General and an analysis of the book "Was Justice Done? The Rosenberg-Sobell Case" written by Malcolm P. Sharp and published in June, 1956. The Attorney General did not specify which book he meant. No book has been prepared on the Sobell case alone but two critical books have been written on the Rosenberg-Sobell case. The other book is entitled "The Judgment of Julius and Ethel Rosenberg" by John Wexley published in May, 1955. Since Sharp's book was published in June, 1956, it is believed to be the one to which he referred.

The analysis points out that Sharp purports to be writing a legal analysis of the Rosenberg-Sobell trial but in effect he restated all the arguments which were raised by the defense on motions for a new trial. Sharp then assumes the defense arguments are correct, the Government witnesses all perjured themselves, the Rosenbergs told the truth and, therefore, they were innocent. In several instances Sharp admits the law is opposite to the way in which he would like to see it and decries this fact. He includes the statement that the Rosenbergs and Sobell were victims of anti-Semitism and points out that even though the judge and prosecutors were Jewish they actually were harder on members of their own community. To further this claim he states the judge and prosecutors were proteges of the late Edward Flynn, Bronx Democratic leader who was a member of a faith which felt the war on communism was a holy war. Thus Sharp makes anticommunism and anti-Semitism synonymous.

ACTION: This is now in excellent form

There is attached for your approval a letter to the Attorney General transmitting to him a memorandum analyzing this book for his information and to show to Alfred S. Dashiell if he so desires.

Enclosure

IPL:dmd

RECORDED - 36 100-7483-1355
INDEXED - 36

JAN 29 1957

50 FEB 4 1957

Belmont has read & approved this

cc - Jardman
Belmont
Nichols
Lee

The Attorney General (orig. & 1) January 31, 1957

Director, FBI

MORTON SOBELL, with aliases
ESPIONAGE - R

There is enclosed herewith a Photostat of a letter dated January 21, 1957, written by the subject's wife, Helen Sobell, and addressed to "Dear Friend." In this letter, Mrs. Sobell urges the recipient to sign the appeal to the President of the United States which is enclosed. A Photostat of the appeal to the President of the United States is also enclosed. This appeal urges the President to ask the Attorney General to consent to a new trial for Morton Sobell or to grant him an executive pardon or commutation.

The above is furnished to you for your information.

Enclosure

101-2483

cc - 1 - Mr. William P. Rogers (Enclosure)
Deputy Attorney General

cc - 1 - Assistant Attorney General (Enclosure)
William F. Tompkins

JPL:jdb
(9)

NOTE: The above-mentioned material is also being furnished to Honorable Robert Cutler by separate cover. The material being furnished was received by Mr. Nichols from Irving Ferman of the American Civil Liberties Union. Mr. Ferman also attached a copy of the brief filed on behalf of Sobell in the Circuit Court of Appeals Second Circuit appealing from the decision with District Court denying Sobell's motion for a new trial. This brief was previously received in the Bureau and has been analyzed.

RECORDED - 33 101-2483-1356

17 FEB 1957

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cc - Bo
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Lee

THE ATTORNEY GENERAL

January 25, 1957

DIRECTOR, FBI

MORTON SOBELL, with aliases
ESPIONAGE - R

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4-22-87 BY 3042 PLOT/cls

In accordance with our telephone conversation of January 23, 1957, concerning the book on the Sobell case, there is enclosed an analysis of the book "Was Justice Done? The Rosenberg-Sobell Case" written by Malcolm P. Sharp and published in June, 1956.

Inasmuch as Mr. Dashiell has not advised of the specific questions being raised, it is, of course, not possible for me to comment on those questions. Should Mr. Dashiell have additional questions, I would be pleased to furnish my comments to you.

Enclosures (2)
101-2483
NOTE: See cover memo, Belmont to Boardman, 1-24-57 JPL:dmd, re same.

ENCLOSURE

RECORDED - 24 101-2483-

INDEXED - 24

JAN 30 1957

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JPL:jad (8)

66 FEB 7 1957

cc - Boardman
Bel
Nichols
Branigan
Lee

January 25, 1957

"WAS JUSTICE DONE?
THE ROSENBERG-SOBELL CASE"

The book entitled "Was Justice Done? The Rosenberg-Sobell Case" was written by Malcolm P. Sharp, Professor of Law, University of Chicago, and was published in June, 1956. Sharp was one of the defense attorneys who participated in the latter stages of the appeals by Julius and Ethel Rosenberg and Morton Sobell. Sharp is a charter member and president of the National Lawyers Guild. The "Guide to Subversive Organizations and Publications" published as of January 2, 1957, and released by the Committee on Un-American Activities, U. S. House of Representatives, page 64, regarding the National Lawyers Guild, cited it as a communist front. (Special Committee on Un-American Activities, House Report 1311 on the CIO Political Action Committee, March 29, 1944, page 149.)

This book purports to be a review of the legal aspects of the Rosenberg-Sobell trial. However, it is completely biased in favor of the defendants and is similar in tone to other books highly recommended by the Communist Party. It must be remembered Sharp was one of the defense attorneys in the Rosenberg-Sobell case and throughout the book he advances arguments which have been presented in court and which have been rejected by all courts concerned. This case is an outstanding one in the annals of American jurisprudence in that prior to the execution of the Rosenbergs in June, 1953, the case was reviewed sixteen times by the United States District Court, seven appeals to the Circuit Court of Appeals were argued, seven petitions to the United States Supreme Court were made and two applications were made to the President of the United States for executive clemency. Since the execution, Sobell has petitioned the United States Supreme Court once and has filed a motion for a new trial with the United States District Court which was denied.

On June 19, 1953, the President of the United States in refusing to grant executive clemency to the Rosenbergs stated, "I am convinced that the only conclusion to be drawn from a history of this case is

ENCLOSURE

RECORDED - 24 | 01-243-1357

J.P.LEE; A.P. LITRENTO:jab
(8)

Original and 1 to AG by cover letter

17 JAN 30 1957

EX-120

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that the Rosenbergs have received the benefit of every safeguard which American justice can provide. There is no question in my mind that their original trial and the long series of appeals constitute the fullest measure of justice and due process of law..."

In order to better acquaint you with this case, there is set forth hereinafter a succinct summary of the testimony adduced from prosecution witnesses during the Rosenberg-Sobell trials:

David Greenglass testified that in November, 1944, his wife, Ruth Greenglass, traveled to Albuquerque, New Mexico, to visit him at the time David was residing there in connection with his employment at Los Alamos. Ruth told David that Julius and Ethel Rosenberg had requested her to ask David if he would make scientific information available to the Russians. David at first refused but later agreed to furnish available data. In January, 1945, David arrived in New York City on army furlough and furnished to Julius Rosenberg details of experiments on work known to David on the atom bomb as well as sketches of the lens molds, an essential part of the bomb. During this furlough, arrangements were perfected between the Greenglasses and the Rosenbergs for a contact to be made with David Greenglass in New Mexico in the future. As a recognition signal, Julius Rosenberg took the side of a jello box from his kitchen and cut it into two parts. He handed one part to the Greenglasses and said that the other part should be given to the person who would contact the Greenglasses. During this furlough, Julius Rosenberg arranged for David to meet an unidentified Russian in mid-town, New York. The Russian interrogated Greenglass about a high explosive lens which was being experimented upon at Los Alamos.

In June, 1945, Harry Gold appeared at the Greenglass residence in Albuquerque, New Mexico, and identified himself by using the side of a jello box which matched the portion in the possession of the Greenglasses. On this occasion, David gave Gold various

sketches and descriptive material concerning experimentation going on at Los Alamos on the lens mold. Gold gave David $500 for the information.

In September, 1945, while Greenglass was again in New York on furlough he furnished to Julius Rosenberg various material in his own handwriting, including sketches of the atom bomb as known to him, consisting of approximately twelve pages. Julius gave the material to his wife, Ethel, who prepared a typewritten report from this material. After the report was typed, the handwritten notes exclusive of the sketches were then destroyed. (It should be noted that the sketches of the atom bomb which were reproduced by Greenglass at the trial were identified at the trial by a former United States Army officer, John A. Derry, as the sketch and description of the actual construction of the type of atom bomb dropped on Nagasaki, Japan, in 1945.)

In February, 1950, when Klaus Fuchs, British atomic scientist, was arrested in England, Julius told David that David would have to leave the country because Fuchs's arrest would lead to the arrest of Fuchs's contact. When Harry Gold was arrested by FBI Agents in May, 1950, Julius gave David $1,000 and a few days later an additional $4,000 in cash and instructions for David to travel to Mexico and from Mexico to Czechoslovakia. Julius pointed out that David would need a tourist card to go to Mexico and a doctor's letter stating he was inoculated for smallpox. Julius also stated that he, himself, had to leave the country because he was a friend of the late Jacob Golos (a Soviet espionage agent) and that Elizabeth Bentley (Golos' courier) probably knew Julius.

Ruth Greenglass corroborated the testimony given by her husband.

Harry Gold testified of the receipt of a part of a jello box side from Anatoli Yakovlev, Soviet Vice Consul in New York and Gold's espionage superior, in May, 1945, and his subsequent trip to Albuquerque, New Mexico, where he contacted the Greenglasses

at the instructions of Yakovlev. Gold testified that he used the jello box side as a recognition signal as well as the words "I come from Julius."

As corroboration of Greenglass' testimony that the Rosenbergs were considering fleeing the jurisdiction, the Government produced the following witnesses:

Dr. George Bernhardt, Rosenberg family physician, testified that in May, 1950, Julius Rosenberg inquired of the doctor what injections were needed to go to Mexico.

Ben Schneider, a photographer, testified that on a Saturday in May or June, 1950, he was visited by the Rosenbergs and their two children and took passport photographs of the entire family. Julius Rosenberg told Schneider he and his family intended to go to France.

David Greenglass, in his testimony, related that Julius Rosenberg told him that he, Rosenberg, had been given a console table as a gift by the Russians which was used by him for photography work. As corroboration for this testimony, the Government produced as a witness Evelyn Cox, a Negro maid who worked part time for the Rosenbergs. She testified to seeing a new table in the living room in the Rosenberg apartment sometime in 1945. She described this table as a solid mahogany console table. Ethel Rosenberg told her that it had been given to her husband by a friend as a gift.

Elizabeth Bentley testified that during her association with Jacob Golos she became aware of the fact that Golos knew an engineer named "Julius" and that he obtained information from "Julius" who was the leader of a communist cell of engineers. "Julius" was turned over to Golos to be developed in Soviet espionage and was to be the contact man between Golos and the group of engineers. Golos told Bentley that "Julius" lived in Knickerbocker Village in New York City. (It

is to be noted that from 1942 to the date of Julius Rosenberg's arrest, he resided at 10 Monroe Street in what is known as Knickerbocker Village, New York City.)

Implication of Morton Sobell in the espionage conspiracy was shown through the testimony of Max Elitcher, a classmate of both Rosenberg and Sobell at the College of the City of New York. Elitcher, an electrical engineer employed by the Bureau of Ordnance, Department of the Navy, from 1938 to 1948, testified that Rosenberg approached him on a number of occasions in an attempt to persuade Elitcher to furnish information to him. Elitcher also testified that Rosenberg told him Morton Sobell was working with him or was "in this with me." Elitcher also testified that in June, 1948, while visiting Sobell, the latter told him he had some "good material" for Rosenberg. Elitcher observed Sobell put a 35 millimeter film can in his coat pocket. He accompanied Sobell by automobile to the lower east side of New York where Sobell left him for about fifteen minutes. When Sobell returned, he stated he had seen Rosenberg. Sobell also said that Rosenberg told him he once spoke with Elizabeth Bentley on the telephone but that she did not know who he was and there was nothing to worry about. Elitcher stated he did not cooperate with Rosenberg or furnish him any information.

With respect to Sobell's flight to Mexico after the arrest of David Greenglass, the Government produced six witnesses from Mexico who testified that Sobell had used various assumed names while in Mexico. The Government also produced as a witness William Danziger of New York City who testified he had acted as a mail drop for Sobell while Sobell was in Mexico.

At the conclusion of the trial and after the rendering of a guilty verdict against all defendants by the jury, Emanuel Bloch, attorney for Julius Rosenberg, addressed the court as follows: "...and again I repeat I want to extend my appreciation for the courtesies extended to me by Mr. Saypol and the members of his staff as well as the members of the FBI and I would

like to say to the jury that a lawyer does not always win a case; all that a lawyer expects is a jury to decide a case on the evidence with mature deliberation. I feel satisfied by reason of the length of time that you took for your deliberations, as well as the questions asked during the course of your deliberations that you examined very carefully the evidence and came to a certain conclusion." (Saypol, mentioned above, is Irving H. Saypol, then United States Attorney and chief prosecutor at the trial.)

On the day of sentencing of the defendants, Bloch also stated as follows: "...in retrospect, we can all say that we attempted to have this case tried as we expect criminal cases to be tried in this country; we tried to keep out extraneous issues; we tried to conduct ourselves as lawyers, and I know that the Court conducted itself as an American judge."

The author in this book raises the cry of anti-Semitism accusing the trial judge and two of the prosecuting attorneys all of whom were Jews of being hard on their community to avoid criticism. It is an interesting fact to note that during the arrest and trial of the Rosenbergs and Sobell and for several months thereafter the Communist Party press was silent. The sentencing of the Rosenbergs was a small item in the "Daily Worker," east coast communist newspaper. In January, 1952, the first official announcement was made of formation of the National Committee to Secure Justice in the Rosenberg Case and in its initial press release of January 3, 1952, that Committee raised the accusation of anti-Semitism. From that date on the Committee engaged in a campaign of world-wide vilification of the judicial system of the United States and pronounced to the world that Rosenbergs and Sobell were innocent victims of anti-Semitism rampant in the United States. This accusation was so blatantly untrue that the Anti-Defamation League of B'nai B'rith said bluntly in its bulletin "The communists aren't interested in the Rosenbergs as Jews. They are not concerned with the welfare of the Jewish community. They're yelling anti-Semitism for their own partisan purpose." On May 13, 1952, the National Community Relations Advisory Council, speaking

on behalf of the American Jewish Committee, the Anti-Defamation League of B'nai B'rith, the American Jewish Congress, the Jewish War Veterans of the United States, the Jewish Labor Committee and the Union of American Hebrew Congregations, issued the following statement: "...Attempts are being made, however, by a Communist-inspired group called the National Committee to Secure Justice in the Rosenberg case, to inject the false issue of anti-Semitism into the Rosenberg case. We condemn these efforts to mislead the people of this country by unsupported charges that the religious ancestry of the defendants was a factor in this case. We denounce this fraudulent effort to confuse and manipulate public opinion for ulterior political purposes."

Dr. S. Andhil Fineberg, prominent rabbi, in his book "The Rosenberg Case, Fact and Fiction" states on page 69 "That the anti-Semitic charges were invented and that the prosecution was accused of conducting the trial to create anti-Jewish feeling in the United States was the Big Lie at its worst."

Lucy S. Dawidowicz in the July, 1953, issue of "Commentary," the publication of the Jewish intellectuals, reported "A check of the 156 names impaneled...reveals that fifteen names were obviously Jewish. Of these, ten were excused by the Court for personal reasons, four were challenged by the defense and one was challenged by the government. There were probably other Jews on this panel, but only these fifteen names were clearly Jewish." This statement set forth above was evoked as a result of claims made by the Committee that no Jews were included in the jury panel from which the jury in the Rosenberg case was selected.

In a chapter outlining the evidence of Sobell's flight to Mexico, Sharp refers to this flight as a "family trip." This he does despite the fact that Sobell used aliases in his travels in Mexico and used a mail drop to forward letters to his relatives

in the United States using other aliases in these letters. As further evidence of the weight given to the Elitcher testimony, the trial court in its charge to the jury stated specifically that they were to acquit Sobell if they did not believe the testimony of Elitcher. The jury found Sobell guilty. As Judge Irving Kaufman stated in his decision denying Sobell's motion for a new trial in June, 1956, "In short, the defendant (Sobell) was clearly proven to be an arch conspirator with the Rosenbergs in their plan to commit espionage against the United States by trafficking in our deepest military secrets -- a crime of the highest magnitude."

In another section of the book, Sharp quotes in full a letter prepared by Dr. Harold C. Urey, atomic scientist, published in "The New York Times" on January 8, 1953, in which Urey criticized the verdict and concluded that he found the Rosenberg testimony more believable that the testimony of the Greenglasses. It is interesting to note Sharp does not mention or quote from a letter written by Urey to the National Committee to Secure Justice in the Rosenberg Case to be read at a meeting of that Committee to be held in New York on April 26, 1953. In that letter, Urey stated in part:

(1) "There has been much discussion of the importance of the secret data which Greenglass states he gave to the 'Russians.' I believe this data was important and that it was not publicly known at the time it was disclosed and I have been assured of the correctness of this conclusion by competent men who were at Los Alamos at the time....

(2) "It seems probable to me that a mechanic such as Greenglass, capable of making metal parts from drawings, should be able to reproduce those drawings in rough form after a lapse of some years. No great scientific knowledge is required to understand the

approximate shape, arrangement and sizes of the mechanical object and considerable information of this kind could have been acquired and transmitted by Greenglass."

Sharp also devotes a chapter to the issue of the console table. In March, 1953, the defense claimed it had located the table in the apartment of the mother of Julius Rosenberg and that it was not adapted for photography. This particular point was raised on a motion for a new trial and was disposed of by the courts. Judge Kaufman in an opinion on June 8, 1953, stated that the question of the table arose during the trial on a discussion of gifts received by Rosenberg from the Russians and that it played an infinitesimal part in the trial. Judge Kaufman also stated members of the Rosenberg family had possession of this table during the trial and were available to testify but did not do so.

Since the execution of the Rosenbergs, the National Committee to Secure Justice in the Rosenberg Case has changed its name to the National Committee to Secure Justice in the Rosenberg-Sobell Case. It has centered its attention on Morton Sobell and has conducted the same type of campaign with the avowed purpose of freeing Sobell. The main attraction presented as a speaker by this Committee has been Mrs. Helen Sobell, wife of Morton. It is interesting to note that prior to her marriage to Sobell, she was the wife of Casey Gurewitz, prominent Communist Party official in Washington, D. C. Mrs. Sobell has been an indefatigable speaker for the Committee and has also made her living by these labors since she is a paid worker for the Committee.

There is attached for your information a copy of the opinion of Judge Irving R. Kaufman, United States District Court, Southern District of New York, written when he denied the motion for a new trial filed by Morton Sobell in June, 1956.

"WAS JUSTICE DONE?
THE ROSENBERG-SOBELL CASE"

The consensus of judicial opinions is best summarized in a statement made by Judge Kaufman in an opinion rendered on January 5, 1953, in denying the application of the Rosenbergs for clemency. Judge Kaufman stated as follows: "This Court has no doubt but that if the Rosenbergs were ever to attain their freedom they would continue in their deep-seated devotion and allegiance to Soviet Russia, a devotion which has caused them to choose martyrdom and to keep their lips sealed. The defendants, still defiant, assert that they seek justice, not mercy. What they seek, they have attained."

Enclosure

ANTI-DEFAMATION LEAGUE

of B'nai B'rith

515 MADISON AVENUE, NEW YORK 22, N. Y., PLaza 1-1801

January 28th,
1957

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4-22-87 BY 3042 [illegible]

B-110-1

Mr. Louis B. Nichols
Department of Justice
Washington, D. C.

Dear Lou:

I notice that in the last few days an awful lot of "material" has come to my desk from the Morton Sobell crowd — copies of briefs, petitions, "newspaper" issues, etc.

I assume that you are getting it all. But on the bare chance that you are not, I wanted you to know it is available here in our files now.

With kind regards.

Sincerely,

[signature]

Arnold Forster

af/sgf

101-2483-1

NOT RECORDED
170 FEB 11 1957
3 FEB 8 1957

Ack to Forster (file - for reference only) ack 2-6-57 GEM

4 gen

ORIGINAL COPY FILED IN 100-3-30-?

January 31, 1957
VIA LIAISON

Honorable Robert Cutler
Special Assistant to the President
Executive Office Building
Washington, D. C.

(orig.)

Dear General Cutler:

It has been brought to my attention that Helen Sobell, wife of Morton Sobell, convicted espionage agent, is circulating a letter requesting the recipient to sign an enclosed appeal to the President of the United States on behalf of her husband. As you are probably aware, Sobell was convicted along with Julius and Ethel Rosenberg of conspiracy to commit espionage in 1951 and Sobell is currently serving a thirty-year sentence in the United States Penitentiary, Alcatraz, California. In the appeal to the President, the signer urges the President to ask the Attorney General to consent to a new trial for Sobell or to grant an executive pardon or commutation of sentence.

For your information, there is enclosed one Photostat each of Mrs. Sobell's letter dated January 21, 1957, and the appeal to the President which is being circulated with her letter.

Sincerely yours,

J. Edgar Hoover

101-2483

Enclosure

JPL:mcd

NOTE: The above-mentioned material is also being furnished to AG, Deputy AG Rogers & AAG Tompkins by separate cover. The material being furnished was received by Mr. Nichols from Irving Ferman of the American Civil Liberties Union. Mr. Ferman also attached a copy of the brief file on behalf

NOTE CONTINUED PAGE 2.

GIR 1

FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
COMMUNICATIONS SECTION

FEB 4 1957

TELETYPE

Mr. Tolson
Mr. Nichols
Mr. Boardman
Mr. Belmont
Mr. Mohr
Mr. Parsons
Mr. Rosen
Mr. Tamm
Mr. Trotter
Mr. Nease
Tele. Room
Mr. Holloman
Miss Gandy

WA 5 FROM NEW YORK 4 3-08 P

DIRECTOR DEFERRED

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4-22-87 BY 3042 RWT CLS

MORTON SOBELL, WAS, ESPIONAGE DASH R. AUSA MAURICE NESSEN, SDNY, TELEPHONICALLY ADVISED INSTANT DATE SUBJECT-S APPEAL SCHEDULED TO BE ARGUED IN US CIRCUIT COURT OF APPEALS ON FEBRUARY SIX. NYO WILL COVER. BUREAU WILL BE KEPT ADVISED .

RECORDED-90
Mr. Belmont

101-2483-1359

FEB 6 1957

K E L L Y COPIES DESTROYED

END AND ACK R 2 1 MAR 10 1961

WA NY R 5 WA GB

TUD DISC

58 FEB 12 1957

cc: Mr.

EX-108

Mr. Boardman
Mr. Belmont
Mr. Mohr
Mr. Parsons
Mr. Rosen
Mr. Tamm
Mr. Trotter
Mr. Nease
Tele. Room
Mr. Holloman
Miss Gandy

January 28, 1957

8676

4/ Morton Sobel

Together

Mr. Alfred S. Dashiell
The Reader's Digest
Pleasantville, New York

Dear Mr. Dashiell:

In accordance with our conversation I am enclosing a memorandum entitled "Was Justice Done the Rosenberg-Sobel Case", which is for your private information.

Sincerely yours,

Attachment

101-2483-1360

RECORDED - 71
INDEXED - 71

18 FEB 6 1957

EX - 120

Expt 203

61 FEB 14 1957

Office Memorandum • UNITED STATES GOVERNMENT

TO : Mr. Tolson

DATE: 1-25-57

FROM : L. B. Nichols

SUBJECT:

Tolson
Nichols
Boardman
Belmont
Mohr
Parsons
Rosen
Tamm
Trotter
Nease
Tele. Room
Holloman
Gandy

I am attaching hereto material which Irving Ferman gave me on 1-23-57 which consists of a mimeographed letter from Mrs. Morton Sobell, mimeographed letters to the President together with a list of individuals who have signed an appeal to the President calling for the Attorney General to consent to a new trial or for an executive pardon or commutation of sentence.

There is also attached a copy of Sobells brief which was filed in the Circuit Court in New York appealing Judge Kaufman's decision of several months ago.

LBN:hpf
(4)
Enclosures
cc - Mr. Boardman
Mr. Belmont

Morton Sobell

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 7/18/80 BY SP-5 Mishler
Comp. #90383

4 ENCLOSURES ENCLO. BEHIND FILE

101-2483-1361

RECORDED - 10 FEB 7 1957

INDEXED - 20

2-12-57 74

60 FEB 13 1957

Mrs. Morton Sobell 30 Charlton Street New York 14, N.Y.

January 21, 1957

Dear Friend.

As the wife of Morton Sobell and on behalf of his mother too I ask that you take a few minutes of your time to look at his case. His conviction upon the testimony of one tainted witness and his sentence of 30 years imprisonment have caused great concern and uneasiness. The enclosed legal briefs contain the material which is being presented to the Second Circuit Court of Appeals. Your reading of this material will convince you, I am sure, of the injustice which has been done and of the need for a new trial for my husband.

In the past few months a number of eminent Americans have signed the enclosed appeal for a new trial or freedom for my husband. I hope that after you have looked at the facts, you will want to join with Elmer Davis, Dr. Linus Pauling, Dr. Harold C. Urey, Lewis Mumford, Rabbi Uri Miller, Rabbi Emanuel Rackman, Dorothy Day, Rev. John Paul Jones, John F. Finerty, Judge Patrick H. O'Brien, and many other persons of prominence.

Recently I visited my husband in Alcatraz. It is encouraging to be able to tell you that these years of suffering have not broken his spirit, that he still holds fast to his faith in American justice. We are given strength by the knowledge that so many believe in us and are helping us in this ordeal.

I know my husband to be innocent, and have confidence that the truth will be proved. However, the years pass by. This is the seventh year of my husband's imprisonment. Your voice added to these others can save some of the years of our youth for us.

On Washington's birthday Senator William Langer will address a gathering in Los Angeles on behalf of my husband. I will release at that time the names of all who are permitting their signatures to be made public. Please help me if you possibly can.

Very sincerely yours,

Helen Sobell

(Mrs. Morton Sobell)

Appeal to the President

President Dwight D. Eisenhower
The White House
Washington, D. C.

Dear Mr. President:

It is because we share your deep concern for the spiritual health of our nation and for the principles of justice upon which it is founded that we address ourselves to you concerning the case of Morton Sobell.

Morton Sobell, now in his sixth year of imprisonment and confined in Alcatraz, is seeking a new trial to reverse his 30-year sentence on a charge of "conspiracy to commit espionage." Both he and his defenders maintain that he is innocent. Moreover, the trial record shows that the judge in passing sentence stated: "The evidence in the case did not point to any activity on your (Morton Sobell's) part in connection with the atomic bomb project."

We do not press upon you, Mr. President, the question of Morton Sobell's innocence or guilt--for we ourselves are not of one mind on that issue. Our faith in our democratic system of justice assures us that the truth will ultimately be established.

We believe it is vital that our nation safeguard its security, but it is important that we do not permit this concern to lead us astray from our traditions of justice and humanity. In this light, we further believe that Morton Sobell's continued imprisonment does not serve our nation's interest or security.

Therefore, most respectfully and earnestly, Mr. President, we look to you to exercise your executive authority either by asking the Attorney General to consent to a new trial for Morton Sobell or by the granting of Executive Pardon or Commutation. We take the liberty of urging your personal attention to this matter.

Name_____

Address_____

City_____ State_____

☐ My signature may be made public along with other signers of the Appeal.

☐ I request that my signature not be made public.

...ollowing persons are among those who have signed th... the President.

Note: Affiliations are for identification only.

Rev. David Andrews, Greensboro, N. C.
Dr. Roland H. Bainton, Yale Divinity School, New Haven, Conn.
Rev. William Baird, Essex Community Church, Chicago, Ill.
Dr. Harold J. Bass, The Church for Today, Tacoma, Wash.
Rev. Reginald H. Bass, Community Church, Brooklyn, N.Y.
Helen Marston Beardsley, Los Angeles, Calif.
Dr. Leo Bigelman, Los Angeles, Calif.
Jessie F. Binford, Hull House, Chicago, Ill.
Prof. David Blackwell, University of California, Berkeley, Calif.
Prof. Derk Bodde, University of Pennsylvania, Philadelphia, Pa.
Prof. Murray Branch, Moorehouse College, Atlanta, Ga.
Robert L. Brook, Attorney, Los Angeles, Calif.
Prof. Anton J. Carlson, University of Chicago, Chicago, Ill.
Rabbi Franklin Cohn, Los Angeles, Calif.
Dr. Ephraim Cross, City College, New York, N.Y.
Prof. Borris Cunningham, University of California, Berkeley, Calif.
Elmer Davis, Commentator, Washington, D.C.
Frank C. Davis, Psychologist, Beverly Hills, Calif.
Dorothy Day, Editor Catholic Worker, New York, N.Y.
Rabbi Julian B. Feibelman, Temple Sinai, New Orleans, La.
Ada M. Field, Guilford College, N.C.
John F. Finerty, Attorney in the Sacco-Vanzetti and Mooney-Billings cases, New York, N. Y.
Waldo Frank, Author, Truro, Mass.
J. Allan Frankel, Attorney, Los Angeles, Calif.
Rev. G. Shubert Frye, Synod of New York, Syracuse, N.Y.
Maxwell Geismar, Literary Critic, Harrison, N.Y.
Prof. Edwin R. Goodenough, Yale University, New Haven, Conn.
Rabbi Harry Halpern, East Midwood Jewish Center, Brooklyn, N.Y.
William Harrison, Publisher and Editor Boston Chronicle, Boston,
Rev. John Paul Jones, Union Presbyterian Church of Bay Ridge, Bkl
Prof. Isaac Kolthoff, University of Minnesota, Minneapolis, Minn
J. M. Kuehne, Prof. Emeritus, University of Texas, Austin, Texas
Rev. John Howland Lathrop, Unitarian Church, Brooklyn, N.Y.
Dr. Norman Lavet, North Holywood, Calif.
Dr. Paul L. Lehmann, Director of Graduate Studies, Princeton Theological Seminary, Princeton, N.J.
Rabbi Eugene J. Lipman, New York, N.Y.
Dr. Milton Z. London, Los Angeles, Calif.
Dr. Bernard M. Loomer, Divinity School of the University of Chi... Chicago,
Daniel Marshall, Attorney, Los Angeles, Calif.
Rev. Archie Matson, Broadway Methodist Church, Glendale, Calif.
Dr. Leo Mayer, New York, N.Y.
Louis McCabe, Attorney, Philadelphia, Pa.
Rev. Sidney G. Menk, University Heights Presbyterian Church, New
Rabbi Uri Miller, Baltimore, Md.
Lewis Mumford, Author, Amenia, N.Y.
Prof. Gardner Murphy, Menninger Foundation, Topeka, Kansas
Dr. Scott Nearing, Camp Rosier, Maine
Judge Patrick H. O'Brien, Detroit, Mich.
Prof. Victor Pashkis, Columbia University, New York, N.Y.
Dr. Linus Pauling, Nobel Prize Scientist, Pasadena, Calif.
Dr. Alexander [illegible] Pennes, Los Angeles, Calif.
[illegible] W. Petherbridge, Attorney, [illegible], Calif.
Rev. [illegible], Calif.
Dr. Irving [illegible] Putnam, Methodist Church, Minneapolis, Minn.
Rabbi Emanuel Rackman, Congregation [illegible] Tefila, New York, N.Y.
Prof. Anatol Rappaport, University of Michigan, Ann Arbor, Mich.
Prof. Oscar K. Rice, University of North Carolina, Chapel Hill, N.C.
Rabbi David S. Shapiro, Congregation Anshe Sfard, Milwaukee, Wis.
Prof. Malcolm Sharp, University of Chicago Law School, Chicago, Ill.
Margaret T. Simkin, Los Angeles, Calif.
Judge Edward P. Totten, Santa Ana, Calif.
Dr. Harold C. Urey, Scientist and Nobel Prize Winner, Chicago, Ill.
Rabbi Jacob J. Weinstein, KAM Temple, Chicago, Ill.
Dr. Frank Weymouth, Los Angeles, Calif.
Prof. Francis D. Wormuth, University of Utah, Salt Lake City, Utah.

Abridged copy of the brief submitted to the U.S. Court of Appeals in behalf of Morton Sobell.

UNITED STATES COURT OF APPEALS

For the Second Circuit

October Term, 1956

No. 24299

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

MORTON SOBELL,
Defendant-Appellant.

On Appeal from an Order of the United States District Court for the Southern District of New York

BRIEF FOR APPELLANT

DONNER, KINOY & PERLIN,
342 Madison Avenue,
New York, New York,
by FRANK J. DONNER
ARTHUR KINOY
MARSHALL PERLIN

BENJAMIN DREYFUS
57 Post Street,
San Francisco, California

LUIS SANCHEZ PONTON
University of Mexico,
Mexico City, Mexico

Attorneys for Defendant-Appellant.

(1)

STATEMENT OF THE CASE

On May 8, 1956, appellant, pursuant to Title 28, U. S. C., Section 2255, moved for a hearing and, upon the hearing, for an order vacating and setting aside the sentence and judgment of conviction on the grounds that his conviction was unjustly and illegally procured in violation of the Constitution and laws of the United States, in that the prosecuting authorities knowingly, wilfully and intentionally used false and perjured testimony and evidence, suppressed evidence which would have aided appellant and impeached the prosecution's case and exposed the falsity thereof, and made false representations to the court (A. 7).*

PRIOR PROCEEDINGS

On January 31, 1951, an indictment was returned against appellant charging in a single count that he had conspired to transmit to the Union of Soviet Socialist Republics "documents, writings, sketches, notes and information relating to the national defense of the United States", in violation of Title 50, U. S. C., Section 34 (R. 2).

---

* On May 25, 1956, appellant filed a second motion (A. 78) pursuant to Title 28, U. S. C., Section 2255 seeking to vacate and set aside the sentence and judgment of conviction on the grounds that the Court had no national jurisdiction and hence could not try appellant, in that the prosecution had seized appellant from Mexico in violation of the Extradition Treaty between the United States and Mexico and without the knowledge and consent of the Government of Mexico. The Court likewise denied this motion and appellant is concurrently appealing the denial of the second motion.

Note: We designate with the letter "A" references to the current record on appeal. The printed record of the original trial is referred to as "R".

Appellant was tried and convicted together with co-defendants Julius and Ethel Rosenberg before a judge and jury. On April 5, 1951, a sentence of thirty years was imposed upon appellant (R. 30). On February 25, 1952, this Court, Judge Frank dissenting, affirmed the judgment of conviction. 195 F. 2d 583. Appellant's petition for a writ of certiorari to the United States Supreme Court was denied. 344 U.S. 838.

THE TRIAL

Only one witness, Max Elitcher, attempted to associate appellant with the alleged conspiracy. He was an admitted perjurer and, if believed, a co-conspirator who was testifying with obvious intent and motive. The remainder of the case against appellant was limited to an attempt to establish his guilty consciousness by proving he had fled to Mexico (A. 16).

The prosecution sought to show that appellant, acting in accordance with a preconceived plan of the conspiracy, fled from the United States to Mexico to avoid apprehension by the federal authorities. To establish that appellant's trip to Mexico was ab initio for the purpose of flight, it sought to prove that he would not voluntarily return to the United States, but had to be brought back against his will (A. 13-19). To this end, the prosecution tendered evidence to prove that appellant was legally deported by the Government of Mexico (A. 11-13).

As stated by the lower court, the evidence of deportation from Mexico was the "natural capstone" of the flight evidence (A. 218).

The prosecution sought to prove appellant's deportation by the Government of Mexico through two witnesses and Government Exhibits 25 and 25-A.

In the course of his direct examination of the witness Manuel Giner de los Rios (a neighbor of appellant in Mexico City), Roy Cohn, the assistant prosecutor, asked "what date Sobell was deported to the United States by the authorities" (R. 926). Defense counsel objected on the ground that the witness was not qualified to establish action by the Mexican authorities. Mr. Cohn replied, "Of course, your Honor, I am asking a question. I think we have other proof coming." In reply to

the Court's question, "You have other proof coming of deportation?", Mr. Cohn answered affirmatively (R. 926).

Shortly thereafter, Mr. Cohn tendered Government Exhibit 25, purportedly a true copy of a manifest made in the regular course of business by the Laredo, Texas, office of Immigration and Naturalization Service, which contained on its face a notation that appellant had been "Deported from Mexico" (R. 1031). Mr. Cohn tendered his exhibit as proof of "the circumstances of the departure of Sobell from Mexico to the United States" (R. 938).

Defense counsel objected to the document on the ground that an entry made by an employee of the United States did not constitute competent proof of governmental action by a foreign power (R. 940). The court directed, over Mr. Cohn's objection, that he produce the maker of the document.

The following day, March 21, 1951, the prosecution produced James S. Huggins, immigration inspector of the Immigration and Naturalization Service of the Department of Justice, who was stationed in Laredo, Texas. Mr. Huggins' direct testimony consisted solely of the fact that he had prepared Government Exhibit 25-A in the regular course of his duties as as Government employee (R. 1025) and that appellant was brought into his office by Mexican Security Police (R. 1030). The prosecution asked him nothing concerning the circumstances of appellant's removal, but merely used his testimony to authenticate the document.

On voir dire and cross-examination, Huggins stated:

1. The notation "Deported from Mexico" was based on his own information and observation (R. 1027, 1028) and was not supplied by the persons who delivered appellant to Laredo, Texas (R. 1028, 1036).

2. Appellant was delivered to him by officials from Mexico acting in their "official capacity" (R. 1026).

3. He had been awaiting appellant's arrival (R. 1034-1035).

4. He advised appellant that the manifest must be signed because "our regulations require that any person who is being deported from Mexico there be a record made * * *" (R. 1036).

The trial court charged the jury that it could consider appellant's trip to Mexico and his return by the Mexican authorities as proof of (1) guilty flight and (2) independent proof of appellant's membership in the Rosenberg-Greenglass conspiracy. The trial court stated:

> "* * * The prosecution says that when the conspiracy was uncovered * * * the defendants, fearful of being apprehended, attempted to flee and that their attempts to flee followed a pattern which also indicates a preconceived plan * * * and that he [appellant] was apprehended only after being delivered to the United States by the Mexican authorities* * *.
>
> "* * * You may consider whether such journeys or trips show a preconceived plan as part of the conspiracy * * *" (R. 1559-1560; emphasis supplied).

The evidence of deportation could only have imported to the jury that the Government of Mexico felt impelled to oust appellant from its territory because he had either entered the country illegally, or while there had violated the laws of Mexico, or was a fugitive from justice who had to be forcibly returned to the United States. The very term "deportation" had a prejudicial effect and implied a prior determination of wrongdoing by the Government of Mexico.

On the day of sentencing, appellant submitted an affidavit in support of a motion in arrest of judgment challenging the jurisdiction of the court over his person. Appellant's affidavit alleged that on August 16, 1950, he was seized at his residence in Mexico City by persons claiming to be police, on the pretext that he was wanted for robbing a bank in Acapulco. His personal effects, including his "visa," were taken from him. He was denied an opportunity to communicate with the United States Embassy, assaulted and rendered unconscious, and removed to a building where he was held from approximately 8:00 o'clock in the evening until 4:00 o'clock the next morning. At that time he and his family were placed in cars under guard and

transported to Nuevo Laredo. Upon approaching the International Bridge, a United States agent entered the car, brought appellant to Laredo, Texas, where he was directed to sign a card and was subsequently placed in custody.

On the basis of this affidavit, appellant's counsel suggested that his removal might not have been lawfully executed and requested that a hearing be held and evidence be adduced so that the court could determine whether or not it had personal jurisdiction over appellant (A. 1598).

The prosecutor, Irving Saypol, argued that the affidavit was false and should be disregarded (R. 1598-1599):

> "This very affidavit contains a falsehood in the statement that there was exhibited amongst other things to the Mexican authorities visas. Counsel ought to know that his client never went into Mexico with a visa * * * It is evident in the fact that throughout this trial there sat in this courtroom the wife of the defendant as to whom the affidavit states that she was present and we know that she was present from the time of the arrest until the time the final act of deportation was effected at Laredo * * * .
>
> "The Court: I think I have enough.
>
> "Mr. Saypol: The whole affidavit portrays certainly that this defendant was not honorably escorted from Mexico but that literally he was kicked out as a deportee." (Emphasis supplied.)

The trial court summarily denied without opinion appellant's motion in arrest of judgment.

THE APPEAL FROM THE ORIGINAL JUDGMENT OF CONVICTION

The prosecution in its brief to this Court (at pp.65-66) urged the relevancy and materiality of the deportation evidence:

> "Thus, proof that his return was involuntary, in conjunction with proof of his activities in Mexico, tended strongly to show that his trip to Mexico was prompted by a desire to escape prosecution. As such it was persuasive evidence of his consciousness of guilt."

The prosecution further argued that the evidence established that appellant had been legally deported by Mexico. It declared that there was no evidence of illegality in appellant's removal nor unlawful instigation or participation on the part of the prosecution or its agents. The prosecution stated in part:

> "While kidnapping may be a criminal offense in Mexico, summary deportation of a fugitive from justice is hardly tantamount to kidnapping. [Footnote:] Even if it is true, as Sobell alleges, that he was beaten by the Mexican police, such mistreatment would hardly invalidate his deportation."
>
> * * *
>
> "There is not a shred of evidence that any United States agent assisted the Mexicans in this act. Nor is there anything in the record to indicate that the United States Government procured the Mexican Government to deport Sobell. The most that appears is that the FBI was waiting for Sobell in Laredo when he was delivered by Mexico into the hands of the United States Immigration Service. From this it may be inferred that the Mexican authorities had alerted the FBI to expect Sobell's arrival, but it by no means follows that the Bureau was the instigator of Sobell's ouster."
>
> * * *
>
> "For even if the rule were as Sobell would like it, he would not be in a position to invoke it, since it presupposes wrongful conduct on the part of a federal officer, and there is not a scintilla of evidence of any such conduct here."

This Court, in affirming the conviction, held the evidence of deportation to be highly relevant and material (United States v. Rosenberg, supra, at 602). It held that Huggins' testimony and Government Exhibit 25A were tendered for the purpose of and did in fact establish that appellant was legally deported by the Government of Mexico:

> "* * * The Government introduced evidence to show that Sobell had been legally deported from Mexico * * *" (at p. 603).