The Effect of the Interstate Agreement on Detainers Upon Federal Prisoner Transfer

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Since 1976, five federal circuit courts have handed down conflicting opinions concerning the nature of and policies behind two legal instruments used to transfer prisoners from one jurisdiction to another—the detainer and the writ of habeas corpus ad prosequendum (the writ). A detainer, typically in the form of a hold order or warrant, is a notification by officials in the accusing jurisdiction to the incarcerating authorities that a prisoner is wanted to face charges. The jurisdiction which files a detainer requests that, upon completion of the prisoner's term, the prisoner will be available to the accusing officials for prosecution. The writ is a federal court order, now statutory in form, which authorizes a prisoner's immediate delivery for prosecution by federal authorities.

There was apparently no conflict between these two instruments until 1970,
FEDERAL DETAINER
when the United States became a party to the Interstate Agreement on Detainers (Agreement). The Agreement was designed to ameliorate the once debilitating plight of prisoners against whom detainers had been filed, by establishing cooperative and expeditious procedures to bring about a final disposition of the pending charges. The conflict among the circuits is whether the sanctions contained in the Agreement should apply to federal prosecutors' use of the writ. Since the Agreement makes no mention of the writ, it is unclear whether that instrument is to be classified as a detainer within the meaning of the statute.

The Second and Third Circuits have interpreted the scope of the Agreement to include the writ within its purview. They have stressed that since the writ is similar in function to a detainer and fosters many of the same abuses of detainer transfer which the Agreement was designed to prevent, the federal government should not be permitted to evade the sanctions of the Agreement when proceeding under the writ. The First, Fifth, and Sixth Circuits, on the other hand, have refused to classify the writ as a detainer under the Agreement. They argue not only that the writ and a detainer serve different functions, but also that the Agreement was enacted only to end certain abuses under the detainer system of prisoner transfer, none of which exist when a


7. The problems of sovereignty and expediency which arise when two or more state or federal jurisdictions want the same person were not present at common law. All persons convicted of a felony were immunized from subsequent prosecution, since the punishment for all felonies was death. Speedy Trial, supra note 2, at 828; see 4 W. Blackstone, Commentaries *335-36.


prisoner is transferred under a writ.\textsuperscript{13} In addition, they contend that there is no evidence that Congress, in adopting the Agreement, intended to repeal the statute under which the writ is issued and that to hold otherwise would violate the presumption against implicit repeal of statutes.\textsuperscript{14}

Prior to enactment of the Agreement, a detainer could remain on file for a substantial time before the prisoner would be transferred,\textsuperscript{15} thereby creating delays which could obstruct the defendant's rehabilitation.\textsuperscript{16} As a result, the prisoner might be subjected to such sanctions as automatic denial of parole and maximum security surveillance.\textsuperscript{17} In addition, the delay decreased the possibility that the prisoner, if convicted of the outstanding charge, could serve his new sentence concurrently with the old one.\textsuperscript{18} The prospect of another term of imprisonment coupled with the punitive measures already imposed upon the convict had understandably adverse effects on his ability and desire to participate in treatment programs.\textsuperscript{19}

The abuses to which detained prisoners were subject were often flagrant. In some instances, federal judges or prosecutors filed detainer warrants against state prisoners for the sole purpose of preventing parole, even though they had no genuine intention to prosecute the charges.\textsuperscript{20} "One prosecutor wrote that a convict could 'sit and rot in prison' rather than be brought promptly to

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  \item Ridgeway v. United States, 558 F.2d 357, 360-62 (6th Cir. 1977); United States v. Kenaan, 557 F.2d 912, 915-17 (1st Cir. 1977); United States v. Scallion, 548 F.2d 1168, 1171-73 (5th Cir. 1977).
  \item Ridgeway v. United States, 558 F.2d 357, 362 (6th Cir. 1977); United States v. Kenaan, 557 F.2d 912, 917 (1st Cir. 1977); see United States v. Scallion, 548 F.2d 1168, 1171-73 (5th Cir. 1977). Since almost all federal transfers are conducted pursuant to the writ, United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977), cert. granted, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 77-52), many federal defendants, under these three circuits' decisions, are denied the protection of the Agreement solely because of "the caption on the paper which produces [them]." United States v. Mauro, 544 F.2d 588, 593 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 76-1596).
  \item The Detainer, supra note 2, at 1192.
  \item Bennett, The Correctional Administrator Views Detainers, 9 Fed. Probation 8, 9 (Jul.-Sept. 1945); Speedy Trial, supra note 2, at 835-36; Convicts in Other Jurisdictions, supra note 3, at 767.
  \item Bennett, The Correctional Administrator Views Detainers, 9 Fed. Probation 8, 9 (Jul.-Sept. 1945); Heyns, The Detainer in a State Correctional System, 9 Fed. Probation 13, 13-14 (Jul.-Sept. 1945); The Detainer, supra note 2, at 835; Speedy Trial, supra note 2, at 835; Detainer System, supra note 3, at 537; Correctional Process, supra note 2, at 418-20; Convicts in Other Jurisdictions, supra note 3, at 767.
  \item Detainer System, supra note 3, at 537; Correctional Process, supra note 2, at 423; Convicts in Other Jurisdictions, supra note 3, at 767.
  \item Bennett, The Correctional Administrator Views Detainers, 9 Fed. Probation 8, 10 (Jul.-Sept. 1945); Heyns, The Detainer in a State Correctional System, 9 Fed. Probation 13, 14 (Jul.-Sept. 1945); Hincks, The Need for Comity in Criminal Administration, 9 Fed. Probation 3, 3-4 (Jul.-Sept. 1945); The Detainer, supra note 2, at 1192; Speedy Trial, supra note 2, at 835-36; Correctional Process, supra note 2, at 421-22; Convicts in Other Jurisdictions, supra note 3, at 767.
  \item Bates, The Detained Prisoner and His Adjustment, 9 Fed. Probation 16, 17 (Jul.-Sept. 1945).\end{itemize}
trial in the prosecutor's jurisdiction." Even where the jurisdiction which filed the detainer subsequently dropped the charges, the detainer would remain in force against the prisoner unless the accusing jurisdiction notified prison authorities that he was no longer wanted.22

While the writ, since it generally leads to prompt transfer, might not foster the same adverse effects on rehabilitation as did the detainer in the period before the prisoner is delivered, it might well impede rehabilitation in the post-transfer period.23 The prisoner's arrival in the accusing jurisdiction did not necessarily eliminate his anxieties over the possibility of prolonged incarceration.24 Also during this time, the prisoner might be shuttled between the two jurisdictions.25 This procedure also disrupted productive participation in treatment programs, many of which require the prisoner's constant physical presence.26 Moreover, the potential for inordinate delay before trial did not automatically disappear upon transfer.27

The provisions of the Agreement address both pre-transfer and post-transfer abuses. In the pre-transfer period its operation may be triggered by either the prisoner or the accusing jurisdiction. If a detainer has been filed, the convict has the right to demand trial on the underlying charges. If he exercises that right, trial must be held within 180 days of the demand.28 If, after filing a detainer, the prosecutor wishes to obtain custody of the accused, he must file a request with the incarcerating jurisdiction.29 After a thirty-day

24. *Id.* at 593.
27. But see the discussion of the Federal Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (Supp. V 1975), which creates statutory maximum periods within which trials of federal defendants must be held, at notes 171-78 infra and accompanying text.
28. Section 2, art. III(a) of the Agreement provides: "Whenever a person has entered upon a term of imprisonment in a penal or correctional instutution 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, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint . . . ." Agreement § 2, art. III(a), 18 U.S.C.A. app., at 231 (West Supp. 1977).
29. Section 2, art IV(a) provides: "The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: And
waiting period, during which the governor of the imprisoning jurisdiction may deny the request,\textsuperscript{30} transfer becomes mandatory.\textsuperscript{31} After the prisoner's arrival in the receiving jurisdiction, the post-transfer provisions of the Agreement require that he be tried within 120 days.\textsuperscript{32} Continuances beyond these time limitations are allowed for "good cause."\textsuperscript{33} However, if the prisoner is returned to the original place of imprisonment before trial or is not tried within the applicable period, the indictment, information, or complaint "shall not be of any further force or effect," and must be dismissed with prejudice.\textsuperscript{34} The Agreement concludes with the exhortation that it be "liberally construed so as to effectuate its purposes."\textsuperscript{35}

This Note will argue that, in the absence of Congress' express exclusion of the writ from the Agreement, it seems both sensible and just to classify that instrument as a detainer within the meaning of the Agreement. The functional differences between the writ and a detainer do not justify a refusal to subject federal prosecutors' use of the writ to the sanctions of the compact.\textsuperscript{36} The Agreement is designed to remedy the abuses faced by prisoners having outstanding charges in other jurisdictions.\textsuperscript{37} As will be seen, transfer under the writ can generate similar abuses.\textsuperscript{38} To allow the federal government to evade the sanctions of the Agreement simply by utilization of this alternative method of acquiring defendants is inconsistent with the Agreement's mandate that it be liberally construed,\textsuperscript{39} and allows perpetuation of the evils which it was created to forestall.\textsuperscript{40} This Note also argues that a judicial decision

\textit{provided further}, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner." Agreement § 2, art. IV(a), 18 U.S.C.A. app., at 232 (West Supp. 1977). The Second Circuit has held that the writ operates as both a detainer and a request within this provision. United States v. Mauro, 544 F.2d 588, 589-90, 592 (2d Cir. 1976), \textit{cert. granted}, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 76-1596); see United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977), \textit{cert. granted}, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 77-52).

30. Under the terms of the Agreement, the word " 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico." Agreement § 2, art. II(a), 18 U.S.C.A. app., at 230 (West Supp. 1977).

31. See note 29 supra.

32. Section 2, art. IV(c) provides: "In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State . . . ." Agreement § 2, art. IV(c), 18 U.S.C.A. app., at 232 (West Supp. 1977).

33. The good cause must be "shown in open court, the prisoner or his counsel being present . . . ." Agreement § 2, arts. III(a), IV(c), 18 U.S.C.A. app., at 231, 232 (West Supp. 1977).


36. See pt. II(B) infra.


38. See pt. II(B) infra.


recognizing the inclusion of the writ within the Agreement will probably be
given prospective effect only, and that prisoners will receive no right
to attack their convictions collaterally on the basis of the Agreement. This
should dispel any concern that such a decision will result in the release of
large numbers of federal convicts who have been transferred pursuant to the
writ in unwitting violation of the Agreement.

This Note is divided into two parts. The first is an examination of the
controversy in the circuits, and is subdivided into three areas of discussion:
(a) an attempt to ascertain whether Congress intended that the writ be
included as a detainer within the meaning of the Agreement; (b) an analysis
of the theoretical and functional differences between the two instruments;
and (c) a study of the abuses fostered by each, as they relate to the purposes of
the Agreement.

The second part proceeds on the assumption that the position which will
ultimately prevail is that of the Second and Third Circuits—that the writ
must be classified as a detainer within the Agreement. This part will analyze
the issues of retroactivity and collateral attack, as they relate to those
decisions.

II. **Classification of the Writ as a Detainer**

A. **Legislative History of the Agreement**

The circuit courts are split on the issue of whether Congress intended, by
enacting the Agreement, to repeal or modify the earlier statute which granted
to federal courts the power to issue the writ. If this was Congress' design,
then the Agreement may be characterized as the "exclusive means of effecting
a transfer" of prisoners to federal jurisdictions for prosecution. The legisla-
tive history prior to the Agreement's enactment, however, provided little
guidance on this question, since it made no reference to either the writ or the
exclusive nature of the Agreement. The courts then resorted to several

3214-15 (U.S. Oct. 4, 1977) (No. 76-1596); United States *ex rel. Esola v. Groomes*, 520 F.2d 830,
837 (3d Cir. 1975).
41. See pt. III(A) infra.
42. See pt. III(B) infra.
43. See United States v. Thompson, No. 76-1976, slip op. at 23 & n.1 (3d Cir. Aug. 22, 1977)
(en banc) (Garth, j., dissenting).
44. See pt. II infra.
45. See pt. III(A) infra.
46. See pt. III(B) infra.
47. See pt. III(C) infra.
48. See United States v. Sorrell, No. 76-1647 (3d Cir. Aug. 22, 1977) (en banc); United States
(No. 76-1596); note 9 supra and accompanying text.
49. See pt. III infra.
50. See notes 8-14 supra and accompanying text.
52. See note 8 supra. The sparse legislative history may be attributed in part to the
uncontested approval given to the Agreement by both Houses of Congress. 116 Cong. Rec.
14000 (House), 38842 (Senate) (1970).
Theories of statutory interpretation, shaping them to fit their respective conclusions.

The First, Fifth, and Sixth Circuits found that Congress' failure to mention the writ in any of the proceedings or reports prior to passage of the Agreement demonstrates that the statute authorizing the writ was not intended to be affected. Therefore, they reasoned, the Agreement is not the exclusive means of transporting prisoners for prosecution. According to these circuits, a holding that transfer under the writ must be subject to the sanctions of the Agreement would violate the rule of statutory construction that, when Congress has enacted legislation on a particular subject, subsequent legislation will not be construed to modify or repeal it. Since the two statutes are not inconsistent, they should be allowed to stand together.

The Fifth Circuit went further, and attempted to glean from the language of the Senate and House Judiciary Committee reports a clear congressional intent that the Agreement not be exclusive. The court first argued that the Committee's description of the Agreement as "a method" of securing prisoners from other jurisdictions indicates that it was not intended to be the sole method. This "plain language" demonstrated that Congress did not intend to repeal the writ statute. The court then referred to other excerpts from the reports which indicated that the abuses sought to be remedied had been perpetrated by the states, not the federal government. That the reports cited only cases which related to unreasonable delay by the states in bringing federal prisoners to trial was deemed "significant" by the court. Taken out


54. Ridgeway v. United States, 558 F.2d 357, 362 (6th Cir. 1977); United States v. Scallion, 548 F.2d 1168, 1171 (5th Cir. 1977); see United States v. Kennaan, 557 F.2d 912, 917 (1st Cir. 1977).


58. Id. at 1171 (emphasis added).

59. Id.

60. Id. at 1172 n.5.

61. Id. at 1173 n.6; see United States v. Thompson, No. 76-1976, slip op. at 28-33 (3d Cir. Aug. 22, 1977) (en banc) (Garth, J., dissenting). The dissenting opinions in Thompson discuss the problems of interpretation involved when the United States became a party to a compact which the original drafters intended to apply primarily to interstate transfers. Id. at 14-37 (Wels & Garth, J.J., dissenting). For example, art. IV of the Agreement requires that trial must be held within 120 days of the prisoner's arrival in the receiving state. However, if the prisoner is being transferred from a state prison to a federal court in the same state the prisoner has been in the
of context, these statements might support an argument that the Agreement was not intended to be the exclusive means of transfer. The Senate and House committees, however, used these cases only to illustrate the abuses which detainers generated; they did not intend them as proof that the federal government, when operating through the writ, could not be guilty of similar abuses.62

The Second Circuit, while agreeing that implicit repeals are not favored, found that subjecting the writ to the sanctions of the Agreement does not impute a congressional intent to repeal the older statute.63 When the Agreement was offered to Congress in 1970, the Second Circuit reasoned, only twenty-five states had adopted it.64 Therefore the writ was still necessary to transfer prisoners to and from the nonparticipating states.65 Congress, then, could not have intended to repeal the statute authorizing the writ.66

Now that most states have adopted the Agreement,67 it would seem that, if federal prosecutors must comply with its provisions when utilizing the writ, the Agreement is indeed the "exclusive means" of transfer. It does not follow, however, that the writ is thereby repealed. The writ is still available as a means of obtaining prisoners for prosecution even in those jurisdictions which have adopted the Agreement.68 As the Third Circuit has observed, applica-


64. Id.

65. Id. The four remaining nonparticipating states are Alabama, Alaska, Mississippi, and Oklahoma. Id.

66. Id.

67. See id.

tion of the Agreement to transfers under the writ would affect only the procedures that the federal government must follow after the writ has been executed.69

The issue of congressional intent took a more confusing turn in 1975. The Senate Judiciary Committee in that year issued a report in connection with the proposed Criminal Justice Reform Act of 1975 (S. 1). In its report, the committee commented on the status of the writ under the Agreement. It concluded that Congress did not intend to limit the scope of the writ when it enacted the Agreement, since the writ had always been an essential part of the mechanism for guaranteeing prisoners' speedy trial rights.71 In addition, the committee proposed that the Agreement be amended to provide for federal participation only when state detainers are lodged against federal prisoners, or, in the Agreement's language, only when the federal government is a "sending state."72 Twelve of the fifteen members of the committee had

69. Id. at 8. A more appropriate question is whether the statute authorizing the writ is rendered obsolete by the Agreement. Under the latter, a request for immediate custody may be made directly to the imprisoning authorities; unlike the procedure under the writ, judicial permission need not be obtained. Agreement § 2, art. IV(a), 18 U.S.C.A. app., at 127-28 (West Supp. 1977). It seems easier, then, to utilize the Agreement and thereby obviate court action in acquiring a prisoner. The Agreement also requires, however, that prior to a request for custody, a detainer must have already been filed. Id. The Second Circuit's holding in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 76-1596), that a writ operates as both a detainer and a request for custody under the Agreement eliminates the necessity of filing two documents in order to trigger the statutory mechanism. See United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977), cert. granted, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 77-52). The obsolescence of the statute authorizing the writ will probably be determined by which of these two alternative procedures proves most convenient to federal prosecutors.


71. The report states in pertinent part: "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." United States v. Mauro, 544 F.2d 588, 597 (2d Cir. 1976) (Mansfield, J., dissenting), cert. granted, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 76-1596).

72. Id. (Mansfield, J., dissenting). The committee has recently modified the proposed amendment to the Agreement to provide for United States participation "as a 'sending state' for purposes of Articles III and IV, but as a 'receiving state' for purposes of Article III only . . . ." Interview with Paul Summitt, Chief Counsel, Senate Criminal Law Subcommittee (Nov. 8, 1977) (Criminal Justice Reform Act, S. 1437, 95th Cong., 1st Sess. (1977)). In other words, the United States is to be a full participant to the Agreement in all cases except where a federal prosecutor, after filing a detainer against a state prisoner, makes a request for custody of that prisoner. This amends the 1975 proposal insofar as it declares that the federal government must comply with the Agreement whenever a state prisoner against whom a federal detainer has been filed demands trial on the underlying charges. See Agreement § 2, art. III, 18 U.S.C.A. app., at 231-32 (West
subscribed to the original report advocating passage of the Agreement. If these remarks were accepted as conclusive proof of congressional intent, the non-exclusive nature of the Agreement could not be disputed. Their significance, however, is questionable.

Courts generally give less weight in ascertaining legislative intent to subsequent legislative history, such as the S. 1 report, than to statements made prior to enactment of a statute. Later remarks may nevertheless be persuasive, depending on the circumstances. The Sixth Circuit pointed to the S. 1 report as an important indication of congressional intent. Judge Mansfield, dissenting from the Second Circuit's opinion in *United States v. Mauro*, noted that the committee membership was substantially the same as in 1970 when it reported out the Agreement. The majority in *Mauro*, however, declared that the report was unimportant in construing the Agreement, since the 1975 bill to which it was addressed had not yet been enacted. The Third Circuit agreed, adding that the report concerned "completely separate proposed legislation . . . [and therefore] is a 'hazardous basis' for inferring" Congress' intent in 1970.

The S. 1 report may be entitled to greater weight than the Second and Third Circuits were willing to give it. Courts have looked to several factors when examining subsequent congressional statements, including the official nature of the statement, the person or body by whom it is made, and the length of time between enactment of the statute and the later remarks. Given the

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75. *Id.*


78. *Id.* at 597 (Mansfield, J., dissenting).

79. *Id.* at 594 (Mansfield, J., dissenting).


For example, in *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), the Senate Committee on Indian Affairs had declared in an official report that the Indian Allotment Act of 1887, which the same committee had reported five years earlier, did not confer title to "executive order" reservations on Indians, but that title to those lands remained in the United States. *Id.* at
official nature of the S. 1 report, and the fact that it was made only five years
after passage of the Agreement by a majority of the members of the same
committee which had originally reported the statute, its statements cannot be
taken lightly in determining congressional intent.

It should be noted, nevertheless, that notwithstanding the importance of
the S. 1 report in ascertaining Congress' intent in 1970, the conclusions of the
report are inconsistent with both the provisions and purposes of the Agree-
ment. The committee's proposal that the federal government participate in the
Agreement only in the capacity of sending state suffers from several flaws.82
First, as several courts have observed, the proposal contradicts the express
terms of the statute.83 Article II includes the United States as a "State" within
the meaning of the Agreement,84 and article VIII provides that the Agreement
"shall enter into full force and effect as to a party State . . . ."85 By the terms
of the Agreement, therefore, the United States is a party to the same extent as
any other participating state.86 It is, therefore, subject to the sanctions of the
statute when it transfers prisoners from other jurisdictions under a detainer.87
Moreover, the committee's argument that prisoners transferred to federal
jurisdictions by means of the writ have always enjoyed speedy trials, and that
it is therefore unnecessary to include the writ as a detainer under the
Agreement, is, as will be discussed below,88 an assumption not always borne
out by experience.

329. The Supreme Court deemed those remarks "virtually conclusive as to the significance of that
Act." Id. at 329-30. The case demonstrates that much importance may be attached to postpassage
congressional statements. It should be noted, however, that, unlike the S. 1 report, the sub-
sequent statements in Sioux Tribe corroborated remarks to the same effect which had been
made prior to enactment of the statute in question. Id. at 329. In addition, the report in Sioux
Tribe was to a bill which was not yet enacted. Id. While this is a factor to be considered, it does
not render the subsequent statement irrelevant. Tailey v. Mathews, 550 F.2d 911, 920 n.22 (4th
Cir. 1977); see Daniels v. United States, 210 F. Supp. 942, 950 (D. Mont. 1962) (per curiam),
82. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 173 n.15 (1974) (Douglas, J.,
dissenting). The committee has modified its position on this point. See the discussion note 72
supra.
83. See, e.g., United States v. Scallion, 548 F.2d 1168, 1174 (5th Cir. 1977); United States v.
(No. 76-1596); United States v. Sorrell, 413 F. Supp. 138, 140 (E.D. Pa. 1976), aff'd, No. 76-1647
86. United States v. Mauro, 544 F.2d 588, 594 (2d Cir. 1976), cert. granted, 46 U.S.L.W.
87. Id. But see United States v. Thompson, No. 76-1976, slip op. at 16 (3d Cir. Aug. 22,
1977) (en banc) (Weis, J., dissenting). Judge Weis argued that characterization of the United
States as a "sending state" alone "makes the statute workable and reasonable," and that by
including the United States as a "receiving state" as well "Congress has attempted to fit a square
peg into a round hole." Id. It is debatable whether the peg becomes any rounder if the federal
government is a sending state. For example, how can a federal prisoner transferred to a state
court in the same state be "returned" to the sending state? See Agreement § 2, arts. IV(e), V(e), 18
88. See pt. II(C) infra.
B. Functional Similarities Between the Writ and a Detainer

A detainer, as noted above, advises the incarcerating authorities that the prisoner is wanted to face charges in another jurisdiction and requests notification of his release date. A detainer may be filed, without judicial approval, by administrative officers such as prosecuting attorneys, sheriffs, wardens, or parole and probation officers. It need not be accompanied by an indictment. Prior to the Agreement, the jurisdiction holding the prisoner would elect either to transfer the prisoner immediately or to hold him until the end of his sentence, at which time, if the charges against him were still outstanding, he was delivered to the requesting authorities.

The writ has existed for centuries at common law and is now codified in a federal statute. It is issued by the court in which the prisoner will be tried only after the prosecutor shows that he is "entitled thereto." The instrument itself is typically drafted in language of command. Once it is issued the prisoner is generally transferred immediately.

The two characteristics of a writ which most clearly distinguish it from a
detainer are its mandatory nature and its effect of producing a prompt transfer of the prisoner. By its terms it commands the prisoner's release, and it may be issued only by a court after a determination both that the government's purpose is to prosecute the prisoner and that proper grounds for the charges against him exist. A detainer, on the other hand, is more like a notice than an order, and may be filed by administrative authorities without judicial review. In addition, periods of delay prior to transfer may subject prisoners to penalties which obstruct their participation in rehabilitation programs. Those sanctions are not imposed under the writ, because receipt of a writ by the imprisoning authorities generally leads to the prisoner's immediate conveyance to the accusing jurisdiction.

Despite these differences, the Second and Third Circuits have held that the writ is "substantially" identical to a detainer as that term was defined in the legislative history to the Agreement. The Second Circuit in Mauro with which the Third Circuit is in accord, reasoned that the writ is indeed a notification to prison officials that a prisoner is wanted to face charges in another jurisdiction. The majority of the panel regarded the mandatory language of the writ as inconsequential, arguing that the words of command amount to no more than a request which a state may in its discretion choose to dishonor.

The majority dismissed the Government's contention that the writ, since it is executed at once, has none of the adverse effects upon rehabilitation which the Agreement was designed to prevent. Noting that a primary goal of the Agreement is to avoid the "uncertainties" which impede a prisoner's participa-
tion in treatment programs, they maintained that shuttling prisoners between jurisdictions contributes to those uncertainties.\textsuperscript{111}

The First, Fifth, and Sixth Circuits, emphasizing the procedural differences between a writ and a detainer, have held that the writ cannot be classified as a detainer under the Agreement.\textsuperscript{112} The courts concluded that since the writ is executed immediately, it results in none of the adverse effects upon rehabilitation which longstanding detainers may foster.\textsuperscript{113} Moreover, the courts argued, the writ has more of an effect than merely conveying notice of outstanding charges. As a federal court order, its commanding language may not be disregarded by the state of incarceration.\textsuperscript{114} In support of that argument, the First Circuit and the dissent in \textit{Mauro} asserted that refusal by a state to comply with the writ would violate the supremacy clause.\textsuperscript{115}

No matter how great the differences between the writ and the detainer may have been at common law, there is much more similarity in the function of the two instruments now that the Agreement has modified prisoner transfer practices under a detainer. If the governor of the incarcerating jurisdiction does not reject a request for custody, pursuant to a detainer within thirty days, then the prisoner \textit{must} be transferred.\textsuperscript{116} Conversely, if a prisoner learns that a detainer has been lodged against him, he has the right to demand transfer and trial on the underlying charges.\textsuperscript{117} These provisions severely curtail the right of a state to choose not to comply with a detainer, thus giving the detainer a mandatory nature more closely resembling that of the writ. Moreover, even at common law, a state could elect to deliver a prisoner against whom a detainer had been filed to the accusing authorities for immediate prosecution.\textsuperscript{118} These considerations weaken the justifications for

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  \item \textsuperscript{111} \textit{Id.} Article IV(e) of the Agreement imposes sanctions against shuttling. Agreement § 2, art. IV(e), 18 U.S.C.A. app., at 232 (West Supp. 1977).
  \item \textsuperscript{113} \textit{See} Ridgeway v. United States, 558 F.2d 357, 362 (6th Cir. 1977); United States v. Kenaan, 557 F.2d 912, 916-17 (1st Cir. 1977); United States v. Scallion, 548 F.2d 1168, 1172-73 (5th Cir. 1977).
  \item \textsuperscript{114} Ridgeway v. United States, 558 F.2d 357, 362 (6th Cir. 1977); United States v. Kenaan, 557 F.2d 912, 916 n.8 (1st Cir. 1977); United States v. Scallion, 548 F.2d 1168, 1173 (5th Cir. 1977).
  \item \textsuperscript{115} United States v. Kenaan, 557 F.2d 912, 916 n.8 (1st Cir. 1977); \textit{accord}, United States v. Mauro, 544 F.2d 588, 595 (2d Cir. 1976) (Mansfield, J., dissenting), \textit{cert. granted}, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 76-1596). The majority in \textit{Mauro} ignored this argument, but denied that the federal writ must be obeyed by the states, arguing that the sending jurisdiction's cooperation was necessary in order to effectuate the prisoner's transfer. 544 F.2d at 592.
  \item \textsuperscript{116} Agreement § 2, art. IV(a), 18 U.S.C.A. app., at 232 (West Supp. 1977).
  \item \textsuperscript{117} Agreement § 2, art. III(a), 18 U.S.C.A. app., at 231 (West Supp. 1977).
  \item \textsuperscript{118} \textit{See} United States v. Kenaan, 557 F.2d 912, 915-16 (1st Cir. 1977); United States v. Mauro, 544 F.2d 588, 595 (2d Cir. 1976) (Mansfield, J., dissenting), \textit{cert. granted}, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 76-1596). Conversely, in at least one case a state was able to defer transfer of its prisoner to federal authorities even though a writ of habeas corpus ad
distinguishing the two instruments on the procedural basis that one is an order and the other mere notice.

The question of whether the writ must be obeyed under the supremacy clause, and is therefore unlike a detainer because it is a command, may be answered by examining the purposes of the supremacy clause. Although there is some authority that the writ is enforceable under the supremacy clause, the issue is unresolved, since there are apparently no cases in which a state has refused to comply with the writ. While there is no rigid formula for determining whether a state law or action violates the supremacy clause, a general test which has been employed by the Supreme Court is whether the state law or action operates to frustrate the purposes of the federal statute. Should a state refuse to obey the federal writ, there are two federal policies which may be frustrated. The first is that of allowing federal courts to obtain custody of prisoners outside of their respective jurisdictions. Non-

prosequendum had been issued. United States v. Oliver, 523 F.2d 253, 258 (2d Cir. 1975). In Oliver the writ was not executed immediately because state charges against the prisoner had not yet been disposed of.

119. The Agreement, of course, is not honored as a matter of supremacy. It is essentially an interstate compact which the United States has joined as a party state. Section 2 of the Agreement provides: "The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining . . . ." Agreement § 2, 18 U.S.C.A. app., at 230 (West Supp. 1977) (emphasis added). Furthermore, each state which is a party to the Agreement may withdraw by repealing its particular statute. Agreement § 2, art. VIII, 18 U.S.C.A. app., at 234 (West Supp. 1977). The federal government, in its capacity as participating state, may not enforce compliance with the Agreement by resort to the supremacy clause.

120. See Schindler, Interjurisdictional Conflict and the Right to a Speedy Trial, 35 U. Cin. L. Rev. 179, 191-92 (1966); note 115 supra and accompanying text. "Undoubtedly a case so holding would yield an exception where the state was actually in the trial process or very close thereto." Schindler, supra at 192 n.46; see, e.g., United States v. Oliver, 523 F.2d 253 (2d Cir. 1975); cf. Younger v. Harris, 401 U.S. 37, 43-45 (1971) (federal courts will not lightly interfere with state court proceedings).

121. There is authority that the writ is obeyed only as a matter of comity. See Ponzi v. Fessenden, 258 U.S. 254, 260 (1922); McDonald v. Ciccone, 409 F.2d 28, 30 (8th Cir. 1969); United States ex rel. Moses v. Kipp, 232 F.2d 147, 150 (7th Cir. 1956). The Fifth Circuit, although it found resolution of this issue to be unnecessary in order to reach its decision, noted that the above cited authority either consisted of dicta or was decided prior to the 1948 Act which explicitly codified the writ. United States v. Scallion, 548 F.2d 1168, 1173 n.7 (5th Cir. 1977).

122. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). The principle of comity dictates that the states be left free to perform their "separate functions" with minimal interference from the federal government. Younger v. Harris, 401 U.S. 37, 44 (1971). When, however, those functions operate to subject the federal government to local controls, conflicts are introduced which it is the purpose of the supremacy clause to avoid. United States v. County of Allegheny, 322 U.S. 174, 183 (1944).


124. The Supreme Court has held that federal courts have the power to issue writs of habeas corpus ad prosequendum outside of their respective jurisdictions. See Carbo v. United States, 364 U.S. 611 (1961). The Court reasoned that the writ would be of no utility if it could not be issued
compliance with the writ by a state located beyond the jurisdiction of a federal court would in effect confine the court's power to issue the writ to the geographical boundaries of its district.¹²⁵ The second policy is that of guaranteeing the constitutional right of defendants to a speedy trial.¹²⁶ Since the writ is intended to bring an accused into federal custody for prosecution,¹²⁷ its execution, by bringing him before the accusing authorities, presumably aids him in procuring a speedy trial.¹²⁸ In the interest of protecting that right, the prosecuting jurisdiction must make reasonable efforts to procure the defendant even though he is jailed in another jurisdiction.¹²⁹ State disobedience of the writ, it may be argued, would thwart such efforts, and thereby infringe upon the prisoner's sixth amendment guarantees.¹³⁰

Beyond the boundaries of the federal court's jurisdiction, and therefore that it should suffer no territorial limitations on its use. Id. at 618-21. Accordingly, it rejected the contention of petitioner, a New York State prisoner, that a California district court had no power to issue the writ to New York officials. Id. at 612-13.

¹²⁵ This would clearly frustrate the federal policy behind the writ, and, consequently, would violate the supremacy clause. U.S. Const. art. VI, § 2.

¹²⁶ U.S. Const. amend. VI. In addition, state disobedience of the writ would deny the statutory rights of federal defendants under the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (Supp. V 1975). See discussion of the Act as it relates to writ transfers, notes 171-78 infra and accompanying text.

¹²⁷ Ex parte Bollman, 8 U.S. 74, 97, 4 Cranch 75, 98 (1807).

¹²⁸ See McDonald v. Ciccone, 409 F.2d 28, 30 (8th Cir. 1969).


¹³⁰ U.S. Const. amend. VI. An analogous situation was presented in Cooper v. Aaron, 358 U.S. 1 (1958), in which the Governor of Arkansas had refused to obey the mandate of the Supreme Court to eliminate enforced racial segregation in state public schools. Id. at 4. (The Supreme Court had earlier held in Brown v. Board of Educ., 347 U.S. 483 (1954), that such segregation violated the equal protection clause of the fourteenth amendment. Accordingly it had decreed that the states promptly initiate a program of gradual integration. Brown v. Board of Educ., 349 U.S. 294 (1955).) The Governor of Arkansas dispatched troops to Central High School in Little Rock to prevent Negro students from entering. Cooper v. Aaron, 358 U.S. at 9. The Constitution, the Court declared, is the supreme law of the land, and the federal judiciary is the supreme determinor of what that law is. Id. at 18. Accordingly, no state agency could disobey the desegregation order, since to do so would nullify the constitutional rights which had been established, id. at 17, and would be inconsistent with the duty of all state officers to uphold the Constitution, id. at 18.

A state's refusal to transfer a prisoner pursuant to a writ is dissimilar to the situation in Cooper, in that no federal court has held that the writ guarantees defendants an enforceable constitutional right to a speedy trial. In fact, in contrast with Cooper, noncompliance need not automatically result in the denial of that right. Moore v. Arizona, 414 U.S. 25, 26-27 (1973); Barker v. Wingo, 407 U.S. 514, 530-31 (1972). Actual delay before trial because of continued incarceration in the holding jurisdiction is only one of the factors courts will consider in deciding whether there has been a speedy trial violation. The reasons for the delay, the defendant's assertion of the right, and prejudice suffered as a result of the delay, must also be weighed. Barker v. Wingo, 407 U.S. at 530-33. Thus, if a prisoner were not prejudiced by the delay or preferred not to assert his speedy trial rights, his sixth amendment guarantee might not be violated, id., in which case the federal government's policy of protecting those rights would not be frustrated. Disobedience of the writ, however, would certainly reduce the chances that such protection would be implemented and
The fact that the supremacy clause may mandate the enforcement of the writ, thereby making the writ an inherent command,\(^{131}\) may nevertheless not provide completely satisfactory grounds upon which to distinguish that instrument from a detainer. In the first place, the fact that a detainer is not obeyed as a matter of supremacy does not alter its quasi-mandatory nature under the Agreement.\(^{132}\) Moreover, focusing on the logical validity of these procedural distinctions can disguise the fact that a writ and a detainer serve the same purpose—interjurisdictional transfer of prisoners.\(^{133}\) The Agreement was designed to correct the abuses fostered by that process.\(^{134}\) It would seem, therefore, that the question as to whether the writ should be classified as a detainer under the Agreement is better answered by determining if transfer under the writ leads to the maladies formerly associated with detainers.

C. Abuses Corrected by the Agreement

Possibly the strongest argument for classifying the writ as a detainer under the Agreement is that some of the abuses which the Agreement was designed to alleviate are present when prisoners are transferred to federal jurisdictions pursuant to the writ.\(^{135}\) The three main purposes of the Agreement are (1) to establish more cooperative procedures for interjurisdictional transfers, (2) to minimize the adverse effects of a filed detainer on a prisoner's rehabilitation, and (3) to promote the "expeditious and orderly disposition of the charges against him."\(^{136}\) The instances in which utilization of the writ permits evasion of these purposes will be examined below.


\(^{132}\) Agreement § 2, art. IV(a), 18 U.S.C.A. app., at 232 (West Supp. 1977); sources cited note 3 supra.


\(^{134}\) United States v. Mauro, 544 F.2d 588, 591-93 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 76-1596); see United States ex rel. Esola v. Groomes, 520 F.2d 830, 837 (3d Cir. 1975). If the writ is excluded from the Agreement's provisions, federal prosecutors may, by proceeding under that document, avoid the possibility that their indictments will be dismissed for failing to try the prisoner within the statutory period. One flaw in the Agreement is that it is not triggered until a detainer has been lodged against the prisoner. \(\text{See Agreement } \|$ \text{2, arts. III(a), IV(a), 18 U.S.C.A. app., at 231-32 (West Supp. 1977); Convicts in Other Jurisdictions, supra note 3, at 775.} (\text{Provost the Speedy Trial Act of 1974, which penalizes government attorneys for failing either to secure the presence of or file a detainer against a prisoner charged with an offense, if the prisoner's whereabouts are known to the attorney, 18 U.S.C. §§ 3161(f), 3162 (Supp. V 1975).}

The policy of the Agreement to promote cooperative methods of transfer seems to justify including the writ within the purview of the statute. When a jurisdiction becomes a participant in the Agreement, it relinquishes its claim to exclusive control over a prisoner during the sentence imposed by its courts. In return, it gains the right to proceed with its rehabilitation programs without the interference inherent in the long pretrial delays and unnecessary transfers to the receiving jurisdiction. If a receiving jurisdiction can sidestep the Agreement by utilizing the writ, the sending jurisdiction loses the right to conduct uninterrupted rehabilitation programs, and incurs the very disadvantages which it joined the Agreement to avoid. This in turn reduces the motivation of the sending jurisdiction to operate within the Agreement when seeking custody of prisoners in the jurisdiction which avoided the Agreement's sanctions by using the writ. Cooperation is consequently discouraged.

Classification of the writ as a detainer also seems justified in view of the rehabilitative purposes of the Agreement. This point may be more fully understood if preceded by a discussion of the potential abuses to which prisoners with detainers were subject prior to the Agreement. The impediments to rehabilitation fostered by the detainer system are well documented. A prosecutor with pending charges against a person serving a sentence in another jurisdiction could file a detainer with the prison authorities and thereby delay holding a trial until the prisoner's term was completed. This, in addition to denying the defendant a speedy trial,

137. "The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures." Agreement § 2, art. I, 18 U.S.C.A. app., at 230 (West Supp. 1977).


142. "The prosecuting attorney who filed the charges knows that the prisoner can be found when he is wanted and that all he has to do is have the sheriff call at the institution the date the prisoner is to be discharged and take him into custody. Consequently he puts the case at the bottom of the docket and forgets about it, safe in the knowledge that meanwhile the prisoner will not be paroled." Bennett, The Correctional Administrator Views Detainers, 9 Fed. Probation 8, 9 (Jul.-Sept. 1945). See also The Detainer, supra note 2, at 1192; Correctional Process, supra note 2, at 417.

created restrictions on the prisoner’s participation in rehabilitation programs. On the theory that a wanted inmate is more likely than others to escape and to be less trustworthy, detainers were commonly denied trusty status, became ineligible for special work and athletic programs, and were refused release for sickness and death of relatives. In addition, these prisoners were often denied parole and automatically placed under maximum security surveillance. Detainers also created severe psychological disadvantages for prisoners, since, regardless of their good behavior or desire to reform, the detainer precluded any guarantee of release within a given time. Moreover, the grounds upon which detainers were based were not always legitimate. They did not have to be supported by an indictment or information, and were often filed merely on suspicion. Prosecutors often lodged detainers knowing that the resulting delay before trial would minimize the possibility that the prisoner, if convicted, could serve the new sentence concurrently with the old one. The fact that an estimated one-half of all detainers lodged were never prosecuted indicates that many were groundless and lodged for punitive reasons.


See Correctional Process, supra note 2, at 419.

See Detainer System, supra note 3, at 537; Correctional Process, supra note 2, at 418-19.


See note 17 supra and accompanying text.


Convicts in Other Jurisdictions, supra note 3, at 773.


See notes 20-22 supra and accompanying text. "[M]any prosecutors are doubtless little troubled by the realization that delay causes anxiety, makes the convict’s eventual defense more difficult, and eliminates the possibility of concurrent sentences. Many detainers are apparently filed for punitive reasons; they are withdrawn shortly before the convicit's release, having served their purpose by curtailing prison privileges and preventing parole." Convicts in Other Jurisdictions, supra note 3, at 772-73 (footnotes omitted). See also Correctional Process, supra note 2, at 423. In addition, if the detained prisoner's sentence was for a substantial length of time, trial on the underlying charges after his release might be impossible because of the disappearance of evidence, death of witnesses, and so forth. See United States v. Ford, 550 F.2d 732, 740 (2d Cir. 1977), cert. granted, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 77-52).
A prisoner faced more problems if he were removed to the accusing state. Depending on the agreement between the two jurisdictions, the defendant could remain in the receiving jurisdiction for long periods, or be transported back and forth between the jurisdictions to answer to charges, arraignments, and other pretrial proceedings. As a result, the prisoner usually developed an adverse attitude toward prison and prison authorities which obstructed the cultivation of a positive approach toward rehabilitation.

At least two of the abuses of the detainer system, namely, post-transfer delay and shuttling, are also present under the writ system of transfer. Several circuits, however, have refused to acknowledge this and have held that the purposes of the Agreement are inapplicable to the writ. The Fifth Circuit has argued that the Agreement was intended to apply only to detainers filed by states, not to writs issued by the federal courts. The First and Sixth Circuits have emphasized that the writ contains none of the defects which the Agreement corrects. They have stressed that since the writ is executed immediately it promotes the expeditious disposition of charges against a prisoner and therefore has none of the antirehabilitative effects of detainers.

Closer analysis of these contentions, however, reveals that they are premised upon somewhat tenuous assumptions. It is true that indefinitely lodged detainers created obstructions to treatment programs which are not present under the writ, because the writ immediately removes the prisoner to the accusing jurisdiction. It is not true, however, that the abuses which the Agreement was designed to eliminate cease after the prisoner is transferred. Long delays before trial subject a prisoner to the same "uncertainties" that the writ of habeas corpus ad prosequendum by federal prosecutors. The court found that "the primary concern of Article IV [was] elimination of abuses of detainers by state—not of the abuses of the writ of habeas corpus ad prosequendum by federal prosecutors." The Federal Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (Supp. V 1975) (pretrial delay beyond the statutorily-defined limits prohibited).


157. The court found that "the primary concern of Article IV [was] elimination of abuses of detainers by state—not of the abuses of the writ of habeas corpus ad prosequendum by federal prosecutors." United States v. Scallion, 548 F.2d 1168, 1172 n.5 (5th Cir. 1977) (footnote omitted).

158. Ridgeway v. United States, 558 F.2d 357, 362 (6th Cir. 1977); United States v. Kenaan, 557 F.2d 912, 916-17 (1st Cir. 1977).

159. United States v. Scallion, 548 F.2d 1168, 1172 n.5 (5th Cir. 1977) (footnote omitted).


regardless of the place of incarceration. The length of delay is not necessarily reduced by the mere fact of transfer to federal custody. Nor, obviously, does the possibility of return to the sending jurisdiction arise until after the defendant arrives in the receiving jurisdiction. The provisions of the Agreement which mandate trial within specified periods and which forbid the prisoner's return prior to trial address these post-transfer defects, whose occurrence does not depend on the mechanism by which custody is obtained. In one case, for example, a state prisoner facing federal charges was shuttled between jurisdictions four times through the use of the writ, and was not tried until approximately two and one-half years after he was first taken into federal custody. To allow such activity to continue because transfer was conducted pursuant to a writ rather than a detainer is to permit transgression of the statute on a technicality, a development which is incompatible with the Agreement's original remedial design. The goals of minimizing obstructions to treatment programs and expediting the orderly disposition of charges are thereby thwarted.

The First Circuit expressed concern lest the federal government be permitted to evade the sanctions of the Agreement through use of the writ. That concern, however, insofar as it related to the possibility of pretrial delay, was "lessened if not dissipated" by the Federal Speedy Trial Act of 1974, which creates time limits within which all federal defendants must be tried. Indeed, the Speedy Trial Act (Act) provides more advantageous speedy-trial protection than the Agreement to prisoners transferred to federal custody under the writ. After a plea of not guilty is entered, the Act requires that a defendant be brought to trial within sixty days from arraignment, which must have been held no later than ten days after filing of the indictment or information upon which the charges are based. The maximum period before trial mandated by the Act is therefore less than the Agreement's

168. Id. at 634. For other examples of post-transferal abuses, see cases cited note 194 infra.
171. See United States v. Kenaan, 557 F.2d 912, 916-17 (1st Cir. 1977).
172. Id. at 917.
174. At least one federal court has called for resolution of the discrepancy between the maximum pretrial periods permitted under the statutes. See United States v. Sorrell, No. 76-1647, slip op. at 7, n.6a (3d Cir. Aug. 22, 1977) (en banc).
provisions of 120 days when the accusing authorities request custody or 180 days when the prisoner demands trial.\textsuperscript{176} In addition to sanctions for pretrial delay, however, the Agreement also provides penalties for shuttleing. The Act provides nothing similar to the Agreement's prohibition of the defendant's return to the original place of imprisonment prior to trial.\textsuperscript{177} The obstructions to rehabilitation caused by shuttleing could thus continue unchecked against a prisoner transferred to federal custody under the writ if his only remedy were under the Act. It is apparent, then, that the alternative protection offered by the Act is only partial, and, in view of the broader purposes of the Agreement,\textsuperscript{178} it does not justify excluding the writ from the latter's provisions.

Since transfer under the writ contains no safeguards against shuttleing of federal defendants, the question of whether the writ should be included within the ambit of the Agreement depends to a great extent on whether shuttleing does in fact generate the abuses which the Agreement prevents.\textsuperscript{179} The Second Circuit found that shuttleting creates impediments to rehabilitation which were sufficiently dangerous to warrant subjecting the writ to the sanctions of the Agreement.\textsuperscript{180} Specifically, the court argued that an impending federal trial and the possibility of an additional sentence create adverse effects on a prisoner's morale.\textsuperscript{181} Shuttleting the prisoner between jurisdictions subjects him to the same "uncertainties" which impede participation in

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The Act requires that the attorney for the federal government, after learning of the prisoner's whereabouts, promptly either seek custody of the prisoner or file a detainer against him. 18 U.S.C. § 3161(j)(1)(A) & (B) (Supp. V 1975). If the attorney chooses the latter course, the warden must inform the prisoner of his right to demand trial, which if exercised must be communicated to the prosecutor. 18 U.S.C. § 3161(j)(2) (Supp. V 1975).

\item Agreement § 2, arts. III(d), IV(e), 18 U.S.C.A. app., at 231, 232 (West Supp. 1977).


\item If the provisions against shuttleting were intended only to expedite a speedy trial by prohibiting time-consuming trips between jurisdictions, then the alternative protections against delay afforded by the Speedy Trial Act would make it unnecessary to hold that the Agreement is applicable to the writ. Such, however, was not the intention of the framers of the Agreement; the effects of shuttleting upon rehabilitation were the primary abuse sought to be checked. \textit{Speedy Trial}, supra note 2, at 855-56.

\item United States \textit{v. Mauro}, 544 F.2d 588, 592-93 (2d Cir. 1976), \textit{cert. granted}, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 76-1596). The defendants in \textit{Mauro} first appeared in the district court pursuant to separate writs of habeas corpus ad prosequendum and were then returned to state custody. \textit{Id.} at 590-91. They were not produced for trial again until five months later, prior to which they had moved for dismissals of their indictments based on the federal government's violation of their rights under the Agreement. \textit{Id.}

\item \textit{Id.} at 593.
\end{enumerate}
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treatment programs.\textsuperscript{182} The court's analysis requires further scrutiny.

Shuttling conceivably impedes rehabilitation in several ways. First, rehabilitation programs require the prisoner's physical presence, which is interrupted by numerous and often unnecessary trips between jurisdictions.\textsuperscript{183} Secondly, as the Second Circuit has observed, shuttling exacerbates the fears and anxieties produced by the possibility of receiving an additional term of imprisonment.\textsuperscript{184} Presumably the trips back and forth between jurisdictions serve as a constant reminder to the prisoner of the imminence of the federal trial. The chance of continued incarceration, which his excursions cannot help but bring to mind, must certainly reduce the prisoner's motivation to engage in treatment programs. The Third Circuit has added a third reason for the prohibition against shuttling. If counsel is located in the indicting jurisdiction, pretrial return to the sending jurisdiction may impede the prisoner's ability to consult with his attorney. This in turn may impede the prisoner's guarantee to a speedy trial.\textsuperscript{185} While, of course, prisoners may regard interjurisdictional transfers as joyrides rather than interruptions of their treatment programs, excluding the writ from the Agreement on that basis alone would ignore those inmates who genuinely desire to participate in their rehabilitation.\textsuperscript{186}

\textsuperscript{182} Id. at 592-93; cf. United States ex rel. Esola v. Groomes, 520 F.2d 830, 837 (3d Cir. 1975) (Agreement applies when state government issues writ for federal prisoner). What constitutes a transfer within the meaning of the Agreement is also the subject of controversy. The Second Circuit has held that the Agreement does not apply to a prisoner who is removed from state prison for a few hours to answer to proceedings in federal court, if he had not been imprisoned anywhere other than the sending state, and if his rehabilitation had not been interrupted. United States v. Chico, 558 F.2d 1047, 1049 (2d Cir. 1977). It has also been held that the Speedy Trial Act does not apply to a state detainee who had not yet been convicted of the state charge and was not participating in any rehabilitation program. United States v. Roberts, 548 F.2d 665, 670-71 (6th Cir.), cert. denied, 97 S. Ct. 2636 (1977). The Third Circuit, however, ordered dismissal of an indictment against a state prisoner whose journey to federal court for arraignment was "less than 10 miles," and who "was returned to the very cell from which he had been taken that morning." United States v. Thompson, No. 76-1976, slip op. at 21 (3d Cir. Aug. 22, 1977) (en banc) (Garth, J., dissenting); accord, United States v. Sorrell, No. 76-1647 (3d Cir. Aug. 22, 1977) (en banc). The case illustrates the severity and absurdity of the remedy provided by the Agreement when the federal jurisdiction, as "receiving state," is geographically the same as the state of imprisonment. The same result would follow, however, if a state court to which a state prisoner was transferred were located near the boundaries of the sending state. While Congress may have been guilty of poor drafting by permitting dismissal in the former instance, United States v. Thompson, No. 76-1976, slip op. at 22 (en banc) (Garth, J., dissenting), the latter illustration demonstrates that the original framers of the Agreement were no less myopic.

\textsuperscript{183} United States ex rel. Esola v. Groomes, 520 F.2d 830, 837 (3d Cir. 1975). In the absence of a rehabilitation program in the original place of imprisonment, no interruption can be said to have occurred. In that instance vacation of the prisoner's conviction would serve no demonstrable purpose under the statute. United States v. Thompson, No. 76-1976, slip op. at 19 (3d Cir. Aug. 22, 1977) (en banc) (Weis, J., dissenting).


\textsuperscript{185} United States v. Sorrell, No. 76-1647, slip op. at 9-10 (3d Cir. Aug. 22, 1977) (en banc).

\textsuperscript{186} Moreover, one of the objectives of rehabilitation is to change such negative or apathetic
though the argument that shuttling obstructs rehabilitation may be questioned on the ground that the rehabilitative theory of punishment itself does not work,\textsuperscript{187} Congress, by adopting the Agreement in 1970, manifested its acceptance of rehabilitation as a goal not to be thwarted.\textsuperscript{188} It would make little sense to exclude one class of prisoners from the protection of this statute because of opposition to the objectives which motivated its enactment.

A final argument which has been advanced against classification of the writ as a detainer within the meaning of the Agreement is that judicial control over the issuance of the writ provides adequate safeguards against abuses.\textsuperscript{189} The requirement that the writ be obtained through a court, however, does not necessarily forestall possible evasions of the Agreement's purposes. The federal habeas corpus statute,\textsuperscript{190} under which the writ is issued, mandates that the court review the grounds upon which that instrument is sought.\textsuperscript{191} No comparable procedure exists when a detainer is filed.\textsuperscript{192} The writ's function, however, is completed upon transfer.\textsuperscript{193} The judicial control exercised before the writ is granted does not prevent the shuttling of a prisoner back and forth between jurisdictions, nor does it prevent unreasonably long pretrial delays once he has been transferred.\textsuperscript{194}

\textsuperscript{187}. Rehabilitation as an effective aim of punishment has received widespread criticism. See Ardenaes, \textit{The General Preventive Effects of Punishment}, 114 U. Pa. L. Rev. 949, 971 (1966); Cohen, \textit{Moral Aspects of the Criminal Law}, 49 Yale L.J. 987, 1012-14 (1940); Hart, \textit{The Aims of the Criminal Law}, 23 Law & Contemp. Prob. 401, 407-08 (1958); Leinwand, \textit{Aversion Therapy: Punishment as Treatment and Treatment as Cruel and Unusual Punishment}, 49 So. Cal. L. Rev. 880, 921-24 (1976). One critic, in noting the possible harmful effects of all rehabilitation programs, forewarned that "[t]he problem of selection of treatment may reduce to the selection of the form of disposal that has the least amount of content, since all content is likely to have undesirable effects. By doing as little as possible we may be doing as little harm as possible. The best (but illegal) treatment for prisoners may be a placebo!" L. Wilkins, \textit{Evaluation of Penal Measures} 76 (1969).


\textsuperscript{189}. \textit{United States v. Kenaan}, 557 F.2d 912, 917 (1st Cir. 1977).


\textsuperscript{193}. See \textit{Ex parte Bollman}, 8 U.S. 74, 97, 4 Cranch 75, 98 (1807); \textit{United States v. Sorrell}, No. 76-1647, slip op. at 8 (3d Cir. Aug. 22, 1977) (en banc).

III. Retroactive Application and Collateral Attack

Assuming that the Second Circuit’s position in *United States v. Mauro*¹⁹⁵ prevails, and the writ is held to be a detainer within the meaning of the Agreement, two questions of practical importance¹⁹⁶ remain: (1) will that decision be applied retroactively to the date when the Agreement became effective as to the federal government, and (2) may a prisoner collaterally attack his conviction based on violation of the Agreement?¹⁹⁷ Given the federal government’s reliance on the writ as a tool for acquiring state prisoners for prosecution,¹⁹⁸ it may safely be assumed that the fate of a substantial number of federal convicts rests on the answers to these questions.¹⁹⁹

Two groups of prisoners would be affected by resolution of these issues. The first is comprised of those transferred in violation of the Agreement who have not exhausted their appeals, and to whom, therefore, only the issue of retroactivity is important. The second group includes prisoners who were transferred in violation of the Agreement but who have exhausted their appeals. Vacation of the convictions of the latter group requires that both retroactive effect and a right of collateral review be granted. If the Second

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¹⁹⁶. Compliance with that decision would seem to impose no undue hardship upon federal prosecuting authorities. The Third Circuit, in affirming two lower court decisions that the writ is a detainer, observed that “since the time of the decision of the three-judge panel in this case, affirming the dismissal of the district court, the United States Attorney’s Office for the Eastern District of Pennsylvania has been adhering to the mandates of the Detainer Agreement by retaining federal custody over prisoners until they can be tried. No suggestion has been made to this court that these procedures have impaired the efficient administration of the United States Attorney’s responsibilities in any way.” United States v. Sorrell, No. 76-1647, slip op. at 3 n.3 (3d Cir. Aug. 22, 1977) (en banc).


The Second Circuit has concluded that collateral review is unavailable for violation of the Agreement. Edwards v. United States, No. 77-2048 (2d Cir. Oct. 25, 1977) (per curiam); see notes 231-33 infra and accompanying text. As yet the other circuits have found no need to consider either issue. The Third Circuit, however, has indicated that neither a right of collateral attack nor retrospective effect would be given to its decision classifying the writ as a detainer under the Agreement, at least where the prisoner had not demanded a speedy trial prior to trial. United States v. Sorrell, No. 76-1647, slip op. at 8 (3d Cir. Aug. 22, 1977) (en banc).


¹⁹⁹. While no statistics are available, there have been at least seven cases this year in the Second Circuit raising issues under the Agreement. Brief and Appendix for United States at 13 n.*. United States v. Edwards, No. 77-2048 (2d Cir. 1977).
Circuit's holding is given only prospective application, neither group may raise the Agreement as a bar to future imprisonment. If retroactive application is allowed, however, the rights of those who have exhausted their appeals depend on their ability to institute collateral proceedings.

In determining whether to apply decisions retroactively or to permit collateral attack, courts place emphasis on the effect of their holdings on the defendants' guilt or innocence. If a decision averts a "clear danger of convicting the innocent," or creates a "fundamental defect" in the defendant's conviction, retroactive effect and a right of collateral appeal are more likely to be granted. The Agreement protects no fundamental rights per se, and those prisoners allowed to benefit by its provisions are freed without regard to whether they committed the crime for which they were convicted. For this reason a decision equating the writ with a detainer under the Agreement is likely to be denied retroactive application, thus denying its protection to both of the above groups.

A. Retroactive Application

Retroactivity of judicial decisions is neither required nor prohibited by the Constitution. In most cases the courts apply a three-pronged balancing test, first implemented in the Supreme Court's early decisions requiring exclusion of evidence seized in violation of the fourth amendment. The three considerations are "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." If the purpose of the standard promulgated in the court's decision would be furthered by retroactive application, the decision is likely to be given that effect. Thus, if the new rule affects "the very integrity of the fact-finding process," and averts a "clear danger of convicting the innocent," it is

201. Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966); see Linkletter v. Walker, 381 U.S. 618, 639 (1965) (If decision affects "the very integrity of the fact-finding process," it will be applied retroactively.).
203. Speedy Trial, supra note 2, at 832; see United States v. Scallion, 548 F.2d 1168, 1174 (5th Cir. 1977).
207. This purpose test is usually given primary weight among the three factors. Desist v. United States, 394 U.S. 244, 249 (1969); Bannister v. United States, 446 F.2d 1250, 1257 (3d Cir. 1971).
usually given retroactive effect. Accordingly, decisions condemning the denial of legal counsel during a criminal trial or preventing the use of coerced confessions are not limited to present or future infractions.

But if the departure from precedent is designed only to deter unconstitutional state action, it is generally given prospective application. Thus, for example, where the Court ruled that illegally seized evidence was to be excluded, the decision was applied prospectively only, because its purpose was to deter police action in violation of the fourth amendment.

It is doubtful that the purposes of a decision to impose the sanctions of the Agreement on the federal government's use of the writ would be furthered by retroactive application. The objectives of the Agreement are to minimize obstructions to prisoner rehabilitation programs, to promote a speedy trial on all outstanding charges, and to instill a spirit of cooperation between jurisdictions when prisoners are transferred between them. These goals affect pretrial procedures, and their frustration does not in itself subvert the factfinding process. In addition, the discord between jurisdictions which the Agreement was designed to prevent is not present when the writ is used to transfer prisoners, since there apparently has been full cooperation by the states with writ transfer. Finally, even though a prisoner's ability and desire to become rehabilitated may have been hampered by the delays and shuttling that sometimes accompany issuance of the writ, the detrimental effect of those abuses is not eliminated by his subsequent release. The harm inflicted, namely, the obstruction of treatment programs, is not undone by removal of the victim from the institution which administers those programs.

Under the second test a new rule will be applied only prospectively if it appears that there was substantial reliance on the old rule, as appears to be the case here. Prior to 1976, the issue of whether the federal writ was subject to the sanctions of the Agreement had never been considered. Federal California, 393 U.S. 314 (1969) (per curiam); see Bannister v. United States, 446 F.2d 1250, 1257 (3d Cir. 1971).


215. The Second Circuit has determined, in addition, that the Agreement safeguards no constitutional guarantees. Edwards v. United States, No. 77-2048, slip op. at 4-5 (2d Cir. Oct. 25, 1977) (per curiam).

216. United States v. Kenaan, 557 F.2d 912, 916 n.8 (1st Cir. 1977); United States v. Scallion, 548 F.2d 1168, 1173 n.7 (5th Cir. 1977).


218. United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 76-1596), was the first case to decide the issue. The Third Circuit had held that state prosecutors must comply with the Agreement when acquiring a federal
prosecutors, therefore, had no cause to believe that they might be required to accomplish transfers under the writ within relatively narrow time frames. In one analogous case, in which the Supreme Court gave only prospective application to a new procedural rule governing defendants' guilty pleas, the Court stressed that the new rule had previously been followed by only one circuit, and that over eighty-five percent of all convictions in the federal courts were obtained pursuant to guilty pleas. The new rule in question, if adopted, will have been followed by only two circuits, and then only since 1976. Similarly, virtually all transfers of prisoners to the federal government are conducted through the writ, and it may reasonably be surmised that many of them were not conducted in accordance with the Agreement's requirements.

Finally, retroactive application of a decision that the writ is a detainer would adversely affect the administration of justice, since it would probably lead to release of a large number of federal prisoners, many of whom are guilty of serious crimes. All convicts transferred under the writ whose return to the sending jurisdiction antedated trial and a large percentage of those whose trial extended beyond the statutory maximum would be discharged. Court calendars would also be clogged by government petitions alleging that the continuances were for "good cause."

B. Collateral Attack

Assuming that retroactive effect is given to a decision equating the writ with a detainer under the Agreement, the future incarceration of federal convicts whose rights under the statute have been violated, and who either

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<td>United States v. Sorrell, No. 76-1647 (3d Cir. Aug. 22, 1977) (en banc); United States v. Thompson, No. 76-1976 (3d Cir. Aug. 22, 1977) (en banc). One dissenter warned that it was &quot;questionable&quot; whether the majority's decision would be held nonretroactive, since, in light of Esola, the new ruling was foreshadowed to some extent and did not overrule &quot;clear past precedent on which the litigants may have relied.&quot; United States v. Thompson, No. 76-1976, slip op. at 23 n.1 (en banc) (Garth, J., dissenting) (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971)). This second test, however, has been held to be the least important of the three factors. United States ex rel. Allison v. New Jersey, 418 F.2d 332, 340 (3d Cir. 1969), cert. denied, 400 U.S. 850 (1970).</td>
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lost on appeal or lost their right to appeal,\textsuperscript{227} will depend on their ability to institute collateral proceedings.\textsuperscript{228} It is, however, doubtful that the statutory prerequisites for permitting collateral relief are met when a conviction is obtained in violation of the Agreement. Under the federal collateral review statute, a prisoner serving a federal sentence may move the sentencing court to "vacate, set aside or correct the sentence" in three situations\textsuperscript{229}—when the claimed error (1) is the sentencing court's lack of jurisdiction, (2) deprives the defendant of a constitutional right, or (3) if there is a violation of a United States law which leads to a "complete miscarriage of justice.\textsuperscript{230} In a recent decision, the Second Circuit has held that none of these requirements are satisfied when the ground for attack is transgression of the provisions of the Agreement.\textsuperscript{231} The court declared that "[n]o argument is required to show" that the alleged error was not of constitutional magnitude and that the sentencing court did not lose its jurisdiction when the petitioner was returned to the original place of imprisonment prior to trial.\textsuperscript{232} Finally, the court found that "[m]ere recital of the facts" demonstrated that the claimed defect did not constitute a "miscarriage of justice" sufficient to warrant the requested relief.

\textsuperscript{227} Notice of appeals in federal criminal cases must be filed within statutorily defined time limits. Fed. R. App. P. 4(b).

\textsuperscript{228} A decision that a statute has retroactive effect does not necessarily create a concomitant right of collateral review. As in the present controversy, where there has been a change in statutory law, additional factors are taken into account Comment, \textit{Availability of Federal Post-Conviction Relief in Light of a Subsequent Change in Law}, 66 J. Crim. L. & Criminology 117, 130 (1975). See, \textit{e.g.}, United States v. Travers, 514 F.2d 1171 (2d Cir. 1974), where the court, after granting retroactive effect to a statutory change, required more before allowing collateral attack. The court noted that the petitioner had been convicted of an act that was no longer criminal and that petitioner had fully utilized the appellate process before initiating collateral proceedings. \textit{Id.} at 1174-76; see Comment, \textit{Availability of Federal Post-Conviction Relief in Light of a Subsequent Change in Law}, 66 J. Crim. L. & Criminology 117, 131-33 (1975); notes 258-71 infra and accompanying text.

\textsuperscript{229} "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."


\textsuperscript{231} Davis v. United States, 417 U.S. 333, 346 (1974) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)); see United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976). The legislative history of the statute indicates that it was enacted as a response to the practical difficulties that had arisen in the federal courts' administration of their habeas corpus jurisdiction. United States v. Hayman, 342 U.S. 205, 219 (1952). Its purpose was to provide the same rights that had previously been given under habeas corpus in a more convenient forum, the sentencing court. \textit{Id. See also} Kaufman v. United States, 394 U.S. 217 (1969). Thus the statute is available only for defects which the original habeas corpus attack would have remedied: lack of jurisdiction, constitutional error, or sentences unlawfully imposed. Friendly, \textit{Is Innocence Irrelevant? Collateral Attack on Criminal Judgments}, 38 U. Chi. L. Rev. 142, 151 (1971).

\textsuperscript{232} Edwards v. United States, No. 77-2048 (2d Cir. Oct. 25, 1977) (per curiam).

\textsuperscript{232} No. 77-2048, slip op. at 4 (2 Cir. Oct. 25, 1977).
Opposition to the argument that the Agreement protects no constitutional guarantees, and therefore cannot be raised collaterally on that ground, seems unlikely. The Agreement, while aimed in part at securing speedy trials for federal defendants, safeguards no sixth amendment rights per se. Delay beyond the statutorily prescribed time limits, coupled with other circumstances, such as lack of reasonable grounds for the delay and the defendant's demand prior to trial for prompt disposition of the charges, may well create constitutional infirmities. Mere delay does not, however, standing alone, ordinarily result in an infringement on constitutional speedy trial rights. Similarly, return of the defendant to the sending jurisdiction prior to trial results in no constitutional defects.

233. Id. at 5.
235. "The thrust of [the Agreement] is not to protect the convict's right to a speedy trial per se, but rather to protect him from the particular disabilities engendered by an untried detainer pending against him while he is serving a prison term." Speedy Trial, supra note 2, at 832; see United States v. Scallion, 548 F.2d 1168, 1174 (5th Cir. 1977).
236. Barker v. Wingo, 407 U.S. 514, 523 (1972). In Barker, the Supreme Court found "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." Id. The same may be said for change of locations prior to trial.
237. Generally, only a lack of subject matter jurisdiction may be raised collaterally, since the right to object to personal jurisdiction is waivable and ordinarily must be raised prior to trial. 8 Moore's Federal Practice ¶ 12.03[2] (2d ed. 1977). Relief from waiver may be granted "for cause shown." Federal R. Crim. P. 12(f). In determining whether to grant such relief, courts consider the merits to determine whether the defendant would be prejudiced by enforcing the waiver; they may also consider whether the defendant had notice of the defect or could have obtained such notice. 8 Moore's Federal Practice, supra ¶ 12.03[3]. The Agreement does not affect the determination of guilt or innocence, and thus defendants are not prejudiced by violation of the statute per se. See notes 261-71 infra and accompanying text. If the writ is held to be a detainer under the Agreement, those defendants transferred under the writ whose rights under the Agreement were violated prior to such a determination could not have obtained notice of the defect prior to their trials. In that instance, if the Agreement were considered a matter of personal jurisdiction, relief from waiver might be granted, and collateral attack allowed.

It is submitted, however, that violation of the Agreement does not affect personal jurisdiction over the defendant. The language of the statute indicates that, if the accusing jurisdiction requests custody of the prisoner, the latter's right to contest the legality of his delivery and appearance before the court is not affected. Agreement § 2, art. IV(d), 18 U.S.C.A. app., at 232 (West Supp. 1977). This means that the court's jurisdiction over his person is determined by the circumstances of the transfer itself, not by any transgression of the Agreement which may occur subsequent to his arrival.

Alternatively, when the prisoner, pursuant to his rights under the Agreement, requests final disposition of the charges against him, this operates as consent to production of his body in any court where his presence may be required to carry out the purposes of the Agreement. Id. art. III(e), 18 U.S.C.A. app., at 231-32 (West Supp. 1977). Consent is one method by which jurisdiction over the person is obtained. See United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974). It is, of course, arguable that, after return to the sending jurisdiction or the expiration of the statutory time period prior to trial, any further appearances are not within the purposes of the Agreement and therefore do not constitute consent. Violation of the statute, therefore, would strip the court of personal jurisdiction. The Supreme Court has held, however, that even though
Whether violation of the Agreement is subject to collateral attack on the ground that it creates a jurisdictional defect in the sentencing court has provoked some controversy. One federal district court has argued that the language of the Agreement compels the conclusion that all proceedings after a violation of its provisions are a nullity. The statute provides that, upon return of a prisoner to the original place of imprisonment prior to trial, the 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." This mandatory terminology, the court held, operates to strip a court of jurisdiction whenever such violation of the Agreement occurs, since the indictment becomes void immediately upon the prisoner's return.

In view of several courts' construction of the Agreement, however, it a defendant is brought before a court against his will, this does not invalidate a subsequent conviction. Frisbie v. Collins, 342 U.S. 519, 522 (1952); Ker v. Illinois, 119 U.S. 436, 444 (1886).

In Frisbie, the defendant, who was living in Chicago, had been forcibly seized by Michigan officers and brought to Michigan to stand trial for murder. He alleged that his trial and conviction were in violation of the fourteenth amendment due process clause and the Federal Kidnaping Act. 342 U.S. at 520. The Court, in denying his petition for habeas corpus relief, held that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" Id. at 522 (footnote omitted). This conclusion was premised "on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards." Id. The Court also noted that the Federal Kidnaping Act, which petitioner raised as an alternative ground for relief, contained no "sanction barring a state from prosecuting persons wrongfully brought to it by its officers. It may be that Congress could add such a sanction." Id. at 523 (footnote omitted). Insofar as the Agreement does bar further prosecution after its violation, the case is distinguishable. Unlike the statute in Frisbie, however, the Agreement does not concern the legality of the initial transfer, by which personal jurisdiction is obtained, but prohibits certain post-transfer conduct.

The Frisbie doctrine has been questioned in instances where the defendant's presence before the court is procured by methods which violate fundamental principles of due process recognized after Frisbie was decided. See United States v. Toscanino, 500 F.2d at 275. It would seem, however, that in cases other than those where constitutional rights are violated or where the court by which jurisdiction over the defendant is obtained is "egregious," a subsequent conviction on the underlying charges will not be vacated. United States ex rel. Lujan v. Gengler, 510 F.2d 62, 64-66 (2d Cir.), cert. denied, 421 U.S. 1001 (1975). As discussed above, the Agreement protects no constitutional guarantees per se, and transgression of its provisions does not amount to conduct in itself so reprehensible as to mandate vacation of an otherwise validly imposed sentence.

240. Agreement § 2, art. IV(e), 18 U.S.C.A. app., at 232 (West Supp. 1977). The identical language appears in art. III(d), which prescribes the penalty for exceeding the statutory maximum period within which trial must be commenced. Thus the same argument is applicable to violation of this provision.
242. See United States v. Ford, 550 F.2d 732, 743-44 (2d Cir. 1977), cert. granted, 46
would seem that its violation creates no jurisdictional defect, and therefore that no collateral review is permissible on that ground. The federal collateral attack statute permits jurisdictional errors to be raised at any time, including after trial or appeal, because a court's subject matter jurisdiction can never be waived.\textsuperscript{243} The decisions in question, however, have declared that a prisoner's right not to be returned to the original place of imprisonment prior to trial is waivable.\textsuperscript{244} If the prisoner requests\textsuperscript{245} to be returned, he can no longer allege that the Agreement was violated on that ground.\textsuperscript{246} Since the statute was designed to remedy obstructions to rehabilitation programs\textsuperscript{247} and create personal rights or privileges in favor of prisoners,\textsuperscript{248} it seems reasonable to conclude that they may elect not to exercise those rights. If, then, the Agreement's sanctions are waivable, to conclude that violation of the statute destroys the court's subject matter jurisdiction, which is nonwaivable, poses an inconsistency which impugns the latter construction.

Drawing an analogy between the provisions of the Agreement which establish time limits within which trial must be held and statutes of limitation which bar an action after the lapse of a certain period is helpful in this context.

\textsuperscript{243} Fed. R. Crim. P. 12(b)(2); see United States v. Loschiavo, 531 F.2d 659, 662-63 (2d Cir. 1976).


\textsuperscript{245} The decisions are unclear as to whether the defendant must be cognizant of his rights under the Agreement at the time of his request. The Second Circuit would seem to require such knowledge. See United States v. Mauro, 544 F.2d 588, 591 n.3 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3214-15 (U.S. Oct. 4, 1977) (No. 76-1596); United States v. Cyphers, 556 F.2d 630, 635 (2d Cir. 1977). The Fifth Circuit, however, has held that a request to be returned to the original place of imprisonment was a waiver and did not indicate that at the time of the request knowledge of the statutory rights was required. United States v. Scallion, 548 F.2d 1168, 1170, 1174 (5th Cir. 1977).

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context. The same justifications given for the requirement that the defense of the statute of limitations be raised before trial and not in a later collateral proceeding also support the argument that the Agreement's benefits are waivable, and are therefore unavailable collaterally. The first reason is that raising the defense at trial gives the prosecution a chance to introduce evidence showing that the defendant falls within one of the exceptions to the particular statute of limitations. For example, the defendant may have been a fugitive and have eluded apprehension. The same justification for denying collateral review applies to the Agreement's time limitations for trial, which also allow continuations for periods of reasonable delay. Here too the prosecution should have the opportunity to offer evidence rebutting the defendant's contention that the Government delayed beyond the statutory period.

The second reason why courts have denied collateral relief based on violation of the statute of limitations is that such statutes are "personal privilege" defenses. Like the Agreement, statutes of limitation are designed to benefit those against whom claims or charges have been made. Courts that have discussed either of them have held that they are therefore waivable. Failure to raise the statute of limitations at an early time can prejudice the plaintiff's case by denying him the opportunity to raise his claim in another forum in which the action has not been barred. Similarly, allowing violation of the Agreement to be raised collaterally prejudices the Government by permitting time-consuming, costly, and essentially unnecessary trials and

249. Fed. R. Crim. P. 12(b)(2); Biddinger v. Commissioner of Police, 245 U.S. 128, 135 (1917); Waters v. United States, 328 F.2d 739, 743 (10th Cir. 1964); United States v. Taylor, 207 F.2d 437, 438 (2d Cir. 1953) (per curiam); Forthoffer v. Swope, 103 F.2d 707, 709 (9th Cir. 1939); Capone v. Aderhold, 65 F.2d 130, 131 (5th Cir. 1933).
250. United States v. Cook, 84 U.S. (17 Wall.) 168, 179 (1872); Capone v. Aderhold, 65 F.2d 130, 131 (5th Cir. 1933).
251. See United States v. White, 28 F. Cas. 568, 569 (D.C. Cir. 1837) (No. 16,677).
253. The analogy fails, of course, when the violation is the return to the sending jurisdiction prior to trial. Agreement § 2, art. III(d), IV(e), 18 U.S.C.A. app., at 231, 232 (West Supp. 1977). In that instance no extensions or exceptions are permitted, and therefore no corresponding need to offer evidence to establish the exceptions exists. Id.
255. Id.; see Hayden v. Ford Motor Co., 497 F.2d 1292, 1294-95 (6th Cir. 1974); see note 242 supra and accompanying text.
256. See Hayden v. Ford Motor Co., 497 F.2d 1292, 1295 (6th Cir. 1974) (defendant waived statute of limitations defense by failing to raise it for 30 months and thereby inducing plaintiff to voluntarily dismiss pending state action). See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 148 (1970). It may be argued, in criticism of this analogy, that statutes of limitation do not ordinarily contain the Agreement's language that upon violation the indictment "shall be of no further force or effect," and that this terminology indicates that transgression of the Agreement destroys the court's jurisdiction and is not merely a waivable defense. Such reasoning overlooks the fact, however, that while a statute of limitation may not explicitly state that noncompliance with its provisions, if alleged at trial, renders the underlying indictment ineffective, that is certainly its effect.
In sum, if the comparison of the Agreement with statutes of limitations is valid, and since the statutory rights conferred by the former are waivable, it is error to conclude that violation of the Agreement creates a defect in the sentencing court's subject matter jurisdiction, a defense which can never be waived.

The same result would probably be reached under the third situation in which the federal collateral attack statute allows collateral review—when sentences are imposed in violation of the laws of the United States. The Agreement, since it is a federal law, fits neatly within this category. Yet not all errors of law committed by the sentencing court may be raised collaterally. Which claims are cognizable depends, initially, on whether they were available on appeal. If the alleged violation could have been raised on appeal but was not, then it may not be reviewed collaterally. Therefore, those federal convicts who, since the Agreement was enacted by Congress, have had detainers filed against them, and whose rights under the statute were subsequently violated, cannot resort to collateral proceedings to set aside their convictions, since the benefits of the Agreement were available to them at trial.

A different test for collateral attack would apply to those prisoners who were transferred to federal custody pursuant to a writ, but before any decision to classify the writ as a detainer within the meaning of the Agreement. If, as in their case, the claim is one that could not have been raised on appeal, it still may not be reviewed collaterally unless it constitutes a "fundamental defect which inherently results in a complete miscarriage of justice ...." It is debatable whether deprivation of the statutory rights under the Agreement constitutes a "miscarriage of justice" so "fundamental" as to entitle prisoners transferred pursuant to the writ to reversal of their convictions upon collateral review after a subsequent extension of the Agreement to include the writ. Previous decisions granting collateral relief under this test have concerned changes in law which, had they been in effect prior to conviction or affirmance, would have exonerated the defendants. In one


260. Stone v. Powell, 428 U.S. 465, 477 n.10 (1976) (exception for constitutional claims); Alfano v. United States, 555 F.2d 1128, 1130 (2d Cir. 1977). This is premised on the rule that habeas corpus (which the federal collateral attack statute was created to mirror, see note 230 supra) is not a substitute for an appeal. Davis v. United States, 417 U.S. 333, 346 (1974); Sunal v. Large, 332 U.S. 174, 178-79 (1947) (listing exceptions to the general rule).


recent Supreme Court case,264 the petitioner was convicted for failing to report to his draft board in violation of a Selective Service regulation which accelerated the induction of delinquent draft registrants.265 After conviction and appeal, the Supreme Court held in a separate case that the regulation was punitive, and thus had no legislative sanction.266 The petitioner then moved to vacate his sentence based on the intervening change in the law, which in effect de-criminalized the conduct for which he was sentenced. The Court held that the issue could be raised in a collateral proceeding, observing that petitioner's "conviction and punishment are for an act that the law does not make criminal."267 In contrast, the procedural guarantees of the Agreement do not determine a defendant's guilt or innocence, which remains unchanged despite a subsequent widening of the scope of that Act. Of course, the defendant's right to a speedy trial may be prejudiced by the extension of proceedings beyond the statutory maximum.268 However, the relation of such a violation to the substance of the offense charged is much more remote than in instances where the subsequent change in law has completely invalidated the crime upon which conviction was based. The possible prejudice here, as in similar procedural cases,269 is not likely to result in the "miscarriage of justice"270 necessary to warrant collateral relief.271

Aside from the legal arguments against allowing a right of collateral attack, there are several policy reasons for disallowing the vacation of convictions in collateral proceedings when the alleged error is a violation of the Agreement. As discussed above, release would not be predicated upon the convict's guilt or innocence.272 In addition, many trials and appeals in our already over-

265. Id. at 334-39.
267. Davis v. United States, 417 U.S. 333, 346 (1974). Similarly, in United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976), the intervening change in law resulted in the petitioner's imprisonment "for something that was not a federal . . . offense." Id. at 665.
268. Perhaps in this situation the more efficacious allegation would be violation of the sixth amendment. See Barker v. Wingo, 407 U.S. 514, 530-31 (1972). It is, however, unlikely that collateral review will be granted to overturn convictions when the only prejudice is to the rehabilitation program in the prisoner's original place of incarceration.
269. Denial of an opportunity to present a defense which future rulings indicate should have been allowed is not reviewable in collateral proceedings. Sunal v. Large, 332 U.S. 174, 183-84 (1947). Refusal to grant relief on these grounds is significant, because conceivably the availability of a defense to a crime affects the determination of guilt more than the time within which trial must be had, or the place where it must be awaited. See Hill v. United States, 368 U.S. 424, 428 (1962); Alfano v. United States, 555 F.2d 1128, 1130 (2d Cir. 1977).
271. The Second Circuit found that a claim alleging violation of the Agreement was "even less appealing than those [it had] recently held insufficient to warrant § 2255 relief in Alfano v. United States, 555 F.2d 1128 (2d Cir. 1977) (violation of requirement for sealing intercepted communications, 18 U.S.C. § 2518(8)(a) ), and in Del Vecchio v. United States, 556 F.2d 106 (2d Cir. 1977) (alleged failure to comply with amended F.R.Cr. P. 11 with respect to guilty pleas)." Edwards v. United States, No. 77-2048, slip op. at 5 (2d Cir. Oct. 25, 1977).
272. See notes 262-71 supra and accompanying text.
crowded court system would become wastes of time, since a prisoner's right to attack his indictment and void the conviction would be preserved after appeal. Finally, the availability of collateral attack proceedings, which may be initiated at any time during imprisonment, can frustrate a central goal of punishment. Prisoners aware of this outlet may not be made to realize that their sentences were justly imposed, and that their rehabilitation is necessary. In view of the rehabilitative purposes of the Agreement, it seems anomalous to create a supplemental remedy for its violation which perpetuates the abuses which it was designed to forestall.

IV. CONCLUSION

The writ and a detainer are in several respects dissimilar, but both in operation generate many of the abuses which the Agreement was intended to remedy. It is arguable that Congress may have intended to limit the federal government's participation in the Agreement, and to place no strictures on federal prosecutors' power to obtain custody of prisoners through the writ. In fact, the Senate Committee on the Judiciary has adopted this view in its proposed amendments to the Agreement. But in view of the above discussion, it is doubtful that such an interpretation furthers all the objectives of the statute. The ease with which federal authorities have apparently accommodated their procedures to the terms of the Agreement when operating under the writ, as well as the likelihood that neither a right of collateral attack nor retroactive effect will be allowed, demonstrate that the practical obstacles to the broader classification adopted by the Second and Third Circuits are minimal. Given these circumstances, and in the absence of a clear legislative intent to the contrary, classifying the writ as a detainer within the meaning of the Agreement would seem to be the fair solution.

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275. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146 (1970). “Neither is it an adequate answer that repentance and rehabilitation may be thought unlikely in many of today's prisons. That is a separate and serious problem, demanding our best thought but irrelevant to the issue here.” Id. (footnote omitted).


277. Clarifying legislation may be necessary to prevent the absurd results when, for example, the “territory” of the state jurisdiction to which a prisoner is returned prior to trial is the same as that of the federal receiving jurisdiction. See note 182 supra. Classification of the writ as a detainer under the Agreement, however, creates no anomalies not already present under the existing terminology.

278. See notes 70-72 supra and accompanying text.

279. See pt. II supra.


281. See pt. III supra.