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The Interstate Agreement on Detainers: Defining the Federal Role

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The Interstate Agreement on Detainers: Defining the Federal Role

I. INTRODUCTION

A detainer is a notice "filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction."[1] The other jurisdiction requests that it be notified when the prisoner's release draws near so that it can obtain custody of him.[2] A simple, informal procedure,[3] the practice of lodging detainers frequently frustrates the purposes of the corrections process and denies the prisoner's right

1. S. REP. No. 1356, 91st Cong., 2d Sess. 2, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4864, 4865. The legislative history of the Interstate Agreement on Detainers is contained in this report.

2. Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 CRIM. L. BULL. 753, 753 n.2 (1971).

3. *See* Dauber, *Reforming the Detainer System: A Case Study*, 7 CRIM. L. BULL. 669, 670-71 (1971).

to a speedy trial.[4] The detainer thus has been the object of both constitutional restraint and legislative reform.

In 1970, Congress enacted into law the Interstate Agreement on Detainers Act,[5] making the United States and the District of Columbia parties to the interstate compact already adopted by 37 states.[6] The purpose of the Agreement is to "encourage the expeditious and orderly disposition"[7] of charges underlying detainers by providing procedures by which prisoners may request disposition of such charges and prosecuting jurisdictions may obtain the presence of prisoners for trial. Recently problems of interpretation have surfaced as the federal courts have endeavored to define the role of the United States under the Agreement. The courts of appeals presently

4. *See* Shelton, *Unconstitutional Uncertainty: A Study of the Use of Detainers*, 1 PROSPECTUS 119 (1968).

5. Act of Dec. 9, 1970, Pub. L. 91-538, §§ 1-8, 84 Stat. 1397 (codified at 18 U.S.C. app., at 1395 (1976)) [hereinafter cited as IAD]. The Agreement was drafted by the Council of State Governments.

6. D. WEXLER, THE LAW OF DETAINERS 19 (LEAA Monograph 1973) [hereinafter cited as MONOGRAPH]. As of this writing, 46 states plus the United States and the District of Columbia have enacted the IAD. The state versions of the Agreement appear as follows: Arizona—ARIZ. REV. STAT. ANN. §§ 31-481 to -482 (1976); Arkansas—ARK. STAT. ANN. §§ 43-3201 to -3208 (1977); California—CAL. PENAL CODE §§ 1389-1389.8 (West 1970); Colorado—COLO. REV. STAT. ANN. §§ 24-60-501 to -507 (1973); Connecticut—CONN. GEN. STAT. §§ 54-186 to -192 (1977); Delaware—DEL. CODE ANN. tit. 11, §§ 2540-2550 (1974); District of Columbia—D.C. CODE ANN. §§ 24-701 to -705 (1973); Florida—FLA. STAT. ANN. §§ 941.45 - .50 (West Supp. 1978); Georgia—GA. CODE ANN. §§ 77-501b to -516b (1973); Hawaii—HAW. REV. STAT. §§ 834-1 to -6 (1976); Idaho—IDAHO CODE §§ 19-5001 to -5008 (Cum. Supp. 1977); Illinois— ILL. ANN. STAT. ch. 38, § 1003-8-9 (Smith-Hurd 1973); Indiana—IND. CODE ANN. §§ 11-1-7-1 to -7, 35-2.1-2-4 (Burns 1973); Iowa—IOWA CODE ANN. §§ 759A.1 -.8 (West Supp. 1977-1978); Kansas—KAN. STAT. §§ 22-4401 to -4408 (1974); Kentucky—KY. REV. STAT. ANN. §§ 440.450-.510 (Baldwin 1975); Maine—ME. REV. STAT. ANN. §§ 1411-1419 (1964); Maryland—MD. ANN. CODE art. 27, §§ 616A-616R (1976); Massachusetts—MASS. GEN. LAWS ANN. ch. 276 app., §§ 1-1 to -8 (West 1972); Michigan—MICH. COMP. LAWS ANN. §§ 780.601-.608 (1968); Minnesota—MINN. STAT. ANN. § 629.294 (West Supp. 1978); Missouri—MO. ANN. STAT. §§ 222.160-.220 (Vernon Supp. 1978); Montana—MONT. REV. CODES ANN. §§ 95-3131 to -3136 (Supp. 1977); Nebraska—NEB. REV. STAT. §§ 29-759 to 765 (1975); Nevada—NEV. REV. STAT. 178.620-.640 (1973); New Hampshire—N.H. REV. STAT. ANN. § 606-A:1 to -6 (1974); New Jersey—N.J. STAT. ANN. § 2A: 159A-1 to -15 (West 1971); New Mexico—N.M. STAT. ANN. §§ 41-20-19 to -23 (1953); New York—N.Y. CRIM. PROC. LAW § 580-20 (McKinney 1971); North Carolina—N.C. GEN. STAT. §§ 15A-761 to -767 (1975); North Dakota—N.D. CENT. CODE 29-34-01 to -08 (1974); Ohio—OHIO REV. CODE ANN. §§ 2963.30-.35 (Page 1975); Oregon—OR. REV. STAT. §§ 135.775-.793 (1977); Pennsylvania—PA. STAT. ANN. tit. 19, §§ 1431-1438 (Purdon 1964); Rhode Island—R.I. GEN. LAWS §§ 13-13-1 to -8 (1977); South Carolina—S.C. CODE §§ 17-11-10 to -80 (1976); South Dakota—S.D. COMPILED LAWS ANN. §§ 23-24A-1 to -34 (1977); Tennessee—TENN. CODE ANN. §§ 40-3901 to -3908 (1975); Texas—TEX. CRIM. PRO. CODE ANN. art. 51.14 (Vernon Supp. 1966-1977); Utah—UTAH CODE ANN. §§ 77-65-4 to -11 (Supp. 1977); Vermont—VT. STAT. ANN. tit. 28, §§ 1501-1509, 1531-1537 (1970); Virginia—VA. CODE §§ 53-304.1 -.8 (1974); Washington—WASH. REV. CODE ANN. §§ 9.100.010-.080 (1977); West Virginia—W. VA. CODE §§ 62-14-1 to -7 (1977); Wisconsin—WIS. STAT. ANN. §§ 976.05-.06 (West 1977); Wyoming—WYO. STAT. §§ 7-408.9 -.15 (1975).

7. IAD, art. I.

disagree on the issue whether the Agreement applies to transfers of prisoners pursuant to the federal writ of habeas corpus ad prosequendum. One view applies the Agreement broadly as the exclusive means of transfer among member states.[8] Other courts, holding that the federal writ, unlike a detainer, does not adversely affect the prisoner's rehabilitation, have refused to require compliance with the Agreement when the federal writ is used.[9] The issue currently is before the Supreme Court.[10] After examining the background of the Interstate Agreement on Detainers and its interpretation by state courts, this Note will evaluate the various federal interpretations and propose a solution that is harmonious with present congressional intent and that accommodates the needs of both prisoners and prosecutors.

II. BACKGROUND OF THE INTERSTATE AGREEMENT ON DETAINERS

A. *History of Detainers*

The detainer has long been criticized in the literature of penology and corrections for its corrosive effect on rehabilitation, its needless curtailment of prison privileges, and its obstruction of the prisoner's right to obtain a speedy trial on the underlying charges.[11] Often merely a letter written by a prosecutor, police officer, or parole authority,[12] a detainer may be viewed casually by the issuing authority, who might not intend to act on the charge, but merely seeks "insurance" that the prisoner can be picked up upon his re-

8. *See* Part IV(B)(3) *infra.*

9. *See* Part IV(B)(2) *infra.*

10. United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), *cert. granted,* 434 U.S. 816 (1977), oral argument heard March 8, 1978; United States v. Ford, 550 F.2d 732 (2d Cir.), *cert. granted,* 434 U.S. 816 (1977), oral argument heard March 8, 1978.

11. *See, e.g.,* Bates, *The Detained Prisoner and His Adjustment,* 9 FED. PROBATION 16 (July-Sept. 1945); Bennett, *The Correctional Administrator Views Detainers,* 9 FED. PROBATION 8 (July-Sept. 1945); Bennett, *"The Last Full Ounce,"* 23 FED. PROBATION 20 (June 1959); Heyns, *The Detainer in a State Correctional System,* 9 FED. PROBATION 13 (July-Sept. 1945); Hincks, *The Need for Comity in Criminal Administration,* 9 FED. PROBATION 3 (July-Sept. 1945); Perry, *Effect of Detainers on Sentencing Policies,* 9 FED. PROBATION 11 (July-Sept. 1945); Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial,* 35 U. CIN. L. REV. 179 (1966); Note, *The Detainer: A Problem in Interstate Criminal Administration,* 48 COLUM. L. REV. 1190 (1948); Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes,* 18 RUTGERS L. REV. 828 (1964); Note, *Detainers and the Correctional Process,* 1966 WASH. U.L.Q. 417; Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions,* 77 YALE L.J. 767 (1968).

12. *See, e.g.,* United States *ex rel.* Sanders v. Arnold, 535 F.2d 848 (3d Cir. 1976); Crow v. United States, 323 F.2d 888 (8th Cir. 1963) (detainer based on complaint, not indictment); People v. Bryarly, 23 Ill. 2d 313, 178 N.E.2d 326 (1961) (detainer lodged despite prosecutor's intention not to prosecute); State *ex rel.* Faehr v. Scholer, 106 Ohio App. 399, 155 N.E.2d 230 (1958) (detainer lodged by police).

lease from prison.[13] Most state detainers on federal prisoners are withdrawn prior to completion of the prisoner's original sentence,[14] and less than half of all detainers are acted upon or even filed with the intention of following up on them.[15]

However routinely the detainer is viewed by the issuing official, prison authorities regard it seriously and henceforth treat the prisoner differently. A prisoner known to be wanted by another jurisdiction is considered a greater escape risk and thus may be deprived of prison privileges[16] or placed in maximum custody automatically without consideration of the seriousness of the charge, his attitude, or the likelihood that the detainer will be acted upon.[17] Many parole authorities will not "parole to a detainer," considering release of a prisoner useless since he immediately will be deprived of liberty by another charge.[18] The drafters of the Interstate Agreement on Detainers noted that detainers defeat the objectives of the correctional-rehabilitative system by creating anxiety, apprehension, and bitterness in prisoners.[19]

Despite the severe criticism in legal literature, courts consistently have rejected constitutional challenges to the detainer itself and to the restrictions placed on prisoners against whom detainers have been lodged. Separation of powers and deference to the experience and expertise of corrections officials are typical grounds for upholding the restrictions on a "detained" prisoner.[20] As long as the

13. Dauber, *supra* note 3, at 670.

14. S. REP. No. 1356, 91st Cong., 2d Sess. 3, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4864, 4866.

15. Shelton, *supra* note 4, at 120. The detainer may be lodged by a prosecutor or police official as a means of punishing the prisoner without an adjudication of guilt by causing curtailment of prison privileges and parole. It may also be used as a threat to encourage the prisoner to make restitution. Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process,* 18 U. KAN. L. REV. 493, 581-82 (1970).

16. Dauber, *supra* note 3, at 670-71.

17. Shelton, *supra* note 4, at 120-23.

18. H. KERPER & J. KERPER, LEGAL RIGHTS OF THE CONVICTED 494-95 (1974). The Model Penal Code § 305.18 recommends parole to a detainer. By federal regulation, detainers lodged against a federal prisoner no longer automatically preclude parole consideration. 28 C.F.R. § 2.3 (1977).

19. The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole, there is little hope for his release after an optimum period of training and treatment, when he is ready to return to society with an excellent possibility that he will not offend again. Instead, he often becomes embittered with continued institutionalization and the objective of the correctional system is defeated. COUNCIL OF STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL 86 (rev. ed. 1949), *quoted in* Dauber, *supra* note 3, at 671.

20. *See* Lawrence v. Blackwell, 298 F. Supp. 708 (N.D. Ga. 1969).

charge underlying a detainer is valid and the restrictions are rationally related to prison security, courts will not overrule the judgment of prison authorities.[21]

B. *Speedy Trial*

Although detainers have withstood constitutional attack, in recent years the validity of the underlying charges has been attacked successfully on speedy trial grounds.[22] Originally, the courts considered speedy trial inapplicable to prisoners since the original policy for affording an accused a speedy trial was to prevent lengthy pretrial confinement with its attendant embarrassment and anxiety,[23] difficulties not experienced by a prisoner. Additionally, the sixth amendment was not considered binding on the states until 1967, when the Supreme Court held in *Klopfer v. North Carolina*[24] that the fourteenth amendment incorporated the speedy trial guarantee. Even then, however, a prosecuting jurisdiction could wait until a prisoner had completed his sentence in another state before bringing him to trial, regardless of the length of the delay, since a prosecutor had no duty to try a prisoner until he legally could compel his presence in court.[25] The detainer had no coercive legal effect on prison officials, who honored it only as a matter of comity. Furthermore, a state court in the prosecuting jurisdiction had no power to compel production of a prisoner incarcerated in another state.[26] Courts also denied prisoners' speedy trial claims on the ground that one imprisoned for a crime was unavailable for trial because of his own actions.[27] Unless a prisoner could show he had no knowledge of the pending charges, his failure to demand immediate trial constituted a waiver of the right to a speedy trial.[28]

The Court in *Smith v. Hooey*[29] rejected the rationale that a state was under no duty to promptly try a prisoner whose presence

21. *See id. See also* Pollard v. State, 128 Ga. App. 470, 197 S.E.2d 158 (1973) (lodging detainer by proper officials does not violate sixth, eighth, or fourteenth amendments); State v. Dowd, 234 Ind. 152, 124 N.E.2d 208 (1955) (prisoner delivered to federal authorities for trial was not deprived of due process).

22. "In all criminal prosecutions, the accused sball enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI.

23. Yackle, *Taking Stock of Detainer Statutes,* 8 LOY. L.A. L. REV. 88, 102 (1975).

24. 386 U.S. 213 (1967).

25. Wexler & Hershey, *supra* note 2, at 755.

26. *Id. See* Henderson v. Circuit Court, 392 F.2d 551 (5th Cir. 1968); McCary v. Kansas, 281 F.2d 185 (10th Cir. 1960).

27. United States v. Fouts, 166 F. Supp. 38, 42 (S.D. Ohio), *aff'd,* 258 F.2d 402 (6th Cir. 1958).

28. Taylor v. United States, 238 F.2d 259, 261 (D.C. Cir. 1956).

29. 393 U.S. 374 (1969).

it could not legally compel, noting that prisoners normally will be produced at the request of the prosecuting jurisdiction through comity.[30] The Court also pointed out that a prisoner suffers as much as any other defendant from pretrial delay. In either case, the loss of witnesses and evidence impairs the ability of the accused to defend himself.[31] The state's duty was defined in *Smith v. Hooey* as a good faith, diligent effort to bring the prisoner to its court for trial upon his demand.[32] The Court did not specifically state whether failure to protect the prisoner's right to a speedy trial would result in dismissal with prejudice. In *Dickey v. Florida,*[33] the Court implied that actual prejudice must be shown before a conviction will be reversed on speedy trial grounds.[34] In *Barker v. Wingo,*[35] however, the Court set forth four factors to be analyzed case-by-case in determining whether the right to a speedy trial has been violated.[36] The Court held that the length of the delay, the reason for the delay, whether the defendant demanded trial, and whether actual prejudice resulted should be balanced and interrelated.[37] Rejecting the "demand-waiver" doctrine, which viewed failure to demand a speedy trial as a voluntary waiver of the right, the Court reasoned that presuming waiver of a fundamental right from inaction was inconsistent with the requirement of "intentional relinquishment" developed in other waiver cases.[38] The defendant who fails to assert the right, however, has a much greater burden of proving denial of the right.[39] In 1973, the Court clarified the sanction for violation of the speedy trial right in *Strunk v. United States.*[40] Although the Court acknowledged that dismissal of an indictment is an " 'unsatisfactorily severe remedy,' " it nevertheless reasoned that "[i]n light of the policies which underlie the right to a speedy trial, dismissal must remain, as *Barker* noted, 'the only possible remedy.' "[41]

30. *Id.* at 377.

31. *Id.* at 378-80.

32. *Id.* at 383. However, a prisoner against whom a detainer for parole or probation violation has been lodged does not have a due process right to a prompt revocation hearing. Moody v. Daggett, 429 U.S. 78 (1976); United States *ex rel.* Caruso v. United States Bd. of Parole, 570 F.2d 1150 (3d Cir. 1978).

33. 398 U.S. 30 (1970).

34. *See id.* at 38.

35. 407 U.S. 514 (1972).

36. *Id.* at 530.

37. *Id.* at 530-33.

38. *Id.* at 525-28. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Note, *Right to Speedy Trial: Maintaining a Proper Balance Between the Interests of Society and the Rights of the Accused,* 4 U.C.L.A.-ALAS. L. REV. 242, 245 (1974).

39. 407 U.S. at 531-32.

40. 412 U.S. 434 (1973).

41. *Id.* at 439-40. In Moore v. Arizona, 414 U.S. 25 (1973), the Court repeated its

Smith v. Hooey and *Barker v. Wingo* defined the constitutional right to a speedy trial in qualitative terms, the Court preferring to evaluate the prejudicial effect of and reasons for the delay on the facts of each case rather than setting fixed time limits beyond which the right was conclusively presumed to be violated and within which the delay was permissible. The Interstate Agreement on Detainers, on the other hand, is a legislative solution to the specific problems associated with detainers. Procedures are provided for invoking the protection of the Agreement, and specific time limits are set for compliance. The following section describes the Agreement's procedures and discusses state court interpretation and construction of its provisions.

III. How the Agreement Works

A. *Brief Overview of Procedures*

Article I sets forth the purposes of the Agreement. First, because detainers based on untried charges create uncertainties and obstruct programs of prisoner treatment and rehabilitation, the Agreement's objective is "to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints."[42] Second, because of the difficulties encountered in obtaining prisoners from other states for trial, the Agreement seeks to provide cooperative procedures for the interstate transfer of prisoners.[43] The first purpose of the Agreement—to provide a means by which prisoners may request trial on charges underlying detainers—is dealt with in article III. An inmate serving a term of imprisonment in a party state may force disposition of all charges[44] underlying detainers lodged against him by another party state by serving written notice and "request for final disposition"[45] on the appropriate prosecuting official and court in which the charges are pending.[46] The prisoner then must be brought to trial within 180

assertion in *Barker* that actual prejudice need not be proven and that "no court should overlook the possible impact pending charges might have on a prisoner's prospects for parole and meaningful rehabilitation." *Id.* at 27.

42. IAD, art. I.

43. *Id.* Article II defines the terms "State," which includes the United States, "Sending State," and "Receiving State."

44. A request concerning any one charge operates as a request for disposition of all charges underlying detainers emanating from any prosecutor in that state. *Id.* at art. III(d).

45. *Id.*

46. The prisoner is supposed to give his request to the warden, who is to forward it along with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence,

days "after he shall have caused [the request] to be delivered."[47] Failure to try the prisoner within this period results in dismissal of the indictment with prejudice.[48] The court may, however, grant reasonable or necessary continuances for good cause.[49]

The second problem identified by the drafters of the Agreement, the absence of procedures for transferring prisoners for trial, is addressed in article IV. By submitting a "written request for temporary custody or availability,"[50] the prosecuting jurisdiction may obtain the prisoner for trial, which in the absence of permissible continuances must be commenced within 120 days of the prisoner's arrival in the receiving state. Both articles III and IV require that trial be held prior to the prisoner's return "to the original place of imprisonment"[51] on pain of dismissal. The time periods of both articles are tolled when the prisoner is unable to stand trial.[52]

B. The Agreement and the States[53]

Relatively little case law dealing with the Agreement exists in most party states, perhaps because the procedures work well and thus generate little litigation, perhaps because prisoners are unaware to a large extent of their rights under the Agreement. Judicial interpretations of the Agreement generally have dealt with three major issues: (1) When does the Agreement apply; (2) What are the

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the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the state parole agency relating to the prisoner.

Id. at art. III(a).

47. *Id. See* text accompanying notes 100-02 *infra.*

48. If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

IAD, art. V(c).

49. *Id.* at art. III(a). The prisoner or his counsel must be present.

50. *Id.* at art. IV. "Availability" refers to article V(a), which permits the federal government to retain custody over a federal prisoner requested by a state prosecutor while making the prisoner available for trial. Any request by a receiving state is subject to approval by the governor of the sending state. *Id.* at art. IV(a).

51. *Id.* at art. IV(e). *See also id.* at art. III(a).

52. *Id.* at art. VI(a). Other relevant portions of the Agreement will be discussed as they pertain to judicial interpretation of the statute.

53. This section deals primarily with state court interpretations of the Agreement. The federal courts, however, have also been involved in interpreting the Agreement through state prisoners' petitions for habeas corpus. Additionally, federal court decisions are discussed in this section in so far as they deal with problems that are common to the working of the Agreement among states alone. The peculiar problems of applying the Agreement to the United States as a "receiving state" are discussed in Part IV.

prisoner's duties under the Agreement; and (3) When will the sanction of dismissal of the indictment with prejudice be invoked against the prosecuting jurisdiction?

(1) Scope of the Agreement

The first requirement courts have inferred from the Agreement is that both the sending state and the receiving state must be parties to the compact.[54] Thus, one important reason for federal adoption of the Agreement was to provide protection for federal prisoners with state detainers lodged against them.[55] The Agreement's protection does not extend to charges against the prisoner that are pending in another federal district.[56] Moreover, the Agreement does not apply to detainers lodged against persons incarcerated while awaiting trial,[57] nor to detainers based on parole or probation violations[58] or convictions[59] because the purpose of the Agreement is to prevent uncertainties and interference with programs of treatment and rehabilitation. An imprisoned defendant awaiting trial presumably is not involved in such programs. Similarly, a detainer based on a certainty—conviction or parole revocation—does not require immediate disposition.[60]

Although the filing of a detainer appears to be a necessary prerequisite to invocation of the Agreement, that has become one of the most controversial aspects of the Agreement, particularly at the federal level.[61] The Agreement does not purport to force the prosecutor to act upon "untried but unpursued" charges, but only upon those underlying a detainer and thereby restricting the prisoner's activities within the institution and affecting chances for parole.[62] The Iowa Supreme Court recently dealt with a prisoner's right

54. "Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a *party state* and whenever during the continuance of the term of imprisonment there is pending in *any other party state* any untried indictment. . ." (Emphasis added). IAD, art. III(a). *See* Smith v. State, 258 Ark. 533, 528 S.W.2d 359 (1957).

55. *See* Hurst v. Hogan, 435 F. Supp. 125 (N.D. Ga. 1977) (federal prisoner must follow IAD procedures to dispose of party state's detainer, but for detainer of nonmember state, may use procedures set up by the Northern District of Georgia before the federal government joined the Agreement); Wexler & Hershey, *supra* note 2, at 757.

56. United States v. Krohn, 558 F.2d 390 (8th Cir. 1977); United States v. Cappucci, 342 F. Supp. 790 (E.D. Pa. 1972).

57. United States v. Roberts, 548 F.2d 665 (6th Cir. 1977); United States v. Boyd, 437 F. Supp. 519 (W.D. Pa. 1977); United States v. Simmons, 437 F. Supp. 621 (W.D. Pa. 1977); Davidson v. State, 18 Md. App. 61, 305 A.2d 474 (1973).

58. Suggs v. Hopper, 234 Ga. 242, 215 S.E.2d 246 (1975).

59. Gaches v. Third Judicial Dist., 416 F. Supp. 767 (W.D. Okla. 1976) (detainer based on defendant's guilty plea with delayed execution of sentence not under IAD).

60. Nor is there a due process right to a prompt revocation hearing. *See* note 32 *supra*.

61. *See* Part IV *infra*.

62. State v. Wood, 241 N.W.2d 8, 12 (Iowa 1976). Although there is no statutory right

under article III of the Agreement to request disposition of charges pending in another jurisdiction.[63] The prisoner had asked to be tried before the prosecutor lodged a detainer.[64] The court held that the Agreement applied since the prosecutor subsequently filed a detainer, but that the 180 day time limit did not begin to run until formal notice was sent by the prison warden.[65]

An important question arising under article IV, which permits the prosecuting jurisdiction to request temporary custody of the prisoner, is whether the Agreement is the exclusive means of obtaining a prisoner for trial. This issue arises primarily when the federal government participates as a "receiving state,"[66] but was first discussed in the context of a state prosecutor's request in the influential case of *United States* ex rel. *Esola v. Groomes.*[67] Esola, a federal prisoner at Danbury, Connecticut, was brought to New Jersey for trial on state charges pursuant to a state court writ of habeas corpus ad prosequendum.[68] He was returned to Danbury and brought back to New Jersey several times before being tried and convicted.[69] The issue was whether these transfers were governed by the Agreement and the defendant thus entitled to dismissal of the indictment under article IV.[70] The government argued that the transfers were not made pursuant to the Agreement, but were judicial writs honored as a matter of comity by the federal custodian,[71] and also that no detainer was or could have been filed.[72] The Third Circuit, foreshadowing its interpretation of the Agreement when the federal government is a receiving state,[73] held that the Agreement provides the exclusive means of transfer of a prisoner for prosecution whether or not the demanding state utilizes article IV's procedures to request

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under IAD to disposition of charges on which no detainer has been lodged, the prisoner still has a constitutional right to a speedy trial. *See* text accompanying notes 29-41 *supra.*

63. State v. Wood, 241 N.W.2d 8 (Iowa 1976).

64. *Id.* at 10-11.

65. *Id.* at 11-12.

66. *See* Part IV *infra.*

67. 520 F.2d 830 (3d Cir. 1975).

68. *Id.* at 832. See the discussion of federal writs in Part IV(A) *infra.* The state writ is universally considered to have no effect beyond the territorial jurisdiction of the state court, although there is a split of authority as to the effect of a federal court writ.

69. *Id.* at 832-33.

70. The case came before the Third Circuit on the prisoner's petition for habeas corpus. He had previously filed a motion to dismiss the indictment in state court, thus exhausting his state remedies as required by 28 U.S.C. § 2254(b) (1970). 520 F.2d at 832-33.

71. 520 F.2d at 836.

72. *Id.* Esola had been arraigned on the state charges and released on bail prior to beginning his federal sentence; thus no detainer could have been lodged with the federal warden.

73. United States v. Sorrell, 562 F.2d 227 (3d Cir. 1977). *See* text accompanying notes 235-48 *infra.*

a prisoner.[74] The court emphasized the Agreement's purpose of minimizing interference with rehabilitation:

> The purpose of the provision [article IV(e)] . . . is to minimize the adverse impact of a foreign prosecution on rehabilitative programs of the confining jurisdiction. When a prisoner is needlessly shuttled between two jurisdictions, then any meaningful participation in an ongoing treatment program is effectively foreclosed for two reasons. First, participation requires physical presence and the continuous physical presence of a prisoner is not possible when multiple trips to a foreign jurisdiction are made. Secondly, the psychological strain resulting from uncertainty about any future sentence decreases an inmate's desire to take advantage of institutional opportunities.[75]

Groomes had important effects upon subsequent interpretation of the Agreement. First, it held that the sanctions of article IV(e) applied even though the requesting jurisdiction had not intended to proceed under the Agreement.[76] It also broadened the scope of the Agreement by holding that a state court writ of habeas corpus ad prosequendum constitutes a detainer for purposes of the Agreement.[77] Although the state court writ, like its federal counterpart,[78] is generally executed immediately and thus does not entail the restrictions associated with ordinary detainers, the court did not discuss these differences. Instead, it emphasized the effects of transferring prisoners between jurisdictions.[79] The Agreement originally stressed the detainer's interference with rehabilitation through its effect on a prisoner's chances for parole, prison jobs, and minimum security confinement, and the psychological effect of these restrictions.[80] Article III provided the solution to this problem by permitting the prisoner to end these restrictions by forcing the prosecutor to try him. In contrast, article IV was originally intended to deal with the prosecutor's need to obtain prisoners from other states for trial rather than with the prisoner's problems. Article IV(e) and the 120 day "speedy trial" limit were simply to prevent abuse of the new procedure.[81] *Groomes* and its progeny[82] thus injected a new element into the Agreement—concern for the effect of transfers between jurisdictions on rehabilitation—when no such concern existed on the part of the drafters of the Agreement.

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74. 520 F.2d at 836.
75. *Id.* at 836-37.
76. *Id.* at 837-38.
77. *Id.* at 838-39.
78. *See* Part IV *infra.*
79. 520 F.2d at 837.
80. *See* text accompanying notes 16-19 *supra.*
81. *See* S. REP. No. 1356, 91st Cong., 2d Sess. 2, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4864, 4865-66.
82. *See* text accompanying notes 235-48 *infra.*

A New York court recently has taken the opposite view, holding that the Interstate Agreement on Detainers is not the sole means of obtaining a prisoner from another jurisdiction for trial. In *People v. Valenti,*[83] when a federal prisoner incarcerated in Missouri was brought to New York in connection with several federal indictments, a New York state court issued a writ of habeas corpus ad prosequendum[84] in order to arraign him on state charges.[85] Upon his return to Missouri, the defendant moved to dismiss the state indictment on the ground that article IV(e) of the Agreement[86] required that he be tried prior to his return to the original place of imprisonment.[87] The New York court rejected the prisoner's claim, holding that the Agreement was inapplicable because the prisoner's appearances in state court were effected pursuant to the judicial writ, authorized by a different section of the New York code. The Agreement was deemed an alternative to the writ, applying only when a true detainer has been lodged.[88]

(2) Requirement of a Demand

Unlike the constitutional right to a speedy trial,[89] article III does not oblige the prosecuting authority filing a detainer to attempt to bring the prisoner to trial absent a demand by him.[90] This requirement has been criticized as ignoring the prosecutor's affirmative constitutional duty to attempt to bring the prisoner to trial promptly, irrespective of whether the prisoner has demanded trial.[91] Legitimate functional differences exist, however, between the prisoner's remedies under the Agreement and under the constitutional right to a speedy trial. The "speedy trial" provisions of the Act were designed to encourage disposition of charges when detainers were interfering with the rehabilitative process rather than to serve as a "constitutional rule of thumb" for determining whether the constitutional right has been violated.[92] The Agreement, unlike the constitutional right, fixes absolute time limits that require dismissal even though actual prejudice to the prisoner cannot be shown.[93] No bal-

83. 90 Misc. 2d 904, 396 N.Y.S.2d 321 (Monroe County Ct. 1977).
84. Authorized by N.Y. CRIM. PROC. LAW § 580.30 (McKinney 1971).
85. 90 Misc. 2d at 905, 396 N.Y.S.2d at 322.
86. N.Y. CRIM. PROC. LAW § 580.20 (McKinney 1971).
87. 90 Misc. 2d at 905, 396 N.Y.S.2d at 323.
88. *Id.* at 907, 396 N.Y.S.2d at 324.
89. *See* text accompanying notes 29-41 *supra.*
90. United States v. Dowl, 394 F. Supp. 1250, 1255 (D. Minn. 1975); *see* Ekis v. Darr, 217 Kan. 817, 539 P.2d 16 (1975).
91. Yackle, *supra* note 23, at 111.
92. Commonwealth v. Bunter, 445 Pa. 413, 423, 282 A.2d 705, 709-10 (1971).
93. *Id. But see* Stroble v. Egeler, 547 F.2d 339 (6th Cir. 1977) (remanding the case for

ancing is required.[94] The Agreement was designed to avoid lengthy inquiry into the facts of each case and to relieve the prisoner of the burden of showing actual prejudice.[95]

A frequently litigated issue is the sufficiency of the prisoner's demand, or "request for final disposition," under article III. What must the prisoner do to invoke the protection of the Agreement and put the prosecutor on notice that he must try him? In light of the remedial aims of the statute and the provision that the agreement shall be liberally construed to effectuate its purposes,[96] most courts have been reluctant to burden the prisoner with formal procedural requirements.[97] According to the prevailing view, the prisoner must simply give his written request for disposition of the charges underlying a detainer to the prison warden or other correctional official, who is under an absolute duty to see that it is transmitted to the proper officials in the prosecuting state along with a certificate containing certain information about the prisoner's sentence.[98] The prisoner's request starts the running of the 180 day time limit even if the warden fails to offer temporary custody of the prisoner to the prosecuting state.[99] The statute does not clearly state whether the prisoner's request actually must be received by the prosecutor in order to begin the 180 day period.[100] Although no case has been reported in which charges are dismissed when the prosecuting jurisdiction failed to receive actual notice of the prisoner's request, courts have been concerned lest the prisoner's attempt to invoke

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an evidentiary hearing to determine, *inter alia,* whether the defendant had heen prejudiced by unauthorized delay and whether the indictment should be dismissed absent such prejudice).

94. Compare the speedy trial balancing test set forth in Barker v. Wingo, 407 U.S. 514 (1972).

95. For the requirement that a prisoner be tried prior to his return to the original place of imprisonment, however, some requirement of prejudice might be advisable. *See also* State v. Lippolis, 55 N.J. 354, 262 A.2d 203 (1970) (adopting the position of the dissenting judge in the court below, 107 N.J. Super. 137, 237 A.2d 705 (Super. Ct. App. Div. 1969), that the prosecution may request continuance after time limits have run, especially when tbe defendant can sbow no prejudice due to the delay). The view taken in *Lippolis* was expressly rejected by the Pennsylvania Supreme Court in Commonwealtb v. Fisher, 451 Pa. 102, 301 A.2d 605 (1973).

96. IAD, art. IX.

97. United States v. Mason, 372 F. Supp. 651, 653-54 (N.D. Ohio 1973); Pittman v. State, 301 A.2d 509 (Del. 1973).

98. Pittman v. State, 301 A.2d 509 (Del. 1973).

99. Rockmore v. State, 21 Ariz. App. 388, 519 P.2d 877 (1974); People v. Esposito, 37 Misc. 2d 386, 201 N.Y.S.2d 83 (Queens County Ct. 1960) (such procedural formalities as sending by registered mail are not the prisoner's responsibility).

100. IAD, art. III provides: "[H]e shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer . . . written notice . . . . The written notice . . . shall be given or sent by the prisoner to the warden . . . who shall promptly forward it together with the certificate . . . ."

the Agreement "be defeated by ineptitude"[101] on the part of either state's officials. At least one state has clarified the procedure by providing that the time limit does not start to run until notice actually is received by the prosecuting jurisdiction.[102]

Other courts have stressed that the prisoner must at least make a good faith attempt to comply with the formal procedures of the Agreement. In *Beebe v. State,*[103] the Delaware court stated that strict compliance with the Agreement's procedures is not required if the prisoner diligently attempts to comply and, through official oversight or error, the formal requirements are not met. The prisoner, however, should not attempt to communicate directly with the prosecuting jurisdiction, but should send his request to the warden.[104] If the prisoner ignores the warden, his failure to comply will be fatal to his request. The 180 day limit runs from the date the prisoner requests that the warden send the IAD forms.[105] Similarly, in *Ekis v. Darr,*[106] the court held that a prisoner's letter or petition, initially sent to the district attorney and the wrong court, was insufficient to invoke the Agreement because he failed to follow the correct procedure when informed of it by the prosecutor. The court was concerned that the prisoner's request be recognized as an IAD procedure:

> [The prisoner's] failure to act in response to the [district attorney's] letter is readily susceptible to an inference that he was ambushing the Kansas authorities. He wanted his demand to be on file, but didn't want anyone to know it was a proceeding under the Agreement.
>
> From the prosecution's point of view it was vitally important to know whether or not Ekis was proceeding under the Agreement.[107]

(3) Penalties

Discussion of the sufficiency of a prisoner's request raises the issue of the effect of a prison official's failure to fulfill his obligations under the Agreement. The warden's duties include: (1) Informing the prisoner promptly of "the source and contents of any detainer

101. People v. Esposito, 37 Misc. 2d 386, 391, 201 N.Y.S.2d 83, 88 (Queens County Ct. 1960).

102. MD. ANN. CODE art. 27, § 6160. *See* Davidson v. State, 18 Md. App. 61, 305 A.2d 474 (1973).

103. 346 A.2d 169 (Del. 1975). The prisoner's IAD claim was also denied in Beebe v. Vaughn, 430 F. Supp. 1220 (D. Del. 1977), where the court held that a federal court has habeas corpus jurisdiction to consider a prisoner's claim even though the United States was not a party to the transaction under the Agreement.

104. 346 A.2d at 171.

105. *Id.*

106. 217 Kan. 817, 539 P.2d 16 (1975).

107. *Id.* at 823, 539 P.2d at 22.

lodged against him;"[108] (2) Informing the prisoner of his rights under the Agreement;[109] (3) Furnishing a certificate with information about the prisoner and his sentence to the prosecuting jurisdiction;[110] (4) Forwarding the prisoner's request and the certificate to "the appropriate prosecuting official and court by registered or certified mail, return receipt requested;"[111] (5) Notifying all appropriate prosecutors and courts in the state of the prisoner's request for disposition of a charge underlying a detainer from that state (because the prisoner's request concerning one detainer from State X operates as a request for disposition of *all* detainers from State X, and the prisoner must be tried on all charges prior to his return to the sending state);[112] (6) Notifying all prosecutors in a state who have lodged detainers against a prisoner when one prosecutor from that state requests temporary custody of the prisoner under Article IV (it is unclear whether these prosecutors must bring the prisoner to trial before his return to the sending state);[113] and (7) Offering temporary custody of the prisoner to the appropriate authority in the receiving state, once a request is made under articles III or IV. The offer is to accompany the prisoner's request under article III.[114]

The warden who has custody of the prisoner is under an absolute duty to perform the duties listed above.[115] Many states have added an additional clause to the Agreement similar to the following section of the Georgia statute: "It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this State to give over the person of any inmate thereof whenever so required by the operation of the Agreement on Detainers."[116] The purpose of the Agreement is to provide a legal basis for the detainer, so that the warden honors the detainer or request as a statutory duty rather than as a matter of comity. The sanction for violation of the warden's statutory duties under the Agreement, however, actually lies against the prosecuting jurisdiction.[117]

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108. IAD, art. III(c).
109. *Id.*
110. *Id.* at art. III(a).
111. *Id.* at art. III(b).
112. *Id.* at art. III(d).
113. *Id.* at art. IV(b).
114. *Id.* at art. V(a).
115. *See, e.g.*, Pittman v. State, 301 A.2d 509 (Del. 1973); People v. Esposito, 37 Misc. 2d 386, 201 N.Y.S.2d 83 (Queens County Ct. 1960).
116. GA. CODE ANN. § 77-514b (1977 Cum. Supp.); *see, e.g.*, IDAHO CODE § 19-5006 (1977 Cum. Supp.); ILL. ANN. STAT. ch. 38, § 1003-8-9(e) (Smith-Hurd 1973).
117. There is a remedy against the warden—an action brought in the court in the jurisdiction in which the prisoner is incarcerated, to order the warden to end restrictions due to the detainer—which has no effect on the underlying charges. *See* Lawrence v. Blackwell, 298 F. Supp. 708 (N.D. Ga. 1969).

The state courts are split on the extent to which the prosecuting jurisdiction is responsible for the failure of the other state's officials to comply with the Agreement. Often the prosecuting state fulfills its duties under the Agreement, yet finds its indictment challenged because of the actions of the other state. The prevailing view, based on the Agreement's remedial purpose, is that each party state is bound by the official acts or omissions of the other party state.[118] The consequences of this imputed responsibility are illustrated in *Nelms v. State.*[119] A Tennessee prosecutor requested temporary custody under article IV of an Iowa prisoner who subsequently requested trial pursuant to article III. The Iowa warden informed Tennessee that two other states had lodged prior detainers. The Tennessee prosecutor, apparently assuming that the prisoner was unavailable at that time,[120] did nothing until six months later, when he successfully requested temporary custody. Despite Iowa's admission of error in failing to notify Tennessee that the prisoner was available and to offer custody at the time of the first request, the Tennessee Supreme Court held that the indictment must be dismissed with prejudice based on Tennessee's failure to promptly respond to the prisoner's article III request. The court rejected the state's argument that it should not be penalized for the sending state's negligence, noting that the alternative would be to put the burden on the prisoner, who is in no position to see that prison authorities perform their duties.[121] Thus, the prosecuting jurisdiction bears the affirmative responsibility not only of discharging its specific duties as outlined by the Agreement, but also of seeing that prison authorities perform their functions.[122]

The Agreement as above construed requires constant vigilance and awareness of time limits by the prosecutor. Lack of proper response by sending-state prison authorities neither tolls the running of time limits nor relieves the prosecutor of the burden of bringing the prisoner to trial. From the prisoner's viewpoint, this requirement serves the Agreement's purpose of ending the uncer-

118. Nelms v. State, 532 S.W.2d 923, 926 (Tenn. 1976).

119. 532 S.W.2d 923 (Tenn. 1976).

120. The time limits of articles III and IV are tolled automatically whenever the prisoner is unavailable for trial, such as when he is standing trial in another state. *See* Price v. State, 237 Ga. 352, 357, 227 S.E.2d 368, 371 (1976) (Hill, J., concurring specially); State v. Wood, 241 N.W.2d 8, 13-14 (Iowa 1976).

121. 532 S.W.2d at 926-27. Writing in dissent, Justice Harbison argued that Tennessee should not be penalized for Iowa's failure to comply with the Agreement. *Id.* at 928.

122. *See, e.g.,* People v. Esposito, 37 Misc. 2d 386, 394-95, 201 N.Y.S.2d 83, 91 (Queens County Ct. 1960) (the prosecutor manifested proper awareness of his own responsibilities according to the court, but failed to press the prison authorities to perform the duty of offering temporary custody).

tainties associated with pending charges for which detainers have been lodged. Realistically the prisoner should not be burdened with formal procedural requirements, especially since he ordinarily is not represented by counsel. The courts have recognized that he is in no position to oversee the warden and compel compliance with the Agreement. On the other hand, consideration of the prosecutor's position indicates the unfairness of penalizing the charging state for omissions by the custodial state. The Agreement's penalty of dismissal with prejudice is intentionally harsh to prevent abuse of the detainer and to encourage prompt and speedy disposition of pending charges. A prosecutor who fails to act diligently to try a prisoner pursuant to his request cannot complain if the indictment is dismissed. The prosecutor's diligence is irrelevant, however, if the prison authority neglects his duties under the Act, for the prosecutor then becomes vicariously responsible and again faces dismissal of a valid indictment. Given the broad range of the warden's duties under the Agreement, his inaction often might result in dismissal of another jurisdiction's indictment. For example, if the warden fails to notify all other prosecutors in a state of a prisoner's request for disposition of a detainer filed by a prosecutor in that state, the prisoner could attack the charges underlying those other detainers if he is not tried before his return to prison. The Agreement provides no remedy for encouraging compliance by prison officials without punishing the prosecutor by dismissal of the charges.[123]

Controversy also exists over the prosecutor's obligations once the prisoner arrives in the prosecuting jurisdiction for trial, whether by his own request or by the prosecutor's initiative. Three possible requirements may trigger dismissal of the indictment: (1) The 180 day limit under article III, running from the time the prisoner's article III request is received by the prosecutor. A continuance for good cause is possible; (2) The 120 day limit under article IV, running from the arrival of the prisoner in the receiving state. This limit applies only when the prosecutor requests custody[124] and a continuance for good cause is permitted; and (3) The requirement under articles III(d) and IV(e) that "[i]f trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."[125]

123. *But see* note 117 *supra.*

124. Commonwealth v. Wilson, 231 Pa. Super. Ct. 451, 453 n.3, 331 A.2d 792, 793 n.3 (1974); State v. George, 271 N.C. 438, 444, 156 S.E.2d 845, 849 (1967).

125. IAD, art. III(d). The wording of IAD, art. IV(e) is nearly identical.

The prevailing view construes the Agreement literally and in favor of the prisoner. One view, espoused by the Pennsylvania courts, holds that any unexcused delay that violates the time limits and is not caused by the defendant mandates dismissal. *Commonwealth v. Wilson*,[126] the most extreme example of this view, stated that the prosecutor's diligence is immaterial. The prisoner initially requested trial in the Pennsylvania court on June 1, 1973. Defense counsel then requested a continuance, and trial was set for October 24. On that date, defendant moved to dismiss "under the misconception that the time proscription under the Act was 120 rather than 180 days."[127] The judge reserved ruling on the motion and due to "inexplicable inadvertence" lost track of the case for months. The trial judge's dismissal of the indictment due to its own error was affirmed by the Pennsylvania Supreme Court, which held that the trial court's "administrative inadvertence" required dismissal: "[I]t is unimportant whether delay is occasioned by the prosecutor's office or by the court; so long as the delay is neither reasonable nor necessary, and not occasioned by the defendant, the legislative policy must be heeded."[128]

A recent case illustrates the Pennsylvania court's belief that the prohibition against return of the prisoner to the sending state prior to trial also should be strictly enforced. In *Commonwealth v. Merlo*,[129] Pennsylvania authorities requested temporary custody of a federal prisoner in Connecticut. Before trial[130] defendant was returned to federal prison because his federal sentence was to end the next month. Upon release from federal custody, defendant voluntarily returned to Pennsylvania and moved for dismissal under article IV(e). The appellate court ordered dismissal of all charges, despite the state's argument that defendant's return to federal prison furthered the Agreement's purposes by minimizing interference with the federal rehabilitation program.[131] Rejecting the state's premise that the Agreement does not apply when the prisoner's original sentence ends before expiration of the 120 days the receiving state has to try him, the court emphasized the *Groomes*[132] notion that the prisoner should not be shuttled back and forth between states. The court clearly stated that failure either to try the defendant within

126. 231 Pa. Super. Ct. 451, 331 A.2d 792 (1974).

127. *Id.* at 453, 331 A.2d at 793.

128. *Id.* at 454, 331 A.2d at 794.

129. 242 Pa. Super. Ct. 517, 364 A.2d 391 (1976).

130. Several trial dates were set, but witnesses failed to appear. *Id.* at 520, 364 A.2d at 393.

131. *Id.* at 523, 364 A.2d at 394-95.

132. 520 F.2d 830 (3d Cir. 1975).

120 days or prior to his return to prison mandates dismissal of the charges,[133] noting that the Agreement is clear and permits no exceptions.[134]

Other courts have been more reluctant to invoke the severe sanction of dismissal with prejudice, especially when the delay can be attributed to the defendant. The Pennsylvania court in the *Wilson* case[135] recognized that the Agreement should be read to omit from the statutory time limits any delay caused by the defendant. Other courts, however, have interpreted this exception more broadly. Several New York cases indicate that the article IV(e) provision requiring trial prior to defendant's return to the original place of imprisonment applies only when the defendant declares himself ready for trial. For example, pretrial motions by the prisoner may indicate lack of readiness and a return to the original prison will not invoke the penalty of article IV(e). In *People v. Bernstein,*[136] a federal prisoner was brought to New York for arraignment on state charges. After making several pretrial motions, the prisoner was returned to federal prison. The court held that no article IV(e) claim arises until all defense motions are completed and the defendant is ready for trial. To hold otherwise, the court noted, requires an impractical and unduly harsh interpretation that would restrict defendants' appearances in state courts for pretrial motions.[137] In *People v. White,*[138] a Connecticut prisoner brought to New York pursuant to article IV was not tried within the 120 day limit. Nonetheless, the court held that a motion to suppress evidence made after expiration of the time limit constituted a waiver of the prisoner's right to compel dismissal under IV(e), on the ground that a hearing on such a motion is considered part of the trial and the defendant manifested an intent to continue to trial.[139] The Illinois Supreme Court recently held in *Neville v. Friedman*[140] that article IV(e) does not require dismissal when the defendant, at his request, has been granted a long, indefinite continuance and has been returned to the original place of imprisonment without objection on his part. The court noted that a literal reading of article IV(e), which contains no exception to the prohibition against return prior to trial, would contradict the underlying purpose of the statute to promote rehabilita-

133. 242 Pa. Super. Ct. at 525, 364 A.2d at 394-95.
134. *Id.*
135. 231 Pa. Super. Ct. 451, 331 A.2d 792 (1974).
136. 74 Misc. 2d 714, 344 N.Y.S.2d 786 (Dutchess County Ct. 1973).
137. *Id.* at 715, 344 N.Y.S.2d at 787-86.
138. 33 App. Div. 2d 217, 305 N.Y.S.2d 875 (1969).
139. *Id.* at 221, 305 N.Y.S.2d at 878.
140. 67 Ill. 2d 488, 367 N.E.2d 1341 (1977).

tion since the detention facility of the receiving state was meant for short-term incarceration and thus not equipped for rehabilitation and training:

> Such interference is not in the best interests of petitioner, for whose benefit the programs are designed, nor of a society interested in the rehabilitation of its offending members. By contrast, we can discern no useful purpose to be accomplished by holding petitioner in the Sangamon County jail during that period, and he does not argue that any exists.[141]

Application of the Agreement among party states thus is by no means uniform. Some states have applied the Agreement as literally as possible in order to give the greatest possible protection to the prisoner; others, while recognizing the need for strong sanctions to enforce the provisions, are reluctant to grant dismissals when the prisoner has in some way contributed to the violation or when no real possibility of prejudice exists.[142]

IV. The Interstate Agreement and the Federal Government

The Interstate Agreement on Detainers has proved to be a fairly workable method of disposing of detainers and producing prisoners for trial when only states are involved, or when the United States acts as a "sending state" under the Agreement. Controversy exists, however, on the extent to which the federal government should be treated as a "receiving state" under the Agreement. The problem arises from three fundamental differences between a state and the United States that cannot be obviated simply by designating the United States as a "state"[143] for purposes of the Agreement. The

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141. *Id.*

142. Some question also exists as to the effect of violation of the Agreement—whether the indictment is automatically extinguished, or whether dismissal requires judicial action. Despite ambiguous language in the Agreement, courts generally agree that the provisions are not self-executing. *See, e.g.*, State v. West, 79 N.J. Super. 379, 191 A.2d 758 (Super. Ct. App. Div. 1963); People v. White, 33 App. Div. 2d 217, 305 N.Y.S.2d 875 (1969). Prior to dismissal of the charges, however, the warden in charge of the prisoner may be required to end the restrictive effects of a detainer if it appears that the charging state violated the Agreement. Watson v. Ralston, 419 F. Supp. 536 (W.D. Wis. 1976). The court discussed the problems facing a warden who knows a prosecutor may have violated the Agreement. The warden could refuse to give temporary custody to the prosecuting state, but this would require the warden to make a factual and legal determination as to whether IAD was violated, a function of the court in the receiving state. To ignore any alleged violation until dismissal of the indictment by giving full effect to the detainer would interfere with rehabilitation. The best course, concluded the court, is for the warden to end any restrictions based on the detainer, but honor the prosecutor's request for custody. *Id.* at 541. To attack the detainer's effects, the prisoner would file suit in the jurisdiction where he is incarcerated; to challenge the validity of the underlying charge, he must petition for a writ of haheas corpus in the district in which the charge is pending. *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973); Nelson v. George, 399 U.S. 224 (1970); Campbell v. Virginia, 453 F.2d 1230 (10th Cir. 1972); Baity v. Ciccone, 379 F. Supp. 552 (W.D. Mo. 1974).

143. IAD, art. II(a). The drafters of the Agreement contemplated federal participation,

primary differences are: (1) The United States traditionally has used the federal writ of habeas corpus ad prosequendum to secure the presence of state prisoners for trial; (2) The jurisdiction of the United States as a "receiving state" may be geographically concurrent with that of the "sending state;" and (3) The United States frequently uses state institutions as federal detention facilities. Neither the drafters of the original agreement nor Congress appear to have foreseen the precise problems of interpretation that have arisen because of these differences, as evidenced by a lack of commentary on the differences in the original proposal by the Council of State Governments[144] and the legislative history of the Agreement[145] before its passage by Congress.

In the absence of opposition to the IAD in Congress,[146] the Act passed without debate and without penetrating analysis of its potential impact. The strong support for federal adoption of the Agreement by the United States Department of Justice suggests that it had no idea that the Agreement would affect its longstanding method of procuring state prisoners.[147] The following section discusses the nature and history of the federal writ of habeas corpus ad prosequendum as a prelude to analysis of the federal case law interpreting the role of the United States as a "receiving state" under the Agreement.

A. The Federal Writ of Habeas Corpus ad Prosequendum

A major issue in application of the Agreement to the federal government is whether the practice of bringing state prisoners to federal court by issuing writs of habeas corpus ad prosequendum and ad testificandum is subject to the statutory provisions. This section traces the origin and development of such writs in order to evaluate the arguments on this question.

Blackstone called the writ of habeas corpus "the most celebrated writ in the English law."[148] The best known writ is the "Great

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and several provisions refer to the United States. *See, e.g.*, IAD, art. II(a) ("State" shall mean, *inter alia*, the United States); IAD, art. V(a) (federal prisoners may remain in federal custody when sent to the receiving state for trial); IAD, § 3 ("Governor" defined as the Attorney General with respect to the United States).

144. COUNCIL OF STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL (rev. ed. 1966), *reprinted in* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO SPEEDY TRIAL (approved draft 1968).

145. S. REP. No. 1356, 91st Cong., 2d Sess. 2, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4864.

146. *Id.*

147. *See* Memorandum from Ezra H. Friedman, Justice Dep't Legislations and Special Projects Section, to Philip T. White, April 21, 1977, at 33 [hereinafter cited as Memorandum] (copy on file with the *Vanderbilt Law Review*).

148. 3 W. BLACKSTONE, COMMENTARIES *129 (1803).

Writ" of habeas corpus ad subjiciendum,[149] commonly reduced to "habeas corpus," which is used to bring a prisoner into court in order to inquire into the legality of his confinement. Blackstone described several other species of writs, among them the writs of habeas corpus ad prosequendum and ad testificandum, "which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed."[150] In the United States, section 14 of the First Judiciary Act of 1789[151] defined the jurisdiction of the courts of the United States to issue writs of habeas corpus. The Judiciary Act's provisions were first construed by Justice Marshall in 1807,[152] who emphasized the necessity of an express grant of power to issue the writs: "for the meaning of the term *habeas corpus,* resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law."[153]

The leading modern decision on federal habeas corpus, *Carbo v. United States,*[154] dealt with the current statutory authority for issuance of writs of habeas corpus:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . . .
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or . . .
> (5) It is necessary to bring him into court to testify or for trial.[155]

The issue in *Carbo* was whether the limitation that writs of habeas corpus could be issued by judges only "within their respective jurisdictions"[156] meant that a district court had no authority to issue a writ of habeas corpus ad prosequendum directed to a prison official outside the court's territorial jurisdiction. Following the lead

149. *Id.* at *131.
150. *Id.* at *130.
151. Act of Sept. 24, 1789, 1 Stat. 73. Section 14 provided in relevant part:

> [T]he courts of the United States, shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions. . . . [W]rits of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Id. at 81-82 (footnote omitted).
152. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).
153. *Id.* at 93-94.
154. 364 U.S. 611 (1961).
155. 28 U.S.C. § 2241 (1970).
156. *Id.* at § 2241(a).

of Justice Marshall, the Court initially examined the common law practice and usage of such writs, noting that their purpose was to secure the presence of prisoners in the proper jurisdiction for trial.[157] It then explored the legislative history behind the present statute and determined that the limiting words "within their respective jurisdictions" applied only to the power to issue writs of habeas corpus ad subjiciendum.[158] To permit judges to issue writs on behalf of petitioners far removed from the court would be inconvenient, expensive, embarrassing, and unnecessary. On the other hand, such power was essential for the writ of habeas corpus ad prosequendum in order to bring a defendant to the proper jurisdiction for trial.[159] Furthermore, the Court found that the drafters of the amendments giving the statute its present form disclaimed any intent to change the substantive law on habeas corpus.[160] Thus, the Court interpreted the habeas corpus statute in a different manner than its language, taken on its face without reference to the nature and purpose of the various writs, would indicate.

The *Carbo* Court specifically declined to consider the question whether a federal writ is mandatory upon state officials.[161] Ordinarily, the custodian state's official delivers the prisoner pursuant to the federal writ as a matter of comity, and the question never arises.[162] State courts, of course, have never had the power to compel production of prisoners from other states or from federal custodians.[163] Prior to enactment of the Interstate Agreement on Detainers, formal extradition was required. Some courts have assumed in dicta that a federal writ cannot compel production of a state prisoner and that the process works only as a matter of comity.[164] The principle of comity was used primarily as a means of denying a prisoner standing to challenge federal transfers pursuant to the writ just as it was used to deny prisoners the right to a speedy trial prior to *Smith v. Hooey*.[165] Persuasive authority, however, supports the proposition that since the supremacy clause makes section 2241[166]

157. 364 U.S. at 614-15.

158. *Id.* at 618-19.

159. *Id.* at 617.

160. *Id.* at 619.

161. "In view of the cooperation extended by the New York authorities in honoring the writ, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation." *Id.* at 621 n.20.

162. *Id.* at 621.

163. *See* Abelman v. Booth, 62 U.S. (21 How.) 506 (1858).

164. *See* Derengowski v. United States Marshal, 377 F.2d 223 (8th Cir. 1967).

165. 393 U.S. 374 (1969); *see* Wzesinski v. Amos, 143 F. Supp. 585 (N.D. Ind. 1956). *See also* United States v. Oliver, 523 F.2d 253, 258 (2d Cir. 1975).

166. *See* text accompanying note 155 *supra*.

the supreme law of the land, a state official is required to turn over a prisoner if so ordered by a federal writ.[167] Because federal courts have the power to compel the release of a prisoner from state custody without dependence on comity, the supremacy of federal law requires obedience by state authorities to a federal writ.[168]

Thus, while the United States occasionally lodged detainers against state prisoners, it typically relied upon the federal writ of habeas corpus ad prosequendum[169] to obtain prisoners for trial. No mention of the writ is found in the legislative history of the Agreement on Detainers and no concern for the Agreement's effect on it surfaced until 1975 when the decisions in *United States v. Mauro*[170] exploded the "time bomb" that had lain dormant since federal adoption of the Agreement five years earlier.[171] The following section will examine the appellate decisions construing the Agreement as applied to the United States. Analysis will focus on the courts' treatment of the previously mentioned characteristics of the United States[172] that distinguish it from a state for purposes of the Agreement.

B. Federal Case Law Construing the Agreement

(1) The Second Circuit's Interpretation: *Mauro, Ford, Chico*

The *Mauro* case, although not the first appellate decision to consider the federal government's role as a "receiving state" under

167. *See Ex parte* Royall, 117 U.S. 241, 249 (1886); United States v. Mauro, 544 F.2d 588, 596-98 (2d Cir. 1976), *cert. granted,* 434 U.S. 816 (1977).

168. Where there is state imprisonment and a pending federal prosecution there is, clearly, no place for the principle of 'comity'. . . . [T]hat authority holding that the writ of habeas corpus ad prosequendum is not mandatory is erroneous, since the statutory writ is the supreme law of the land and the imprisoning state has no choice but to yield the prisoner, anything in its law to the contrary notwithstanding.

Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial,* 35 U. CIN. L. REV. 179, 191-92 (1966).

169. Section 2241 also authorizes writs of habeas corpus ad testificandum, used to bring prisoners to testify in federal court. The *Carbo* Court specifically declined to rule whether such a writ has extraterritorial effect, and many lower courts have held that a district court lacks authority to compel production of a prisoner incarcerated outside its district to testify, at least in civil cases. Clark v. Hendrix, 397 F. Supp. 966 (N.D. Ga. 1975); Silver v. Dunbar, 264 F. Supp. 177 (S.D. Cal. 1967). Several cases prior to *Carbo* indicated that the writ did have extraterritorial effect. *See In re* Thaw, 166 F. 71 (3d Cir. 1908); Underwood v. Maloney, 15 F.R.D. 104 (N.D.N.Y. 1954). The Seventh Circuit recently reversed its prior rule and held that the district court has the power to compel production of prisoner-witnesses from anywhere in the United States through use of the writ. Stone v. Morris, 546 F.2d 730 (7th Cir. 1976).

170. 544 F.2d 588 (2d Cir. 1976), *cert. granted,* 434 U.S. 816 (1977).

171. [1978] 22 CRIM. L. REP. (BNA) 4216 (summary of oral argument before the Supreme Court).

172. *See* text accompanying notes 143-44 *supra.*

the Agreement,[173] was the first to hold that the use of the federal writ of habeas corpus ad prosequendum sufficed to invoke the Agreement. Two defendants indicted on federal charges while in New York state prisons[174] were brought to federal district court pursuant to a writ of habeas corpus ad prosequendum for arraignment. After setting trial dates, the district court[175] ordered the defendants to be returned to state custody because of the crowded condition of the federal detention facility. Thereafter, each defendant moved for dismissal, claiming violation of article IV(e). The district court granted the motions and dismissed the indictments.[176] Affirming the dismissal, two members of the panel[177] held that writs of habeas corpus ad prosequendum constitute detainers under the Agreement,[178] reasoning that "[a]ny other construction would permit the United States to evade and circumvent the Agreement by simply utilizing the traditional writ."[179]

Arguing that the Agreement was not intended to regulate the writ of habeas corpus ad prosequendum, the government contended that article IV's proviso permitting the governor of the sending state to disapprove the receiving state's request for temporary custody excluded the federal writ, a mandatory court order;[180] that the writ,

173. The first federal appellate decision to discuss the applicability of the Agreement to the federal government as a "receiving state" was United States v. Ricketson, 498 F.2d 367 (7th Cir. 1974). The state prisoner was taken to federal court pursuant to the writ for pretrial motions, then returned to state custody. Without discussion of the possibility that a writ of habeas corpus ad prosequendum by itself could invoke the Agreement, the court rejected the prisoner's article IV(e) claim on the ground that no detainer had been lodged until after these pretrial transfers occurred. Nor did the court discuss whether the writ constituted a "request" under article IV, although it assumed that it did. The court expressly declined to consider whether the Agreement is the exclusive means of transfer:

> We only note that it appears that the United States Attorney never intended to make a request under the Agreement in 1972; he wanted custody of defendant for short periods for particular purposes, but it clearly was not contemplated in March, May or July 1972 that defendant would be held in federal custody until tried.

Id. at 373.

174. The defendants were charged with criminal contempt for refusal to testify before a federal grand jury.

175. Judge Bartels of the Eastern District of New York was the presiding judge.

176. It was in effect Judge Bartels who violated IAD by ordering defendants' return to state custody, then dismissing the indictments. Additionally, the government had argued that defendant Fusco waived his rights under article IV(e) by requesting the return to state prison. The court rejected this contention on the ground that, as a request to *remain* in federal custody made by another prisoner had been denied due to overcrowded conditions, "it would have heen futile for Fusco to make the same request before the same judge." 544 F.2d at 591 n.3. *See* text accompanying notes 136-40 *supra* for state views on prisoner waiver.

177. Anderson and Mulligan were the memhers affirming the dismissal.

178. No federal warrants or other notification apparently had been lodged.

179. 544 F.2d at 592.

180. *Id.* at 592 & n.5.

executed immediately, does not adversely affect rehabilitation;[181] and that to equate the writ with a detainer would repeal the federal statute authorizing writs of habeas corpus, an improper result absent specific legislative intent.[182] The government further contended that the United States adopted the Agreement only as a sending state.[183] The court rejected the government's interpretation, indicating that compliance with the writ is solely a matter of comity,[184] that the Agreement was intended to be the exclusive means of transferring a prisoner from one party state to another for trial,[185] and that the habeas writ would not be repealed since resort to the writ still was necessary for transferring prisoners from non-member states.[186] Rejecting also the government's attempt to distinguish the writ from a detainer, the court stated that the uncertainties inherent in the federal trial and sentencing obviously affected defendants' ability to participate in rehabilitation programs.[187] Because the Agreement was desigued to prevent prisoners from being "shuttled back and forth" between the two jurisdictions, the court reasoned, "[t]he disruptive effect upon the prisoner's morale is the same irrespective of the caption on the paper which produces him in the jurisdiction seeking him for trial."[188] Finally, the court rejected the government's contention that the United States adopted the Agreement only as a sending state.[189]

Judge Mansfield's dissent stressed the significant functional and legal differences between the writ and a detainer.[190] The primary purpose of the Agreement, he noted, was to prevent loss of privileges, ineligibility for rehabilitation and work programs, and other detrimental effects of a detainer that usually lasted the duration of a prisoner's sentence.[191] The writ, according to Judge Mansfield, "has never had any such prejudicial consequences for the prisoner; it is executed at once and, upon return of the prisoner to

181. *Id.* at 592-93.

182. *Id.* at 594.

183. *Id.*

184. *Id.* at 592 & n.5.

185. The court based its holding on United States *ex rel.* Esola v. Groomes, 520 F.2d 830 (3d Cir. 1975), which concerned a *state* writ of habeas corpus ad prosequendum. *See* text accompanying notes 67-82 *supra*.

186. 544 F.2d at 594.

187. *Id.* at 592-93.

188. *Id.* at 593. The court appears oblivious to the fact that tbe uncertainties referred to were likely to exist regardless of whether the defendants were in state or federal custody and that in federal custody, they would probably not be able to participate in work or treatment programs.

189. *Id.*

190. *Id.* at 595 (Mansfield, J., dissenting).

191. *Id.* at 596.

the state institution, it does not remain outstanding against him as would a detainer. Thus the writ is wholly unrelated to detainers or their prejudicial consequences."[192] Article IV, he reasoned, was meant to allow states to obtain custody of prisoners held by the federal authorities or by another state by means that previously did not exist.[193] He noted that the sanction of dismissal was to assure that the state, "after obtaining the detained prisoner merely upon request, will not abuse that privilege by returning him untried, since this would have the effect of reinstating and indefinitely prolonging the detainer . . . with its detrimental effects."[194] The dissent argued that eliminating the harmful effects of the detainer is the motivating force of the Agreement; because a writ of habeas corpus ad prosequendum does not entail any of the consequences of a detainer, the Act is not invoked by its issuance.[195] Judge Mansfield also noted that the Senate Judiciary Committee Report on the Criminal Justice Reform Act of 1975 (S-1)[196] stated that Congress had not intended to limit the scope and applicability of the writ in enacting the federal version of the Agreement in 1970. While the majority gave little weight to expressions of intent of a subsequent Congress, the dissent noted that twelve of the fifteen members of the 1975 committee that issued the S-1 report also were members of the committee that recommended adoption of the Agreement in 1970.[197]

In the next Second Circuit decision construing the Agreement Judge Mansfield wrote for the majority. The defendant in *United States v. Ford*[198] was in a Massachusetts prison when the United States obtained a writ of habeas corpus ad prosequendum to bring him to federal district court in New York. When the government was granted a continuance, the defendant upon his request was returned to Massachusetts. After a 17 month delay, a second writ issued and defendant returned to federal court for trial and moved for dismissal

192. *Id.* at 596-97.

193. *Id.* at 597.

194. *Id.*

195. *Id.*

196. The Committee stated that the Agreement:

> has been amended to clarify the intent of Congress by providing that the Federal Government is a participant in the Agreement only in the capacity of sending state. Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. § 2241(c)(5), the Federal writ of habeas corpus ad prosequendum. The Committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ.

S. REP. No. 94-00, 94th Cong., 1st Sess. 983-84 (1975).

197. Judge Mansfield distinguished the *Groomes* case, as a state writ has no extraterritorial effect and could thus only function as a detainer.

198. 550 F.2d 732 (2d Cir. 1977).

under articles IV(e) and V(a).[199] In contrast to the situation in *Mauro,* the government in *Ford* conceded that a detainer had been filed prior to issuance of the writ but argued that the writ did not constitute a "request for temporary custody" under article IV.[200] Such a construction, argued the government, would repeal by implication the habeas corpus statute.[201] Judge Mansfield, who had dissented in *Mauro,* found no difficulty in applying the Agreement here because a federal detainer had been lodged against the defendant for years.[202] Addressing the argument distinguishing a "request" from a federal writ, the court refused to

> take a hypothetical and possibly non-existent conflict between a minor provision of the Act which relates to transfer mechanics [permitting the governor to disapprove a request] and prior federal law (28 U.S.C. § 2241) and to use it as the touchstone for an interpretation of the rest of the Act that would vitiate its operation insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ. This, in turn, would substantially impair the operation of the Agreement as a whole, since federal detainers form a large percentage of all detainers outstanding.[203]

The court emphasized the need for uniformity and a comprehensive and coherent solution to the problems of detainers.[204] Although the court held that the prisoner waived his right to dismissal under article IV(e) by requesting the return to state prison,[205] and that the purpose of preventing interference with rehabilitation would not be served by requiring continuous federal custody, it nonetheless ordered dismissal based on article V(c), violation of the 120 day limit.[206] The court found that although some of the requested continuances were reasonable and necessary, thereby justifying extension of the time limit, other delays were not properly granted,[207] leaving dismissal of the indictment the only possible remedy.

A third Second Circuit case reflects a desire to limit the applicability of the Agreement. In *United States v. Chico,*[208] the defendants, serving state sentences in Connecticut, were indicted by a federal grand jury in Connecticut, brought to federal district court for arraignment, then immediately returned to state prison. Later

199. *Id.* at 735-36.
200. *Id.* at 736.
201. *Id.* at 737.
202. *Id.* at 741.
203. *Id.* at 742.
204. *Id.* at 741.
205. Compare the *Mauro* court's attitude, *supra* note 176.
206. 550 F.2d at 743.
207. The improper delay actually was caused by the trial judge, who, the court said, should have reassigned the case to another judge if his own calendar was full.
208. 558 F.2d 1047 (2d Cir. 1977).

both pleaded guilty and were placed on probation upon their release from state custody.[209] On a subsequent charge of violation of that probation, defendants argued that the government had violated article IV(e) by returning them to state prison after arraignment and before trial.[210] Rejecting their claim, Judge Mansfield found that article IV(e) does not apply when a prisoner is removed from prison for a few hours to appear in federal court without ever being held at any place of imprisonment other than that of the sending state.[211] As in *Ford,* Mansfield again refused to hold that a writ is a detainer, distinguishing *Mauro* and *Ford* on the ground that the defendants in *Chico* were never imprisoned by the receiving state.[212] Additionally, he noted that neither their physical presence nor the rehabilitation program at the state institution had been interrupted.[213] The court found support for its holding in article IV(e), which refers to the prisoner's return " 'to the *original* place of imprisonment' [which] . . . necessarily implies removal *to another* place of imprisonment in the receiving state."[214] The court held that bringing a prisoner to federal court for "short, discrete appearances," at least when the prisoner's state incarceration is not interrupted, does not invoke the Agreement.[215]

(2) Opposition to *Mauro*

The First, Fifth, and Sixth Circuits have announced their opposition to the Second Circuit's interpretation of the federal role under the Agreement. The first appellate decision to hold that a writ of habeas corpus ad prosequendum is neither a detainer nor a request under article IV was *United States v. Scallion.*[216] Scallion, a New York state prisoner, was sent to the federal district court in Louisiana pursuant to a federal writ of habeas corpus ad prosequendum.[217] While awaiting trial in Louisiana, he returned to New York

209. *Id.* at 1048.

210. *Id.*

211. *Id.* at 1049.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* The court did not reach the issue of the effect of a guilty plea on IAD rights. *See* Strawderman v. United States, 436 F. Supp. 503 (E.D. Va. 1977) (voluntary guilty plea waives rights). *See also* text accompanying notes 262-64 *infra.* In the most recent Second Circuit decision concerning the Agreement, Edwards v. United States, 564 F.2d 652 (1977) (per curiam), the court did not reach the substantive issues, which included the effect of a guilty plea, the fact that the defendant was not "serving a term of imprisonment," and the *Chico* issue. The panel chose to affirm denial of the claim on the ground that an IAD claim is not cognizable under 28 U.S.C. § 2255 (1970). *Id.* at 653.

216. 548 F.2d 1168 (5th Cir. 1977).

217. *Id.* at 1169-70. Defendant was actually in California at the time the writ was issued for trial on federal charges. Government's Brief at 3.

at his own request to attend a parole hearing and moved for dismissal under articles IV(e) and IV(c).[218] The court held that the Agreement does not govern transfers under the federal writ because of the functional and legal differences between the detainer and the writ.[219] Emphasizing the judicial character of the writ, the court stated:

> The writ of haheas corpus ad prosequendum issued hy a federal district court is an order commanding the production of a prisoner promptly or by a specified date . . . whereas a detainer is merely a notice that the prisoner is wanted to face pending criminal charges and requires further process . . . before the prisoner is turned over.[220]

The court found that preserving the writ as an alternative means of transfer was reasonably compatible with the purpose of the Agreement, which concerns the abuse of detainers rather than problems with the judicial writ.[221]

The Sixth Circuit articulated a similar rationale in *Ridgeway v. United States,*[222] when a prisoner was taken from a Michigan state prison to federal court in the same state several times pursuant to a federal writ. The government had lodged no detainer against the prisoner.[223] Holding that a writ of habeas corpus ad prosequendum could not be equated with a detainer, the court emphasized the informal nature of the detainer as well as its profound effect on the prisoner's institutional life, an effect not produced by the writ.[224] Additionally, the court observed that the writ, which can be issued only by a federal court, is executed immediately, unlike a detainer, which is filed by police or prosecutor and can affect the prisoner's institutional life for many years.[225] The court agreed with the government that Congress did not intend to repeal by implication the habeas corpus statute, as such an interpretation violates fundamental rules of statutory construction.[226] Because both statutes serve distinct purposes, the court preferred to reconcile them, especially since the legislative history of the Agreement does not mention the writ of habeas corpus ad prosequendum.[227] In *United States v.*

218. *Id.* at 1170.
219. *Id.* at 1173.
220. *Id.* at 1173.
221. The court said that the Agreement provides *a* method not the only method. *Id.* at 1171. *See* S. REP. No. 1356, 91st Cong., 2d Sess. 2, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4864, 4865.
222. 558 F.2d 357 (6th Cir. 1977).
223. *Id.* at 358-59.
224. *Id.* at 362. *See* text accompanying notes 11-20 *supra.*
225. 558 F.2d at 362.
226. *Id.*
227. *Id.*

Eaddy,[228] the court remanded the case for determination whether a detainer had been lodged, holding that transfer of the defendant solely by writs of habeas corpus ad prosequendum did not invoke the Agreement.[229] Thus the Sixth Circuit appears to agree with Judge Mansfield's position in *Ford* and *Mauro* that the triggering event is the lodging of a detainer, not the use of the writ.

In *United States v. Kenaan*,[230] the First Circuit joined the Fifth and Sixth Circuits, holding that in the absence of a detainer, a federal writ does not invoke the Agreement. The court repeated the theme of *Scallion* and *Ridgeway* that the writ has never been associated with the problems common to detainers and with the difficulty of transfer between states.[231] Responding to the argument that article IV will be rendered meaningless if the writ is not governed by the Agreement, the court emphasized judicial control of the writ:

> The writ and the actions taken pursuant thereto being under the control of the issuing court, we are confident that the court will be alert to, and fully empowered to forestall, potential abuse of the writ. Second, any concern over potential delay-in-trial abuses by the federal government are further diminished by the provisions of the federal Speedy Trial Act of 1974.[232]

The court also gave great credence to the implied repeal argument,[233] noting that the court's duty is to interpret seemingly inconsistent statutes in order to allow both to operate harmoniously.[234]

(3) The Third Circuit's Approach

The Third Circuit has given *Mauro* its broadest application, rejecting both the views of the First, Fifth, and Sixth Circuits that a federal writ is not a detainer and the Second Circuit's limitation in *Chico*. In *United States v. Sorrell*,[235] a federal writ of habeas corpus ad prosequendum brought the defendant from a Pennsylvania prison to federal district court in Philadelphia for arraignment on federal charges. He was returned to prison prior to trial[236] and moved to dismiss the federal charges under article IV(e). The Third Circuit affirmed the trial court's dismissal of the indictment, holding that the writ was both a detainer and a request for temporary

228. 563 F.2d 252 (6th Cir. 1977).
229. *Id.* at 255-56.
230. 557 F.2d 912 (1st Cir. 1977).
231. *Id.* at 916.
232. *Id.* at 917 (citations omitted).
233. *See* text accompanying note 227 *supra*.
234. 557 F.2d at 917.
235. 562 F.2d 227 (3d Cir. 1977).
236. *Id.* at 228-29. A second writ issued and defendant requested a continuance. When the third writ brought him to court, defendant moved to dismiss. *Id.* at 229.

custody under the Agreement.[237] Relying on the *Groomes* interpretation that the Agreement was intended to prevent interference with rehabilitation,[238] the court rejected the government's attempts to distinguish the writ from proceedings under the Agreement[239] and its attempt to distinguish *Groomes* on its facts. The government had argued that while the prisoner in *Groomes* had been transferred nine times between two states and had waited nine months for trial, the defendant in *Sorrell* was not "shuttled back and forth between different states . . . ."[240] The court, however, refused to distinguish between the case in which a prisoner is brought to federal court for arraignment and immediately returned to his home prison a short distance away[241] and the situation in *Groomes*, in which the defendant's original place of imprisonment is in another state. The court thus concluded that article IV(e) applies without exception whenever a detainer has been lodged.[242] In reaching this conclusion, the court injected a new policy consideration into the article IV(e) problem, noting that returning defendant to the state prison impeded his ability to consult with counsel, a result "inconsistent with the remedial purposes and plain statutory language of the Detainer Agreement."[243]

The access-to-counsel rationale was repeated in *United States v. Thompson.*[244] In *Thompson,* the defendant was serving a state sentence in a Philadelphia state prison desiguated as a federal detention facility.[245] Thus, had the federal authorities retained custody of the defendant, in technical compliance with the Agreement, the defendant could have remained in the same institution. The court dismissed the indictment for failure to make this paper change of custody, on the ground that because the prisoner "was not as available to his counsel . . . as he would have been if the federal authorities had retained custody of him during this period, we cannot say that the failure to comply . . . is so insubstantial that . . . article

237. *Id.* at 231.

238. *See* text accompanying notes 67-81 *supra.*

239. The Government argued, *inter alia,* that procedures under the Agreement are to be invoked by the executive branch; the district court here issued the writs on its own motion without resort to the Agreement. Government's Brief at 4.

240. *Id.* at 2.

241. Gratorford Prison, where defendant was imprisoned, is approximately 35 miles from Philadelphia. 562 F.2d at 229 n.3.

242. An ironic aspect of *Sorrell* is that if the defendant had remained in federal custody from the time of arraignment until trial, he would have been kept in a state prison, as there was no federal facility in eastern Pennsylvania. *Id.*

243. *Id.* at 232.

244. 562 F.2d 232 (3d Cir. 1977).

245. *Id.* at 233-34.

IV(e) . . . should not be applied according to its terms."[246] Straining to find some benefit that would accrue to the prisoner by remaining, at least on paper, in federal custody, the court noted that if Thompson had remained in federal hands, the United States Marshal could have brought him "to a place of easy accessibility to his lawyer."[247] The court did not consider that Thompson conceivably might have been sent to one of six state prisons[248] designated for federal use—some much farther away from the federal court—and thus might have been much less accessible to counsel. One question that arises from the court's analysis is why the court tried so hard to find some prejudice to the prisoner due to his return to state custody if the Agreement is to apply without exception. The court's endeavor to find actual prejudice in this case suggests that the government should argue that minor technical violations of the Agreement constitute harmless error not requiring dismissal.

Two judges filed dissenting opinions from the *en banc* majority opinions in *Sorrell* and *Thompson*. Judge Weis stressed the problems of applying language designed for states to the federal government. For example, the provision that trial shall begin within 120 days of the prisoner's arrival in the receiving state is clear when applied to transfers from one state to another. Confusion arises, however, when the prisoner is transferred from a state prison to a federal court in the same state, since the prisoner has been in the United States, the receiving state, continuously.[249] If the Agreement is to apply to such a transfer, the court must interpret "receiving state" to mean custody of the United States. If read literally, however, the statute could not be enforced against the United States.[250] Judge Weis persuasively argued that "[t]o read the ambiguous and superficially considered Agreement as constricting the power which has been exercised by the federal courts for almost two hundred years is a questionable solution to a perplexing problem."[251] Retain-

246. *Id.* at 234.

247. *Id.*

248. *See* United States v. Sorrell, 562 F.2d 227, 229 n.3 (3d Cir. 1977).

249. 562 F.2d at 232, 235.

250. *Id.* Examples abound of terms that cannot be applied to the United States as a "state." Judge Weis noted that article V(h) provides that "responsibility for the prisoner rests with the receiving state from the time 'a party State receives custody. . .until such prisoner is returned to the *territory and custody* of the sending State. . . .' Where the prisoner is transferred from a federal institution to a state, he has never left the United States." *Id.* Similarly, if arrival in the receiving state is interpreted as custody of the federal government, then ambiguity arises in article V(g): "For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State. . . ."

251. 562 F.2d at 236.

ing the writ as an alternate method of transfer "would not defeat the primary aims of the Agreement—to permit the prisoner and authorities to obtain speedy disposition of outstanding detainers and prevent unnecessary interruptions to rehabilitative programs."[252] Applying the Agreement in *Sorrell* would actually result in a longer disruption of the state rehabilitative program since the prisoner would have to remain in a facility that does not offer work or rehabilitation programs.[253]

Judge Garth dissented also, joining in Judge Weis' conclusion that "in adopting the Interstate Agreement Congress has attempted to fit a square peg into a round hole,"[254] and arguing that the legislation could never have been passed without opposition had such a result been intended.[255] The only permanent solution is legislative amendment, but until then Judge Garth suggested applying article IV(e) only when state lines are crossed during the transfer.[256] His solution thus would subject the federal writ to the Agreement only when the state prisoner is sent to a federal court outside the sending state.

V. Comment and Proposal

The serious problems associated with the federal role as a "state" under the Agreement are rooted in the drafters' failure to explore fully the consequences of providing for federal participation in the Agreement as a means of resolving state problems. Congress had the opportunity to study the probable effect of the Act on federal procedures, but appears to have been oblivious to the possible impact of article IV on federal indictments. One explanation, frequently advanced by the federal government and consistently rejected by the courts,[257] is that Congress intended to adopt the Agreement with the United States acting only as a "sending state." No evidence in the legislative history supports this view, although a later Senate committee composed primarily of members of the original committee recommending adoption of the Agreement indicated that such was the original intent.[258] In reality, the federal role simply

252. *Id.*

253. *Id.* at 237.

254. *Id.* at 236.

255. *Id.* at 239.

256. *Id.* at 245. Thus article IV(e) would apply to federal-state transfers only when they have the same characteristics as comparable state-state transfers: (1) state boundaries are crossed; (2) a prisoner confined for violating the laws of one jurisdiction; (3) the prisoner is returned to an institution of the same jurisdiction as the one from which he was taken.

257. Even courts that have found for the government on other grounds have rejected the sending-state argument. *See* United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977).

258. *See* text accompanying notes 196-97 *supra*. S-1, which was never passed, would

was not studied thoroughly, and thus little evidence of the true congressional intent can be gleaned from the legislative history.

Forced to fit a square peg into a round hole, the courts have proposed several interpretations of the Agreement pending legislative amendment.[259] One approach, adopted by the Third Circuit, is to make the Agreement the exclusive means of transfer for the purpose of prosecution.[260] This method has the advantages of certainty and predictability once the prosecuting authority knows that it must proceed under the Agreement. Problems arise, however, if this interpretation is applied retroactively to transfers occurring before the government was aware of the Agreement's broad application. The scope of the problem depends upon whether a prisoner must raise an IAD claim at trial, or whether he may raise the issue for the first time on appeal or through collateral attack.[261] The Sixth Circuit has held that a prisoner may raise the claim on appeal if the government does not demonstrate that he has "slept on his rights" below.[262] The Third Circuit, replying to the argument that its broad interpretation of the Agreement would result in the vacation of hundreds of otherwise valid convictions,[263] has stated that the claim must be advanced at the trial level or it is deemed waived.[264]

Even if the Agreement is not applied retroactively, disadvantages exist that outweigh the benefits of a broad application. First, requiring the prisoner to remain in federal custody from arraignment through trial may be of little benefit and may actually hinder the state rehabilitation program. Many prisoners probably would prefer to be returned to the work, treatment, and training opportunities of the state institution rather than remain in a federal detention center. Additionally, if the state prison is used for federal detention, the Agreement penalizes too harshly the failure to transfer paper custody of the prisoner. The Justice Department has indicated that total compliance will be expensive and will contribute to the overcrowding of federal facilities.[265] Considering the dubious

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have limited the federal role to that of a sending state only, thus preventing state prisoners from disposing of federal detainers under article III. The Criminal Justice Reform Act of 1976 has modified this amendment, treating the United States as both a receiving and sending state under article III and as a sending state only for article IV.

259. *See, e.g.*, United States v. Thompson, 562 F.2d 232, 244 (3d Cir. 1977) (Garth, J., dissenting).

260. The courts have consistently rejected claims attempting to regulate the writ of habeas corpus ad testificandum by the Agreement. *See* Adams v. United States, 423 F. Supp. 578 (E.D.N.Y. 1976); United States v. Evans, 423 F. Supp. 528 (S.D.N.Y. 1976).

261. *See, e.g.*, United States v. Cyphers, 556 F.2d 630 (2d Cir. 1977).

262. United States v. Eaddy, 563 F.2d 252, 255 (6th Cir. 1977).

263. United States v. Sorrell, 562 F.2d 227, 231 (3d Cir. 1977).

264. *Id.*

265. Memorandum, *supra* note 147, at 39.

benefit of article IV(e) for most prisoners, a more practical and realistic solution would be to charge the government with violation of its article IV(e) duty only if the prisoner has requested and been denied the right to remain in federal custody, or if actual prejudice results from the return to state prison prior to trial.

A further disadvantage of applying IAD broadly is that, carried to its logical extreme, article IV could be construed to require trial on all federal indictments prior to the prisoner's return to the original place of imprisonment.[266] For example, if a state prisoner wanted on federal bank robbery charges in several states is taken for arraignment to one of the federal districts and then returned to state prison, he conceivably could attack all pending federal indictments, since he was not tried on them prior to his return to the original place of imprisonment and the United States is treated as one state under the Agreement.[267] Although the Agreement was not intended to aid a prisoner in obtaining dismissals of charges, an overly strict and literal interpretation will have this effect.[268]

The more moderate approach of the Second Circuit, illustrated by the *Chico* case,[269] refuses to apply the Agreement when the defendant has been brought to federal court only for "short, discrete appearances" and has not been imprisoned away from the original place of imprisonment.[270] This interpretation of the Agreement prevents abuse of the writ, since the prisoner cannot be freely shuttled back and forth between jurisdictions and the state rehabilitation program is not interrupted. On the other hand, the government is not forced into technical compliance with the Agreement that does not benefit the prisoner. The approach is deficient in several respects, however, sacrificing predictability and certainty, generating litigation, and forcing individual evaluation of each case. What if the defendant remains overnight in federal custody before his return to state prison? Must the state institution and the federal court be in the same city, or the same state? Judge Weis' dissent in *Sorrell* and *Thompson*[271] modified the *Chico* approach by applying the Agreement to federal transfers only when state lines are crossed. This interpretation permits predictability, but has no basis in the Agreement itself and does not deal with the fundamental differences

266. *See* text accompanying note 113 *supra*.

267. IAD, art. II.

268. *See* Brant v. United States, No. 77-160 (W.D. Pa. March 24, 1977) (the prisoner made this argument, but his claim was never decided as he was killed while attempting to escape from the federal penitentiary in Atlanta, Georgia).

269. 558 F.2d 1047 (2d Cir. 1977). *See* text accompanying notes 206-13 *supra*.

270. 558 F.2d at 1048.

271. *See* text accompanying notes 249-57 *supra*.

between the federal writ and the detainer.[272]

The foregoing approaches fail to accommodate reasonably the conflicting needs of the prisoner, whose rehabilitation must not needlessly be interrupted, the prosecutor, who needs to know what procedures to follow, and the court, which must not be inundated with litigation. The optimum interpretation of the Agreement would conform to present congressional intent, retaining intact the writ of habeas corpus ad prosequendum yet permitting the prisoner to challenge abuse of the writ and interference with his rehabilitation. Since Congress in the Criminal Justice Reform Act of 1976 has expressed an intent to exclude the United States from the Agreement as a receiving state under article IV,[273] the best solution is to effectuate that intent by applying article IV only to transfers "made possible" by that article, as the Agreement itself provides.[274] Writs of habeas corpus ad prosequendum have their own statutory basis[275] and according to the better view must be obeyed by prison officials under the supremacy clause;[276] therefore, they should not be treated as proceedings made possible by article IV, irrespective of whether a detainer has been lodged. If a detainer has been lodged, a prisoner would still have the right under article III to request disposition of the underlying charges.[277] If the prisoner initiates the request, the 180 day limit of article III applies regardless of the method used to obtain the prisoner, because the prisoner clearly has invoked the Agreement and is entitled to its protection.[278] On the other hand, if the United States, on its own motion, seeks to try a prisoner and uses the federal writ, it should not be subject to requirements designed to regulate requests for custody made possible by the Agreement. When a detainer has been lodged, however, and the government abuses the writ by constantly transferring the prisoner, delaying trial, thereby prolonging the detainer, the prisoner should be able to invoke the Agreement's protection by requesting trial under article III. Once the prisoner requests trial, the time limits of article III apply.[279] This view restores the Agreement's original focus on the detainer, avoids needless requirements that do not benefit the prisoner, and retains the sanctions of the Agreement if the prisoner's

272. *See* text accompanying notes 190-94 *supra.*
273. S. 1437, H.R. 6869, 95th Cong., 1st Sess. (1977).
274. IAD, art. IV.
275. *See* text accompanying note 155 *supra.*
276. *See* text accompanying notes 166-68 *supra.*
277. *See* notes 44-45 *supra* and accompanying text.
278. *See* note 47 *supra* and accompanying text.
279. *See* notes 44-46 *supra* and accompanying text.

request is ignored.[280] Although the Agreement should not be construed narrowly to dilute its protection for the prisoner, neither should it be applied broadly to interfere with prosecutions when little potential for abuse exists and when neither the drafters nor Congress contemplated its application.[281]

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280. It is also in harmony with the federal Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1976), which deals with federal transfers of prisoners for trial without reference to the IAD provisions.

281. *See* note 273 *supra* and accompanying text.