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The Interstate Agreement on Detainers and the Federal Government

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In 1970, Congress entered into the Interstate Agreement on Detainers (the Agreement) on behalf of the federal government and the District of Columbia. At that time the Agreement had been enacted by twenty-eight states and since then has been entered into by all but four states. Briefly stated, the Agreement provides...
a mechanism for clearing outstanding detainers and obtaining speedy trials of persons already incarcerated and serving sentences in jurisdictions other than those which have lodged the detainers. Under the Agreement, if a prisoner in a party state had a detainer lodged against him by a second party state, he may file a “written request” for final disposition; the second state then must try the prisoner within 180 days of the request. Similarly, a prosecutor may obtain a prisoner incarcerated in a party state by first lodging a detainer against the prisoner and then presenting a “written request for temporary custody” over him. Once such a request is made, the defendant must be tried within 120 days after arrival in the requesting state. In either case, if the defendant is not tried within the requisite time or if he is returned to the original jurisdiction without trial, the charges against him must be dismissed with prejudice.

Almost six years after federal participation began, the Court

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4. The Act does not define “detainer.” However, the House and Senate Committee on the Judiciary reports, H.R. Rep. No. 1018, 91st Cong., 2d Sess. 2 (1970); S. Rep. No. 1356, 91st Cong., 2d Sess. 2, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4864, 4865, define detainer as “a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction.”


6. Id. art. III(a), 18 U.S.C. app., at 4475.

7. Id. art. IV(a), 18 U.S.C. app., at 4476.

8. Id. art. IV(e), 18 U.S.C. app., at 4476.

9. Id. art. IV(e), 18 U.S.C. app., at 4476.
of Appeals for the Second Circuit held in *United States v. Mauro*,\(^{10}\) for the first time in any circuit, that a writ of habeas corpus ad prosequendum\(^{11}\) constitutes a "detainer" as contemplated by the Agreement and that return to state custody without trial violates the Agreement. The court further held by implication that the writ is a "written request" by a prosecutor and that the Agreement is the sole means of exchanging sentenced prisoners between the United States and a party state. Shortly after *Mauro*, the question whether a writ of habeas corpus ad prosequendum is a detainer under the Agreement arose in other circuits. The First,\(^{12}\) Fifth,\(^{13}\) Sixth,\(^{14}\) and Eighth\(^{15}\) Circuits rejected the *Mauro* determination. On the other hand, the Third Circuit has followed *Mauro*.\(^{16}\) The Ninth Circuit presently has a similar issue pending before it.\(^{17}\) Moreover, following *Mauro*, the Second Circuit held in *United States v. Ford*\(^{18}\) that, regardless of whether a writ of habeas corpus ad prosequendum is a detainer, once a detainer has been lodged the writ is a "written request for custody"\(^{19}\) under the Agreement.

Whether the writ of habeas corpus ad prosequendum constitutes either a detainer or a written request for custody are issues of critical importance to the orderly administration of the federal criminal justice system. In early October 1977, the Supreme Court granted certiorari in *Mauro* and *Ford* to resolve these issues.\(^{20}\)


\(\)\(^{11}\) A writ of habeas corpus ad prosequendum is a "federal court order commanding the immediate production of a prisoner at a federal trial." *Id.* at 595 (Mansfield, J., dissenting). Such a writ is issued pursuant to 28 U.S.C. § 2241(c)(5) (1970). See text accompanying notes 128-130 infra.


\(\)\(^{13}\) *United States v. Scallion*, 548 F.2d 1168 (5th Cir. 1977), *petition for cert. filed*, No. 76-6559.

\(\)\(^{14}\) *Ridgeway v. United States*, 558 F.2d 357 (6th Cir. 1977).


\(\)\(^{16}\) *United States v. Sorrell*, 562 F.2d 227 (3d Cir. 1977) (en banc).

\(\)\(^{17}\) *United States v. Adkins*, No. 76-3523 (9th Cir., filed Nov. 26, 1976) (sub judice).


article will examine the Agreement from the federal viewpoint and explore the correctness of Mauro and Ford, concluding, finally, that the holding of each is incorrect.21

THE AGREEMENT

The Agreement was first proposed in 1956 by the Council of State Governments to remedy serious defects that had arisen in the so-called detainer system.22 This unregulated system23 allowed law enforcement officials in one state to file a detainer with prison authorities in a second state, advising the authorities that charges were pending in the first state against a prisoner jailed in the second state and requesting the second state to notify the first when the inmate's release was imminent.24 The detainer thus served as a

21. This article will not discuss the following anticipated troublesome problems which will arise if the Supreme Court sustains either Mauro or Ford: (1) under what circumstances rights are created by the Agreement, when these rights may be waived, and what, if any, is the applicable waiver standard, see, e.g., United States v. Cyphers, 556 F.2d 630 (2d Cir.), cert. denied, 97 S. Ct. 2937 (1977); United States v. Ford, 550 F.2d 732 (2d Cir. 1977), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 77-52). A related issue is whether a claim under the Agreement is waived by a plea of guilty, see, e.g., Edwards v. United States, 564 F.2d 652, 653 (2d Cir. 1977) (district court held plea of guilty waived claim, while court of appeals, without disturbing this holding, affirmed district court on other grounds); (2) whether these decisions should be applied retroactively, see, e.g., Genovese v. United States, No. 76C-1720 (E.D.N.Y. Nov. 1, 1977), holding that Mauro should not be given retroactive effect. Accord, United States v. Sorrell, 562 F.2d 227, 231 & n.66 (3d Cir. 1977) (en banc); (3) whether a claimed violation of the Agreement is cognizable in a collateral attack on a federal conviction under 28 U.S.C. § 2255 (1970), see Edwards v. United States, 564 F.2d 652, 653 (2d Cir. 1977) ("[A] claim based on a violation of [the Agreement] is not within 28 U.S.C. § 2255."); and (4) whether any judicial limitations on the apparent breadth of the Agreement are proper and are consistent with and will effectuate the Agreement's underlying purposes, see, e.g., United States v. Chico, 558 F.2d 1047 (2d Cir. 1977) (return of prisoner on same day does not violate Agreement); United States v. Roberts, 548 F.2d 665 (6th Cir.), cert. denied, 431 U.S. 931 (1977) (Agreement inapplicable to unsentenced state prisoner). For a discussion of these problems, see Note, The Effect of the Interstate Agreement upon Federal Prisoner Transfer, 46 FORDHAM L. REV. 492 (1977).


24. See id. According to the Council of State Governments, "[a] detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer."
“hold” on the prisoner.

This system, however, caused several problems. Once the institution became aware that the inmate was “wanted” by another state, the inmate usually was denied full participation in rehabilitation and treatment programs. In addition, detainers raised speedy trial problems. When the Agreement was initially proposed, a prisoner’s demand to be tried pursuant to a detainer on charges outstanding in a jurisdiction other than the one in which he was incarcerated was of no legal effect, because an inmate could not compel the state in which he was serving a sentence to transfer him to a state which had lodged a detainer. Likewise, it was practically impossible for the state which had lodged the detainer to obtain custody of the inmate prior to the completion of his sentence in the confining state; the necessary procedures were cumbersome and expensive and thus were seldom invoked. Consequently, this system was, not surprisingly, unsatisfactory to prisoners, prison officials, and law enforcement authorities alike and was severely criticized.

COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1959, at 167 (1958), reprinted in ABA STANDARDS, supra note 22, app. A, at 43, 43. Or, as the Sixth Circuit recently stated: “A detainer is simply a notice to prison authorities that charges are pending against an inmate elsewhere, requesting the custodian to notify the sender before releasing the inmate.” Ridgeway v. United States, 558 F.2d 357, 360 (6th Cir. 1977). Detainers are generally classified into three categories depending upon the reason the prisoner is wanted in the issuing jurisdiction: (1) to answer outstanding charges; (2) to begin serving an imposed but unexecuted sentence; or (3) for violation of parole or probation. Dauber, Reforming the Detainer System: A Case Study, 7 CRIM. L. BULL. 669, 676 (1971). The detainers discussed in this article are of the first type only, that is, notification that charges are pending against the prisoner in another jurisdiction.


26. However, over 10 years after the Agreement was first proposed, the Supreme Court held that, upon a prisoner’s demand, a good faith effort must be made to try the defendant. See Smith v. Hooey, 393 U.S. 374, 383 (1969); text accompanying notes 42 & 43 infra.

The defects in the detainer system did not, however, similarly affect the federal government where federal charges were outstanding against inmates confined in state prisons. In such cases, the federal government had available the time-honored writ of habeas corpus ad prosequendum to obtain the production of state prisoners.28 This writ is a federal district court order to produce a prisoner at federal trial.29 State authorities have always complied with this order,30 and it is probably enforceable under the supremacy clause,31 although the courts have not decided the precise issue. The detainer system did not adversely affect state prisoners against whom federal charges were pending, since in such cases the inmate could apply to the federal district court in which the charges were pending, if the federal prosecutor had not done so, for a writ of habeas corpus ad prosequendum directing his production in federal court to obtain a speedy trial.32 A federal inmate, however, against

29. See note 11 supra.
30. Research has failed to disclose a case to the contrary. See United States v. Mauro, 544 F.2d 588, 596 (2d Cir. 1976) (Mansfield, J., dissenting), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 76-1596). Potential noncompliance was averted in Kyle v. United States, 211 F.2d 912 (9th Cir. 1954), where a state official refused to disturb a state prisoner's custody, and the federal authorities apparently did not pursue the issue, never obtaining a federal writ.
31. U.S. CONST. art. VI, cl. 2, which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." See text accompanying notes 155-197 infra.
32. See S. REP. No. 60, 94th Cong., 1st Sess. 984 (1975). Contra, Crow v. United States, 323 F.2d 886 (6th Cir. 1963), in which the court stated that a state prisoner, where a federal detainer had been lodged based on a complaint rather than on an information or indictment, had no right to obtain the federal ad prosequendum writ in connection with a speedy trial demand, because there was "no federal crimi-
whom there was lodged a detainer based on an outstanding state charge did suffer the adverse consequences that affected a state inmate against whom there was lodged a state detainer. In such a case, there was, prior to the Agreement, no simple mechanism for this federal prisoner to clear the state detainer. Thus, "the Agreement was framed with State problems in mind."33

CONGRESSIONAL PARTICIPATION

Effective March 9, 1971, the United States became a party to the Agreement.34 The Council of State Governments envisioned federal participation when it first proposed the Agreement in 1956.35 The Agreement, however, was not introduced in Congress until 1963, when Representative Emanuel Celler submitted the Agreement to the House;36 yet at that time, no action was taken. In 1968, Representative Celler reintroduced the Agreement,37 but although the bill was passed by the House,38 the Senate failed to act on it.39

The 1968 congressional history of the proposed legislation indicates that federal participation in the Agreement was sought primarily to alleviate two serious problems: First, federal prisoners could not initiate proceedings to clear state detainers filed against them;40 second, state prosecutors could only secure out-of-State prisoners for trial pursuant to special contracts between State Governors.41 Not unexpectedly, there is no mention in this legislative

33. United States v. Sorrell, 562 F.2d 227, 243 (3d Cir. 1977) (en banc) (Garth, J., dissenting) (dissenting also in United States v. Thompson, 562 F.2d 232 (3d Cir. 1977)).
35. In the original proposal, "state" was defined as "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." COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION, PROGRAM FOR 1957, text of the Agreement on Detainers, art. II(a), reprinted in ABA STANDARDS, supra note 22, app. B, at 47, 50 (proposed text of Agreement).
38. 114 CONG. REC. 11,793 (1968).
39. Id. at 11,980.
40. Id. at 11,795 (remarks of Rep. Kastenmeier).
41. Id. Following Representative Kastenmeier's remarks, Representative Poff
history of a need for the federal government to obtain state prisoners; since the federal writ of habeas corpus ad prosequendum had always been used.

Following Congress’ failure in 1968 to enact the Agreement, the Supreme Court decided *Smith v. Hooey*. In *Hooey* the Court held that the sixth amendment right to a speedy trial, as made binding on the states under the fourteenth amendment, applies even when the state cannot compel the presence of a federal prisoner detained in a federal institution. Because of this decision, enactment of the Agreement became imperative. Thus, the Agreement was reported out of the House Judiciary Committee in early 1970. Shortly thereafter, the House passed the bill and referred it to the Senate; the Senate passed the bill on November 23, 1970. The accompanying House and Senate Committee on the Judiciary reports, as well as the floor speeches, reflect concern for potential dismissal of state cases against federal prisoners based on *Hooey*. Thus, for example, in the opening paragraphs of the Senate report, after noting *Hooey*, the Committee on the Judiciary stated that it “is of the opinion that the enactment of this legislation would afford [state] defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right.” The Senate urged passage of the bill because

[u]nder the present [detainer] system it is impossible to get prompt disposition of criminal charges which are the basis for criminal detainment. For that reason alone this legislation is justified.

[In addition,] in the interest of rehabilitation, this legislation is justified. So long as there is a criminal charge outstanding ... and there has been no resolution of that charge, the uncertainty militates against the interest of the accused in pursuing rehabilitating programs.

Id. (remarks of Rep. Poff).

42. 393 U.S. 374 (1969). See also Dickey v. Florida, 398 U.S. 30 (1970) (conviction of state defendant reversed where state failed to make any effort to obtain defendant for trial while he was federal inmate for period of seven years).


45. 116 CONG. REC. 14,000 (1970).

46. Id. at 14,156.

47. Id. at 38,842.


50. Unquestionably, in this context, the committee was referring only to state, not federal, defendants.

report's "Statement of the Facts" section, however, contains no reference to the rehabilitative purposes of the Agreement. Indeed, this purpose of the Agreement does not appear until the third page of the Senate report. Therefore, while Congress was concerned with the adverse effects of outstanding state detainers on federal prisoners, it appears that the possibility of dismissal of state cases under Hooey was the real impetus for enactment of the Agreement. This conclusion is buttressed by the failure of the legislative history to discuss expected use of the Agreement by the United States as a "Receiving State" to obtain sentenced state prisoners. Although the Assistant to the Commissioner of the District of Columbia noted that the Agreement would enable "District prosecuting authorities to have a prisoner in a party State made available for disposition of local detainers," this comment had no applicability to the federal government, which had available to it the ad prosequendum writ. Rather, the comment applied only to the "local" District of Columbia courts (excluding, of course, the United States District Court for the District of Columbia), which did not have the ad prosequendum writ.

The bill enacting the Agreement became effective March 9, 1971. Not until almost six years later, however, did federal indictments come under attack by sentenced state prisoners whose appearances in federal court had been obtained not pursuant to the Agreement, but under the traditional federal writ of habeas corpus ad prosequendum.

52. Id. at 3, [1970] U.S. CODE CONG. & AD. NEWS at 4866.
53. The Agreement defines a "Receiving State" as "the State in which trial is to be had on any indictment, information, or complaint pursuant to article III or article IV hereof." Interstate Agreement on Detainers Act, Pub. L. No. 91-538, § 2, art. II(c), 84 Stat. 1397 (1970), reprinted in 18 U.S.C. app., at 4475, 4475 (1970). The Agreement defines a "Sending State" as "a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof." Id. art. II(b), 18 U.S.C. app., at 4476.
JUDICIAL TREATMENT OF THE AGREEMENT

In United States v. Mauro, the Government appealed from orders of a federal district court which dismissed indictments on the ground of noncompliance with the Agreement. The facts of Mauro were unexceptional: On November 3, 1975, defendants John Mauro and John Fusco were charged with criminal contempt of court for their refusal to testify before a federal grand jury. At the time of these indictments, defendants were New York State inmates serving unrelated state sentences. On November 5, 1975, the United States District Court for the Eastern District of New York issued separate writs of habeas corpus ad prosequendum for Mauro and Fusco pursuant to which they were arraigned on their respective indictments on November 24, 1975. Defendants remained in federal custody and next appeared in court on December 2, 1975. At this appearance, after setting trial dates in February for Fusco and in March for Mauro, the district court judge noted that the local federal facility, in which defendants were being held, was overcrowded. Thus the court ordered both to be returned to state custody and to be "Writ down for trial." Shortly thereafter, the two were returned to state custody. The court issued ad prosequendum writs again, and each defendant was produced once more in the district court. Prior to these appearances, however, defendants moved to dismiss the indictments on the ground that the Agreement had been violated, because they had been returned to state custody without having been tried on the federal indictments. The district court agreed, and ordered dismissal of the indictments.

58. Id. at 589-90. Defendants were charged with criminal contempt of court pursuant to 18 U.S.C. § 401 (1970).
60. Id.
61. Id.
62. Id. Both Mauro and Fusco were held at the federal Metropolitan Correctional Center in New York City. Id. While New York City has a federal institution, most cities having federal district courts do not. In such cases, the United States Bureau of Prisons enters into contracts with local correctional institutions for the lodging of federal defendants. See United States v. Sorrell, 562 F.2d 227, 229 n.3 (3d Cir. 1977) (en banc); 18 U.S.C. § 4002 (1970).
On appeal, the Government argued that a writ of habeas corpus ad prosequendum constitutes enforceable federal court process and not a detainer under the Agreement. The Government asserted that the Agreement did not, in effect, repeal this writ. Therefore, the Government contended that the Agreement is not the sole means whereby federal prosecutors may obtain sentenced state prisoners for trial, and that its provisions are inapplicable when a writ of habeas corpus ad prosequendum is employed.\textsuperscript{65} In addition, the Government urged that the Agreement, according to its congressional history, applied to the United States only as a “Sending State,” not as a “Receiving State.”\textsuperscript{66}

By a divided court, the Second Circuit rejected the Government’s arguments and affirmed the orders of dismissal.\textsuperscript{67} The majority rejected the Government’s contention that the habeas corpus ad prosequendum writ is mandatory and held that the writ is a detainer.\textsuperscript{68} Implicit in this holding was a finding that the writ also constituted a prosecutor’s “written request for temporary custody or availability”\textsuperscript{69} of the prisoner, because unlike article III, which governs prisoner-initiated requests and is triggered solely by the pendency of a detainer, article IV, which governs prosecutor-initiated requests, is triggered by the “written request” only when a detainer has already been lodged. Thus, to decide that dismissal of the indictment was required under article IV(e), the \textit{Mauro} majority, albeit sub silentio, must have decided that the writ qualified as such a “written request.”\textsuperscript{70} Moreover, the court held that the Agreement is the sole means of exchanging prisoners between the party states to the Agreement.\textsuperscript{71} The court also relied upon


\textsuperscript{66} \textit{Id.} at 593.

\textsuperscript{67} \textit{Id.} at 595.

\textsuperscript{68} \textit{Id.} at 592.


\textsuperscript{70} This reading of \textit{Mauro} is supported by United States v. \textit{Ford}, 550 F.2d 732 (2d Cir. 1977), \textit{cert. granted}, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 77-52), in which the majority opinion, authored by Judge Mansfield, who had dissented in \textit{Mauro}, stated: “We held [in \textit{Mauro}] . . . that the writ of habeas corpus ad prosequendum constitutes a ‘detainer’ and a ‘request’ by a prosecuting authority within the meaning of the [Agreement], with the present author dissenting in that case from the majority’s holding that a writ of habeas corpus ad prosequendum constitutes a ‘detainer.’” \textit{Id.} at 736.

language in the Agreement and in its legislative history in holding that the United States is both a sending and receiving state\textsuperscript{72} and that the writ remains extant only where a defendant is imprisoned in a nonparty jurisdiction.\textsuperscript{73}

Judge Mansfield dissented in Mauro on the ground that a writ of habeas corpus ad prosequendum is different from a detainer and is a valid order under 28 U.S.C. § 2241(c)(5).\textsuperscript{74} He distinguished a detainer from a federal writ of habeas corpus ad prosequendum on two grounds. First, Judge Mansfield concluded that the writ is a federal court order to produce a prisoner at federal trial while a detainer is a mere notification of pending charges and a request that the prisoner be detained.\textsuperscript{75} Second, Judge Mansfield would have held that, unlike a detainer, a writ is enforceable against the states under the supremacy clause.\textsuperscript{76} Additionally, he concluded that neither the face of the Agreement nor its legislative history indicates congressional intent to repeal the federal statute concerning writs of habeas corpus.\textsuperscript{77} Thus, Judge Mansfield would have found that where a federal court issues a writ of habeas corpus ad prosequendum to obtain a prisoner, the Agreement is inapplicable.\textsuperscript{78}

The Second Circuit decision in United States v. Ford\textsuperscript{79} followed shortly after Mauro. In Ford, unlike in Mauro, authorities lodged a federal detainer prior to issuing a writ of habeas corpus ad prosequendum.\textsuperscript{80} Thus, the court was not asked to determine whether the writ constituted a "detainer" and a "request," as decided by Mauro, but instead whether it constituted a "request" where a federal detainer had already been filed. While this distinction may seem at first glance to be overly technical in light of the Mauro conjunctive holding, it provided a basis for Judge Mansfield, who had dissented in Mauro, to author the majority opinion in Ford. The court held that the Agreement comes into play whenever a federal detainer, as distinguished from a writ of habeas corpus ad

\begin{itemize}
\item \textsuperscript{72} Id. at 593.
\item \textsuperscript{73} Id. at 594.
\item \textsuperscript{74} Id. at 595 (Mansfield, J., dissenting).
\item \textsuperscript{75} Id. (Mansfield, J., dissenting).
\item \textsuperscript{76} Id. at 596 (Mansfield, J., dissenting).
\item \textsuperscript{77} Id. at 597 (Mansfield, J., dissenting) (discussing 18 U.S.C. § 2241 (1970)).
\item \textsuperscript{78} Id. (Mansfield, J., dissenting).
\item \textsuperscript{79} 550 F.2d 732 (2d Cir. 1977), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 77-52).
\item \textsuperscript{80} Compare id. at 735 with United States v. Mauro, 544 F.2d 588, 589-90 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 76-1596).
\end{itemize}
prosequendum, is lodged against a sentenced state prisoner.\textsuperscript{81} Ford also presented the court with the question whether claimed violations of the Agreement could be raised for the first time on appeal without having been presented at trial.\textsuperscript{82}

In Ford defendant was arrested in Illinois pursuant to two federal warrants, one issued by the District Court for the Southern District of New York and the other by the District Court for Massachusetts.\textsuperscript{83} Ford was first turned over to Massachusetts federal authorities. The federal charges against him were dropped, but he subsequently pleaded guilty to state charges and was sentenced to a term of imprisonment. New York authorities then lodged their warrant with the Commonwealth of Massachusetts as a detainer,\textsuperscript{84} and after Ford began serving his Massachusetts sentence, the Southern District of New York issued a writ of habeas corpus ad prosequendum to obtain him for arraignment. Ford was then produced from Massachusetts before the District Court for the Southern District of New York for arraignment on April 1, 1974, at which time he pleaded not guilty to an indictment charging him with bank robbery and aggravated bank robbery.\textsuperscript{85} On April 3, 1974, a superseding indictment was filed charging Ford and another with the same bank robbery and additional crimes involving the use of a firearm in the commission of a bank robbery, interstate transportation of a stolen automobile, and conspiracy.\textsuperscript{86} Ford was taken from federal custody, which he had not yet left, and again was produced in federal court on April 15, 1974, for arraignment on this new indictment; trial was then set for May 28, 1974. Prior to trial, the Government moved for an adjournment, and the trial was adjourned to August 21. Thereafter, on June 14, 1974, Ford sought and was granted permission to be returned to Massachusetts, where his lawyer was located, so that he could prepare for trial. In August, the trial was again rescheduled to November 14, 1974, this time because the judge originally assigned to the case had resigned from

\textsuperscript{82} See United States v. Cyphers, 556 F.2d 630, 634-37 (2d Cir.), cert. denied, 97 S. Ct. 2937 (1977), where the issue was, \textit{inter alia}, whether the failure to raise a claimed violation of the Agreement before trial constitutes a waiver under FED. R. CRIM. P. 12(f).
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 735 n.1.
the bench. In November, the Government moved for an additional adjournment. The motion was granted and trial was reset for February 18, 1975.87 On that date, June 11, 1975 was set as a new trial date. In March, the District Court for the Southern District of New York announced a crash program, to begin June 2, for the disposition of civil cases. As a result, Ford's trial was postponed until August 8, 1975.88 On August 8, 1975, pursuant to a second writ of habeas corpus ad prosequendum, Ford was obtained from Massachusetts for trial. At the beginning of trial, Ford again moved for dismissal of the indictment on speedy trial grounds but did not contend that the Agreement's requirement that trial begin within 120 days of a prosecutor-initiated production had been violated. The speedy trial motion was denied, and Ford was thereafter convicted by a jury on all counts.89

On appeal, the Second Circuit, in a split decision, felt "constrained to hold that, whether or not a writ of habeas corpus ad prosequendum constitutes a 'detainer,' . . . once a federal detainer has been lodged against a state prisoner the habeas writ constitutes a 'written request for temporary custody' within the meaning of Article IV of the [Agreement]."90 The court decided that Ford, by requesting to be returned to Massachusetts, had waived the Agreement's requirement that a prisoner not be returned to the sending state without trial on the charges for which he was obtained.91 The court, however, declined similarly to find such a waiver with respect to the Agreement's 120-day requirement.92 Although not expressly stated, under the court's holding Ford's speedy trial motions included by implication an assertion of a violation of the Agreement's 120-day limitation. The majority found several of the delays unjustified93 but failed to discuss Ford's failure to present the claimed violation of the Agreement in the district court.94

87. Id. at 735.
88. Id. at 736.
89. Id.
90. Id. at 742 (citation omitted). Judges Mansfield and Meskill comprised the court's majority; Judge Moore dissented.
91. Id.
94. Cf. United States v. Scallion, 548 F.2d 1168, 1174 (5th Cir. 1977), petition for cert. filed, No. 76-6559 (finding that defendant waived violation of Agreement by failing to present issue to district court or to court of appeals prior to filing amended
Several federal courts of appeals in addition to the Second Circuit have considered the applicability of the Agreement to writs of habeas corpus ad prosequendum. In *United States v. Scallion*, a unanimous panel of the Fifth Circuit held that a writ of habeas corpus ad prosequendum is not a detainer for purposes of the Agreement. The court reviewed the legislative history of the Agreement and concluded that Congress did not intend that the Agreement establish the exclusive mechanism for prisoner transfer for prosecution. Moreover, following an approach similar to that of Judge Mansfield in his *Mauro* dissent, the Fifth Circuit stated: "Both historically and substantively, the writ of habeas corpus ad prosequendum issued by a federal district is entirely different from a 'detainer' as [defined in the legislative history]." The court, however, followed *Mauro* in rejecting the Government's contention that the United States joined the Agreement only as a sending state and not as a receiving state.

petition for rehearing). In *Ford* the Government, in its brief submitted prior to *Mauro*, argued that the district court's decision in *Mauro* was incorrect, raising essentially the same arguments presented in the court of appeals in that case. Brief for Appellee at 21, *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 77-52). The Government also contended that *Mauro*, if affirmed, could only logically apply to the bank robbery count, the sole charge which formed the basis of the first writ of habeas corpus ad prosequendum. Petition for Rehearing En Banc for Appellee at 17-20, *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 77-52). The Government contended that the other charges in the superseding indictment, charges on which Ford had not been brought and returned on, should not have been dismissed. Brief for Appellee at 28, *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 77-52). While this argument was neither referred to by the *Ford* majority nor its dissent, the Second Circuit accepted it in *United States v. Cyphers*, 556 F.2d 630, 635 (2d Cir.), cert. denied, 97 S. Ct. 2937 (1977). Similarly, in *United States v. Cumberbatch*, 563 F.2d 49 (2d Cir. 1977), the court affirmed conviction, rejecting defendant's contention that dismissal of a first indictment with prejudice for violation of the Agreement, required dismissal of a supplemental indictment; the court thus recognized a distinction between the original charge and additional charges contained in the superseding indictment.

95. 548 F.2d 1168 (5th Cir. 1977), petition for cert. filed, No. 76-6559.
96. 548 F.2d 1168 (5th Cir. 1977), petition for cert. filed, No. 76-6559.
97. Id. at 1171.
Thereafter, in *United States v. Kenaan*, the First Circuit, approving both Scallion and the Mauro dissent, held that a writ of habeas corpus ad prosequendum is not a detainer under the Agreement. The court held unanimously that a detainer is different from a writ of habeas corpus ad prosequendum in purpose, legal basis, and historical context. Thus, the two constitute distinct methods for obtaining custody of prisoners for federal prosecution. Moreover, the court viewed the Agreement as aimed at curbing abuses which are not associated with the ad prosequendum writ, because the writ "is carried out immediately and is discharged when the prisoner is returned to state custody."

Almost immediately following Kenaan, the Sixth Circuit in *Ridgeway v. United States* joined the First and Fifth Circuits in holding that the ad prosequendum writ is not a detainer under the Agreement. The court noted that the Agreement's legislative history lacks express reference to the writ of habeas corpus ad prosequendum. The court then examined the origins of the Agreement and summarized the effects of the detainer system on an inmate. Finally, the court concluded that the Agreement was designed to correct deficiencies in the detainer system that are not present with use of the ad prosequendum writ. The court refused to hold that the Agreement had either implicitly repealed section 2241(c)(5) or modified the writ authorized by that section, and concluded that Congress did not intend "to make the Agreement the exclusive means by which a state prisoner can be brought to trial in federal court."

Subsequent to Kenaan, the Third Circuit followed Mauro. In

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100. See id. at 915.
101. Id. at 917.
102. Id. at 915.
103. Id. at 916.
104. 558 F.2d 357 (6th Cir. 1977).
108. Id. at 360-61.
109. Id. at 362.
111. *Ridgeway v. United States*, 558 F.2d 357, 362 (6th Cir. 1977) (citation omitted). *Kenaan* was not cited in *Ridgeway* probably because the two decisions were practically contemporaneous.
United States v. Sorrell, a divided en banc court held that an ad
prosequendum writ is a detainer within the meaning of the Agree-
ment. The court further held, as did the Second Circuit in Ford,
that such writ constitutes both a “detainer” and a “written request
for temporary custody or availability.” Two separate dissenting
opinions were filed in Sorrell. In the first, Judge Weis stated that
the Agreement was poorly drafted legislation. He would have fol-
lowed Kenaan, Scallion, and Ridgeway, and thus would have held
that the writ is not a detainer, since he believed that Congress did
not intend to limit the power of federal courts to issue the ad pro-
sequendum writ. Judge Weis, however, rejected the Govern-
ment’s contention that Congress intended the federal government
to participate in the Agreement only as a sending state, preferring
“to uphold the unrestricted availability of habeas corpus ad
prosequendum.” In the second dissenting opinion, Judge Garth
construed the Agreement as covering cases involving federal-state
transfers only if state boundaries are crossed. His construction was
drawn principally from an ingenious conclusion that “transfers of
custody” are not the triggering events under Article IV(e),
coupled with his belief that, while the federal government did not
become a party to the Agreement in a receiving capacity only, the
Agreement’s effect on the United States was only considered in

112. 562 F.2d 227 (3d Cir. 1977) (en banc).
113. Id. at 231.
114. Id. at 231 n.6.
115. See id. at 235 (Weis, J., dissenting); id. at 238 (Garth, J., dissenting). These
dissenting opinions were also filed in United States v. Thompson, 562 F.2d 232 (3d
Cir. 1977) (en banc). In Thompson the Third Circuit rejected the Government’s argu-
ment that the Agreement does not apply where the United States prosecutes a
sentenced state prisoner within the geographical boundaries of the state in which the
federal district court is situated. Id. at 234 n.2.
116. United States v. Sorrell, 562 F.2d 227, 238 (3d Cir. 1977) (en banc) (Weis,
J., dissenting) (dissenting also in United States v. Thompson, 562 F.2d 232 (3d Cir.
1977)).
117. Id. at 236 (Weis, J., dissenting) (dissenting also in United States v. Thompson,
562 F.2d 232 (3d Cir. 1977)).
118. Id. at 235-36 (Weis, J., dissenting) (dissenting also in United States v. Thompson,
562 F.2d 232 (3d Cir. 1977)).
119. Id. at 238 (Weis, J., dissenting) (dissenting also in United States v. Thompson,
562 F.2d 232 (3d Cir. 1977)) (citations omitted). This position, although
rejected in Mauro and Scallion, is supported by S. REP. No. 00, 94th Cong., 1st Sess.
984 (1975), which refers to a proposed amendment to the Agreement designed “to
clarify the intent of the Congress by providing that the Federal Government is a
participant in the Agreement only in the capacity of a ‘sending state.’”
120. United States v. Sorrell, 562 F.2d 227, 242 (3d Cir. 1977) (Garth, J., dis-
senting) (dissenting also in United States v. Thompson, 562 F.2d 232 (3d Circ. 1977)).
that capacity. Judge Garth would have had the court try "to make as much sense out of the Agreement"\textsuperscript{121} as possible until Congress could take the necessary corrective action.

Most recently, the Eighth Circuit in \textit{United States v. Harris},\textsuperscript{122} held that issuing a writ of habeas corpus ad prosequendum does not constitute lodging a detainer under the Agreement, and thus "the dismissal requirements of the Agreement apply only to detainers and not to federal writs of habeas corpus ad prosequendum."\textsuperscript{123} Although this determination was not necessary to the court's holding because \textit{Harris} involved an unsentenced state prisoner who had been produced in federal court, the Eighth Circuit soon applied \textit{Harris} to a state prisoner who had been serving a state sentence. In this case, \textit{United States v. Frye},\textsuperscript{124} the court recognized disagreement among the circuits, and stated: "[I]t is our view that Congress did not intend by adoption of the Interstate Agreement on Detainers Act to repeal or modify the provisions of 28 U.S.C. \textsection 2241(c)(5) authorizing the production of prisoners to testify or for trial."\textsuperscript{125}

\textbf{IS A WRIT OF HABEAS CORPUS AD PROSEQUENDUM A DETAINER?}

Notwithstanding \textit{Mauro}\textsuperscript{126} and \textit{Sorrell},\textsuperscript{127} review and analysis of the nature, purpose, and history of the writ of habeas corpus ad prosequendum, together with examination of the Agreement's legislative history, requires the conclusion that the writ is separate and distinct from the detainer. A necessary corollary of this result is that the issuance, execution, and satisfaction of the writ neither involves the Agreement nor invokes any of its terms.

\textit{The Writ of Habeas Corpus Ad Prosequendum}

The writ of habeas corpus ad prosequendum is one of several kinds of habeas corpus writs.\textsuperscript{128} It empowers a court to order the

\begin{itemize}
\item \textsuperscript{121} \textit{Id.} at 244 (Garth, J., dissenting) (dissenting also in \textit{United States v. Thompson}, 562 F.2d 232 (3d Cir. 1977)).
\item \textsuperscript{122} 566 F.2d 610 (1977).
\item \textsuperscript{123} \textit{Id.} at 613.
\item \textsuperscript{124} 566 F.2d 1090 (1977).
\item \textsuperscript{125} \textit{Id.} at 1091.
\item \textsuperscript{126} \textit{United States v. Mauro}, 544 F.2d 588 (2d Cir. 1976), \textit{cert. granted}, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 76-1596).
\item \textsuperscript{127} \textit{United States v. Sorrell}, 562 F.2d 227 (3d Cir. 1977) (en banc).
\item \textsuperscript{128} The various habeas corpus writs are provided for in 28 U.S.C. \textsection 2241
production of a prisoner from one jurisdiction to another for pros-
cution. This writ is one of the "auxiliary or processive" writs,
because its purpose is to aid the jurisdiction of a particular
court. It differs from a writ of habeas corpus ad subjiciendum,
which is an original or remedial writ used to test the legality of the
detention of a prisoner "with a view to an order releasing the
[prisoner]." The writ of habeas corpus ad subjiciendum has been
described as the "Great Writ," and when "writ of habeas cor-
pus" is used alone, usually only the writ of habeas corpus ad sub-
jiciendum is intended.

Although this article concerns an auxiliary writ, it is necessary
to analyze briefly the federal habeas corpus statute. This approach
is warranted, because the development of federal writs of habeas
corpus—both the Great Writ and the processive writs—followed
parallel courses.

In section 14 of the Judiciary Act of 1789, Congress authorized
all the . . . courts of the United States . . . to issue writs of scire
facias, habeas corpus, (e) and all other writs not specially pro-
vided for by statute, which may be necessary for the exercise of
their respective jurisdictions, and agreeable to the principles and
usages of law. And . . . either of the justices of the supreme
court, as well as judges of the district courts, shall have power to
grant writs of habeas corpus for the purpose of an inquiry into
the cause of commitment.—Provided, that writs of habeas corpus
shall in no case extend to prisoners in gaol, unless where they
are in custody, under or by colour of the authority of the United
States, or are committed for trial before some court of the same,
or are necessary to be brought into court to testify.

In Ex parte Bollman, the Supreme Court held that the first sen-
tence of section 14 empowered a federal court to issue auxiliary

(1970). For the provision for the writ of habeas corpus ad prosequendum, see id.
§ 2241(e)(5).
130. See generally Longsdorf, Habeas Corpus: A Protean Writ and Remedy, 8
F.R.D. 179, 184-87 (1949).
writ of habeas corpus ad subjiciendum "the great and efficacious writ, in all manner
of illegal confinement." 3 W. BLACKSTONE, COMMENTARIES *131.
134. See id.
135. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73.
136. 8 U.S. 46, 4 Cranch 75 (1807).
writs, including writs of habeas corpus ad prosequendum,\(^{137}\) and that the second sentence empowered a federal judge or justice to issue the Great Writ for inquiry into the lawfulness of a petitioner's detention.\(^{138}\) The second sentence of section 14 did not, however, make federal habeas corpus available as a remedy to a prisoner held in state custody.\(^{139}\) Such availability was not extended until 1833,\(^{140}\) when, as a result of the nullification controversy which arose in South Carolina, it became necessary for Congress to extend the Great Writ to federal officers held in state custody for the performance of their official duties.\(^{141}\)

Although a state prisoner, who was convicted as a result of his activities as a federal officer acting under federal authority, was not authorized to use an ad subjiciendum writ to challenge his detention until 1833, the federal auxiliary or processive writs, authorized in the original Judiciary Act, already extended to bring a state prisoner into federal court to testify.\(^{142}\) Notwithstanding erroneous dictum in *Ex parte Dorr*\(^ {143}\) indicating that a federal judge was authorized to issue a habeas corpus writ only to bring a state prisoner to federal court as a witness,\(^{144}\) it is apparent that a state prisoner was subject to production in federal court for prosecution as well.\(^ {145}\)

\(^{137}\) See id. at 59, 4 Cranch at 96.

\(^{138}\) See id. See also Longsdorf, supra note 130, at 186.

\(^{139}\) *Ex parte Bollman*, 8 U.S. 46, 59-60, 4 Cranch 75, 97 (1807).

\(^{140}\) Act of March 2, 1833, ch. 57, § 7, 4 Stat. 632. An earlier provision, Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, which applied to removal of prosecutions of federal officers for acts relating to the customs laws, did not provide a habeas corpus mechanism; rather, it provided for a petition to be filed with the circuit court for removal. *Id.* Thus, this provision is generally considered outside the realm of habeas corpus.

\(^{141}\) See In re Neagle, 135 U.S. 1, 70 (1890).

\(^{142}\) Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73; *Ex parte Dorr*, 44 U.S. 113, 3 How. 103 (1845).

\(^{143}\) 44 U.S. 113, 3 How. 103 (1845).

\(^{144}\) *Id.* at 115, 3 How. at 105. This dictum inexplicably ignores the Act of 1833, which extended the reach of federal habeas corpus to a limited class of state prisoners, that is, federal officers acting under federal authority. *See note 140 supra* and accompanying text. It also inexplicably failed to recognize *Ex parte Bollman*, 8 U.S. 46, 4 Cranch 75 (1807), which the Supreme Court has characterized as finding "authority for the writ ad prosequendum in the reference to habeas corpus in the first sentence of § 14 [of the Judiciary Act of 1789]." *Carbo v. United States*, 364 U.S. 611, 617-18 (1961). *See also Longsdorf, supra* note 130, at 185.

\(^{145}\) In Virginia v. Paul, 148 U.S. 107 (1893), the Supreme Court held that the writ of habeas corpus cum causa is the proper writ for removal of a state prisoner under state indictment to federal court for trial. It appears that in *Paul* an ad prosequendum writ was "actually used." *See Longsdorf, supra* note 130, at 185. Apparently, this is the earliest use of this writ to obtain production of a state prisoner for trial in federal court, although the writ is generally assumed to be almost 200
Federal habeas corpus jurisdiction was next expanded in 1842 to reach a foreign national held in state or federal custody for acts committed under foreign authority.146 Thereafter, during the Reconstruction period Congress extended federal habeas corpus to state prisoners generally.147 The Supreme Court has stated that the 1867 Act "was the last important statutory change"148 in habeas corpus jurisdiction.

Following a series of revisions,149 the habeas corpus statutes took their present form,150 and for the first time a statute made explicit reference to the writ ad prosequendum.151 As the Supreme Court noted, however, this reference did not change the then-existing habeas corpus law.152 According to the Court, in the 1875 revision of the Statutes at Large "the ad prosequendum writ, necessary as a tool for jurisdictional potency as well as administrative efficiency, [was] extended to the entire country."153

years old, see Carbo v. United States, 364 U.S. 611, 620 (1961). Thus, it seems that the reason for this early disuse of the writ is that, since the writ by its terms would return the prisoner to state custody at the conclusion of the federal trial, the states honored the writ as a matter of course in nonremoval situations. Moreover, since the early federal criminal jurisdiction was narrow in scope, the potential for conflict was minimal. In any event, there are no early reported federal prosecutions in which a court saw a necessity for noting that the federal defendant had been produced in federal court from state custody pursuant to an ad prosequendum writ, if indeed such a writ was employed.


The statute referring to the writ ad prosequendum states:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(5) It is necessary to bring him into court to testify or for trial.


153. Id. at 618. For the text of the Revised Statutes which consolidated into positive law the antecedent habeas corpus legislation, see Longsdorf, supra note 149, at 412-14.
Thus, the ad prosequendum writ is traceable to the Judiciary Act of 1789, and even further to common law origins. Although not the Great Writ, it is nevertheless a species of that most celebrated of writs in English law.\textsuperscript{154} To fulfill its function when issued by a federal court, the writ ad prosequendum is probably enforceable against state authorities by virtue of the supremacy clause.\textsuperscript{155}

That the federal courts have never been called upon to invoke federal supremacy in enforcing the processive writ of habeas corpus ad prosequendum does not mean that the writ is complied with only as a matter of comity. Although the \textit{Mauro} court indicated that "[w]hile a writ of \textit{habeas corpus ad prosequendum} may use mandatory language, the jurisdiction to which such a writ is addressed is relied upon to cooperate in turning over the defendant to the other sovereign,"\textsuperscript{156} the precise issue of federal supremacy has never been decided. In \textit{Carbo v. United States},\textsuperscript{157} the Supreme Court noted that the federal ad prosequendum writ in question had been given full recognition under the comity that exists between sovereigns in the federal-state system\textsuperscript{158} and stated that "[i]n view of the cooperation extended by the [state] authorities in honoring the writ, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation."\textsuperscript{159} But, as Judge Mansfield wrote in dissent in \textit{Mauro}, there is "no doubt that if a state institution refused to obey a federal writ of habeas corpus ad prosequendum properly issued pursuant to \textsection{2241} and thus provoked a federal-state confrontation, the writ would be held enforceable [sic] against the institution under the Supremacy Clause."\textsuperscript{160}

\textsuperscript{154. See 3 W. Blackstone, \textit{Commentaries} *131.}
\textsuperscript{155. U.S. Const. art. VI, cl. 2. For the text of the supremacy clause, see note 31 supra.}
\textsuperscript{156. United States v. Mauro, 544 F.2d 588, 592 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 76-1596) (quoting United States v. Oliver, 523 F.2d 253, 258 (2d Cir. 1975)). The cases cited in \textit{Oliver} as support for this proposition, however, do not decide the issue of enforceability of the ad prosequendum writ. Rather, these cases discuss the enforceability issue only in dicta: Carbo v. United States, 364 U.S. 611 (1961) (Court held that federal district court can issue ad prosequendum writ beyond territorial limitation of particular district); McDonald v. Ciccone, 409 F.2d 28 (8th Cir. 1969) (state prisoner on federal writ lacks standing to prevent his return to state custody); Moses v. Kipp, 232 F.2d 147 (7th Cir. 1956) (state prisoner on writ to federal court has no standing to attack his return to state jurisdiction); Lunsford v. Hudspeth, 126 F.2d 653 (10th Cir. 1942) (state prisoner on writ to federal court properly returned to state jurisdiction does not commence federal sentence until returned to federal custody after service of state sentence).
\textsuperscript{157. 364 U.S. 611 (1961).}
\textsuperscript{158. See id. at 621.}
\textsuperscript{159. Id. at 621 n.20.}
\textsuperscript{160. United States v. Mauro, 544 F.2d 588, 596 (2d Cir. 1976) (Mansfield, J.,}
Additional support for the position that federal supremacy requires state authorities to honor a federal ad prosequendum writ was advanced by one commentator:

Where there is state imprisonment and a pending federal prosecution there is, clearly, no place for the principle of "comity." Federal law authorizes the writ of habeas corpus ad prosequendum, and the Supreme Court of the United States has held, in *Carbo v. United States*, that this power is not confined within the borders of the issuing judicial district. In the *Carbo* case there was consent by the State of New York, the imprisoning state. Thus the decision does not consider or reject the authority holding that such consent is necessary before the writ of habeas corpus ad prosequendum can issue. However, that authority is erroneous, since the statutory writ is the supreme law of the land and the imprisoning state has no choice but to yield the prisoner, anything in its law to the contrary notwithstanding.161

The authority referred to is a line of cases which stems from *Ponzi v. Fessenden*,162 where the Supreme Court implied in dictum that compliance with a writ of habeas corpus directing the production of a prisoner for trial was a matter of comity.163 Yet neither *Ponzi* nor any of the decisions involved a state refusal to comply with the federal writ of habeas corpus ad prosequendum.164 There-

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162. 258 U.S. 254 (1922).
163. See id. at 262.
164. For cases in which courts stated in dicta that compliance with the ad prosequendum writ is a matter of comity between the state and federal government, see United States v. Oliver, 523 F.2d 253 (2d Cir. 1975) (alleged violation of plan for prompt disposition of criminal cases); Trigg v. Moseley, 433 F.2d 364 (10th Cir. 1970) (federal prisoner cannot obtain federal writ for removal of state detainer before exhausting state remedies); McDonald v. Ciccone, 409 F.2d 28 (8th Cir. 1969) (state prisoner on federal writ lacks standing to prevent his return to state custody); McDonald v. United States, 403 F.2d 37 (5th Cir. 1968) (state prisoner on federal writ lacks standing to attack return to state custody); Crow v. United States, 323 F.2d 888 (8th Cir. 1963) (state prisoner appealing state conviction cannot obtain federal writ for federal trial); Moses v. Kipp, 232 F.2d 147 (7th Cir. 1956) (state prisoner on writ to federal court has no standing to attack his return to state jurisdiction); Lunsford v. Hudspeth, 126 F.2d 653 (10th Cir. 1942) (state prisoner on writ to federal court properly returned to state jurisdiction does not commence federal sentence until returned to federal custody after service of state sentence).
fore, cases such as *Stamphill v. United States*,\(^{165}\) *Strand v. Schmitt-roth*,\(^{166}\) and *In re Nelson*\(^{167}\) are not authority for the proposition that comity requires compliance with an ad prosequendum writ. In *Stamphill* the issue was whether the state’s surrender of a defendant pursuant to a writ was for trial only or included service of his sentence.\(^{168}\) The issue in *Strand* was whether a federal probationer could be arrested by state authorities.\(^{169}\) Finally, *Nelson* concerned the enforceability of a federal mandate calling for service of a federal sentence. In *Nelson* no statutory authority was found, absent state consent, to enforce that mandate,\(^{170}\) although it seems that Congress could enact such statutory authority if it wished to do so.

The most important case in the context of federal supremacy of the ad prosequendum writ is *Ponzi v. Fessenden*.\(^{171}\) In *Ponzi* Chief Justice Taft stated that the federal system of two sovereigns requires “a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.”\(^{172}\) At issue in *Ponzi* was the authority of the United States Attorney General to authorize the transfer of a federal prisoner to state custody. The case did not involve the enforceability of federal process.\(^{173}\) *Ponzi*, therefore, does not support the proposition that the federal writ of habeas corpus ad prosequendum is not enforceable against a state prisoner. Moreover, the broad dictum in *Ponzi* is perhaps grounded in the established principle that the states have no power to issue a habeas corpus writ against the federal government.\(^{174}\) As the Supreme Court has explained, to permit otherwise would be “inconsistent with the supremacy of the general government, as defined and limited by the Constitution of the United States and the laws made in pursuance thereof.”\(^{175}\) Thus, it appears that the Supreme Court

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165. 135 F.2d 177 (10th Cir. 1943).
166. 251 F.2d 590 (9th Cir.), cert. dismissed, 355 U.S. 886 (1957).
167. 434 F.2d 748 (8th Cir. 1970).
168. *Stamphill v. United States*, 135 F.2d 177, 177-78 (10th Cir. 1943).
171. 258 U.S. 254 (1922).
172. Id. at 259.
173. Id. at 261-62. The authority of the Attorney General to authorize the transfer of a federal prisoner to state custody is now expressly granted. 18 U.S.C. § 4085 (1970).
overbroadly stated the federal-state relationship with reference to comity in recognition of the supremacy principle and with an awareness of the potential for conflict or misunderstanding inherent in that relationship.

Comity, therefore, especially in connection with the auxiliary federal ad prosequendum writ, simply means that absent special circumstances, the federal courts will forbear from interference with state court jurisdiction. In other words, comity is a corollary of the rule of first-acquired jurisdiction that was held in *In re Johnson*\(^{176}\) to be "so frequently applied in cases of conflicting jurisdiction between Federal and state courts."\(^{177}\) This rule\(^{178}\) has been stated to be "one of comity only, and has a wide application in civil cases, *but a limited one in criminal cases*."\(^{179}\) One lower federal court has stated:

> It has also become well settled that if a party is on trial or in duress—that is, in actual custody—under the authority of a state court, no other state court, and no United States court, should, except in an urgent case, take the defendant from that custody, prior to an actual release or relinquishment of the right to the custody on the part of the court before which the matter is pending.\(^{180}\)

These interrelated rules of comity and first-acquired jurisdiction were self-imposed by the federal courts early in their history to prevent disruption of the delicate balance of federalism. Examination of the early precedents concerning federal supremacy indicates that the federal government has the power to enforce auxiliary or processive writs of habeas corpus if it chooses to do so.

In *Ableman v. Booth*,\(^{181}\) the Supreme Court held that a state court lacks the authority to issue a writ of habeas corpus for a person held by an officer of the United States under federal author-

\(^{176}\) 167 U.S. 120 (1897).
\(^{177}\) *Id.* at 125.
\(^{178}\) In *In re Johnson*, 167 U.S. 120 (1897), the Court stated: (1) it has been the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession. *Id.* at 125.


\(^{180}\) *Ex parte Marrin*, 164 F. 631, 636 (E.D.N.Y. 1908) (citations omitted).

\(^{181}\) 62 U.S. (21 How.) 506 (1858).
The Court based this conclusion on the supremacy clause and observed that the power of the United States to enforce its own laws through its own courts does not need "the consent of the State in which the culprit [is] found." A person who has allegedly committed a federal offense may, of course, be prosecuted in federal court. As a result, the federal government must possess the corresponding power to issue appropriate process to compel production of a person before its courts. As the Supreme Court indicated in an analogous context, to rely upon state cooperation is "an element of weakness [not] to be found in the Constitution." Similarly, the fortuitous circumstance that a person who has allegedly violated federal law is in state custody cannot deny the United States the power to enforce federal law should it choose to do so, since "[n]o State government can exclude [the United States] from the exercise of any authority conferred upon it by the Constitution."

The judicial power to adjudicate criminal prosecutions brought by the executive department, which is charged with the responsibility to prosecute violations of the law, "carries with it all those incidental powers which are necessary to its complete and effectual execution." Indeed, in *Cohens v. Virginia*, the Supreme Court noted that while a state cannot extraterritorially apprehend a fugitive, but instead must make a demand on the executive of the state in which the fugitive is located, this principle does not apply to the United States when it exercises the power of arrest outside its exclusive jurisdiction and without regard to the necessity for a demand upon the executive of the state. By analogy, therefore, a similar power should exist to permit the United States to compel a state to yield custody over a person held under state authority. A re-

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182. *Id.* See also *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871).
183. U.S. CONST. art. VI, cl. 2. For the text of the supremacy clause, see note 31 supra.
185. Federal judicial power over criminal prosecutions was established in the early 1800's. *Cohens v. Virginia*, 19 U.S. 120, 6 Wheat. 264 (1821). The Supreme Court has noted that "'[i]t was essential . . . to its very existence as a Government, that [the United States] should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws.' *Ableman v. Booth*, 62 U.S. (21 How.) 506, 518 (1858).
187. *Id.*
189. 19 U.S. 120, 6 Wheat. 264 (1821).
190. Where the defendant seeks to involve *FED. R. CRIM. P. 20* (transfer from
requirement of state consent would place enforcement of federal law under state control, at least in this limited circumstance where the defendant is in state custody. Such a result would be inconsistent with federalism, which establishes the federal government as supreme.\textsuperscript{191}

Federal and state governments are, of course, distinct. They have been characterized as "independent of each other, and supreme within their respective spheres."\textsuperscript{192} Because of this independence, the Supreme Court has noted that "within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority."\textsuperscript{193} This latter qualification indicates that states may not deny federal judicial process. If federal supremacy is respected, there can be no other result.

This supremacy principle underlies the federal removal statutes,\textsuperscript{194} the constitutionality of which is well-settled.\textsuperscript{195} In a removed criminal case, the processive or auxiliary writ of habeas corpus cum causa is the traditional means of securing a state prisoner's district for plea and sentence), while incarcerated in a state institution, commentators have stated: "A writ of habeas corpus ad prosequendum should serve every purpose of a warrant of arrest . . . ." 4 W. BARRON \& A. HOLTZOFF, FEDERAL PRACTICE \& PROCEDURE § 2081, at 146 (1951 ed.). \textit{See id.} at 149 (Wright ed. Supp. 1964). \textit{See also} Clark v. United States, 367 F.2d 378 (5th Cir. 1966). While such production pursuant to FED. R. CRIM. P. 20 is accomplished by the defendant's actions rather than by federal process, this distinction is irrelevant to resolving the delicate issue of federal-state relations. Thus \textit{Clark}, as well as the cited commentary, support the proposition that the ad prosequendum writ can compel production similarly to an arrest warrant.


193. \textit{Id.} at 407 (emphasis added).

194. 28 U.S.C. §§ 1441-1451 (1970). \textit{Cf. 18 U.S.C. § 351 (1970) (congressional assassination, kidnapping, and assault), which provides in part: "If Federal investigative or prosecutive jurisdiction is asserted for a violation of this section, such assertion shall suspend the exercise of jurisdiction by a State or local authority, under any applicable State or local law, until Federal action is terminated." \textit{Id.} § 351(f). While perhaps technically not a removal statute, this provision is analogous to removal and is grounded, as it must be, in the concept of supremacy. Although there are no reported decisions concerning this provision, it would appear to be constitutionally valid, as are the removal statutes. \textit{See notes 195 \& 196 infra.}

195. \textit{See, e.g.}, Tennessee v. Davis, 100 U.S. 257 (1879) (power to remove criminal cases); Martin v. Hunter's Lessee, 14 U.S. 141, 161, 1 Wheat. 304, 349 (1816) (power to remove civil cases).
presence in federal court, although the present statute merely provides:

If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court. A fortiori, if Congress can authorize compulsory removal of an entire state prosecution into federal court, it should be empowered to authorize compulsory production of state prisoners for trial on federal charges.

If the production of a state prisoner in federal court depends solely upon the deferential doctrine of comity, an uncooperative or hostile state could prevent effective enforcement of federal criminal law. Such a state could permit the state penitentiary to be a sanctuary. Therefore, it would be anomalous to conclude that the federal government can arrest a person anywhere in the country but may not take custody over a person accused of violating federal law simply because the person is in state custody. Thus, the power to issue a writ of habeas corpus, even if exercised infrequently, is an indispensable component of federal supremacy.

Differences Between a Writ of Habeas Corpus Ad Prosequendum and a Detainer

While the Agreement does not expressly define a detainer, the legislative history provides the following definition: "A detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." More specifically defined, "a detainer is simply a request, grounded in notions of comity, that the detaining institution notify the law enforcement authorities in the demanding state when the inmate's release date draws near."

196. The first criminal removal statute, Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, did not specify the type of process to be used. Subsequently, Act of March 2, 1833, ch. 57, § 3, 4 Stat. 632, provided for the issuance of writs of habeas corpus cum causa.


199. Wexler & Hershey, Criminal Detainers in a Nutshell, 7 CRIM. L. BULL. 753, 753 n.2 (1971) (emphasis added). More fully, Wexler and Hershey stated: "Upon
A detainer, then, is nothing more than an informal notification which does not compel or require any action by the authorities with which it is lodged. Since such notification may be filed by any law enforcement authority, including the police, empowered to take an inmate into custody, a detainer may thus be issued without judicial authorization or supervision. Indeed, as one federal court of appeals has noted, detainers are “informal aides in interstate and intrastate criminal administration.” Detainers do not, however, affect prosecution of the inmate. The detainer once filed remains lodged against the inmate until further affirmative action is taken. Prior to the Agreement, the detainer would have remained lodged until the expiration of the imprisonment term, causing serious damage to the inmate’s quest for rehabilitation, parole, or other institutional privilege. Under the Agreement, either the prosecuting authority requests custody of the detainee, or the detainee himself requests transfer to the issuing jurisdiction for trial.

A federal writ of habeas corpus ad prosequendum, on the other hand, is a “court order directing the production of a prisoner to stand trial in federal court.” The writ is time-honored judicial process, commanding the appropriate authority to produce a state prisoner in federal court promptly or by a specified date. By its terms, the writ is executed immediately and cannot, like a detainer, lie dormant for an indefinite period, prejudicing the state inmate’s rehabilitation program. Upon return of the inmate to the state prison, the writ is satisfied and the prisoner can reinvolve himself in a rehabilitation program.

A writ of habeas corpus ad prosequendum, therefore, is distinct from a detainer in a legal, historical, and functional sense. The remaining question, then, is whether, notwithstanding these differences, Congress intended to classify ad prosequendum writs as detainers, thereby subjecting them to the Agreement’s limitations.

Congressional enactment of the Agreement must be viewed against the background of its failure to consider the effect of the Agreement on the statute authorizing the writ of habeas corpus notification, the demanding state will presumably have an ample opportunity to set in motion its extradition machinery should it decide definitely to prosecute the prisoner at the expiration of his term.”

203. See text accompanying notes 128-197 supra.
ad prosequendum. This perspective is especially valid where, as here, the extant legislation serves a distinct purpose, has a distinct function, and is separate from the subsequent statute. In such a situation, an established rule of statutory construction provides that where Congress has enacted express legislation concerning a particular subject matter, that legislation should not be deemed implicitly repealed by subsequent legislation which is not concerned with the same subject matter and which serves distinct purposes. Courts should try to reconcile an earlier statute with the later one. Repeal of an earlier statute by implication is not favored, because it is simple for Congress to state unequivocally that prior legislation is repealed, if that is its intention. Only where there is an irreconcilable conflict between two statutes, or when the latter act, by its terms, is clearly intended to supersede the former statute, is there repeal by implication. Thus, the Agreement should be construed to permit both the ad prosequendum writ and the detainer under the Agreement to have continued and independent vitality. To do so will do no violence to the expressed purposes of the Agreement.

The Agreement can be readily construed to apply to the United States only as a sending state. Although the language of the Agreement includes the United States as a “state,” so that the federal government is thus within the definitions adopted by the Agreement as both a “Sending State” and a “Receiving State,” Congress evidently envisioned United States participation only as a sending state. This congressional intent is illuminated by the statement of the Senate Committee on the Judiciary, subsequent to enactment of the Agreement, in connection with clarifying legislation contained in the proposed Criminal Justice Reform Act of 1975, which provided in pertinent part:

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207. See notes 35 & 53 supra and accompanying text.
208. S. 1, 94th Cong., 1st Sess., 121 CONG. REC. S33 (daily ed. Jan. 15, 1975). S. 1 contained a provision which stated: “Adoption of Agreement by the United States—The United States solely as a ‘sending state,’ and the District of Columbia are parties to the Interstate Agreement on Detainers . . . .” United States v. Mauro, 554 F.2d 588, 594 (2d Cir. 1976) (quoting S. 1, 94th Cong., 1st Sess. § 3201(a), 121 CONG. REC. S33 (daily ed. Jan. 15, 1975), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 76-1596). While S. 1 was not enacted by the 94th Congress, legislation now pending before the 95th Congress would make the United States a party to the
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.209

This construction, according to Judge Weis, dissenting in *United States v. Sorrell*,210 would make “the statute workable and reasonable.”211 Judge Weis further noted, however, that this construction “has been consistently rejected in the courts reviewing it.”212 Nevertheless, to construe the Agreement to include the federal government only as a sending state would effectuate congressional purpose and would not produce bizarre results, such as those in *United States v. Thompson*.213 Moreover, the statement by Congress subsequent to enactment of the Agreement214 should be treated as virtually conclusive of the intended scope of the Agreement.215

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210. 562 F.2d 227 (3d Cir. 1977) (en banc) (Weis, J., dissenting) (dissenting also in United States v. Thompson, 562 F.2d 232 (3d Cir. 1977)).

211. **Id. at 235-36 (Weis, J., dissenting) (dissenting also in United States v. Thompson, 562 F.2d 232 (3d Cir. 1977)).**

212. **Id. at 236 (Weis, J., dissenting) (dissenting also in United States v. Thompson, 562 F.2d 232 (3d Cir. 1977) (citing United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 76-1596); United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977), petition for cert. filed, No. 76-6559).**

213. 562 F.2d 232 (3d Cir. 1977). In *Thompson* the prisoner was produced from a state jail in Philadelphia to federal court in Philadelphia, and returned to jail the same day. Although the state jail was also a contract facility for federal prisoners, see 18 U.S.C. § 4002 (1970), Thompson was returned and accepted by the state jail as a state prisoner, because the United States had not arranged for his technical “paper” transfer from state to federal custody. *United States v. Thompson*, 562 F.2d 232, 234 (3d Cir. 1977). According to the Third Circuit, this return violated the Agreement, and thus caused dismissal of the federal indictment. **Id. at 234-35. Such dismissal is as severe a sanction as most sanctions for constitutional violations. Thus, to characterize such a result as bizarre is an understatement.**

214. **See text accompanying notes 208 & 209 supra.**

Soon after the Agreement's passage and just prior to its effective date, the Bureau of Prisons of the Department of Justice, the Agency responsible for federal prisoners, issued an important policy statement.\(^{216}\) This statement indicates that the Agreement was enacted to allow a state to take custody over federal and foreign state prisoners\(^ {217}\) since there has always been authority for the federal government to take custody over state inmates.

Further indication of congressional intent appears in the Speedy Trial Act of 1974.\(^ {218}\) Although this statute was enacted after passage of the Agreement, an examination of its provisions demonstrates that Congress, in 1974, did not believe that the writ of habeas corpus ad prosequendum was affected by the prior passage of the Agreement. This Act, then, is further evidence of the original congressional purpose to leave the writ of habeas corpus ad prosequendum unaffected by the Agreement.

The Speedy Trial Act of 1974 sets forth the duty of the federal prosecutor: When such an official knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.\(^ {219}\)

This provision was adopted almost verbatim from section 3.1 of the ABA Standards Relating to Speedy Trial recommended in 1967 by the Advisory Committee on the Criminal Trial.\(^ {220}\) As the committee noted, this section was derived from the Interstate Agreement on Detainers\(^ {221}\) and from the Uniform Mandatory Disposition of subsequent legislation could not supplement the intent of the original Congress which enacted a particular statute. In the context of the Agreement, congressional intent was always inferable: The United States was participating in the Agreement to send prisoners to various states to avoid speedy trial dismissals and to enable federal prisoners under state detainers to clear their outstanding detainers. Without the Agreement, the detainer system adversely affected prisoners' rights with regard to rehabilitation programs and the like.

\(^{217}\) Id.
\(^{219}\) Id. § 3161(j)(l).
\(^{220}\) ABA STANDARDS, supra note 22, § 3.1.
\(^{221}\) See id. § 3.1(a), Commentary at 34.
Detainers Act. The ABA provision, however, was broader in scope and required the prosecutor to initiate procedures under which the inmate could demand trial even though the prosecutor did not seek immediate trial.

Significantly, Congress impliedly recognized the continued viability of the writ of habeas corpus ad prosequendum through its only change from the proposed ABA provision and the enacted legislation. The Speedy Trial Act of 1974 provides:

When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

The legislature omitted from the parenthetical proviso of this section language included in the ABA provision concerning "the traditional right of the executive to refuse transfer." Thus, Congress impliedly recognized the mandatory nature of the traditional writ of habeas corpus ad prosequendum as used to obtain state prisoners: Congress adopted the ABA proposal absent the provision concerning the right of the executive to refuse transfer, because the writ was not susceptible to refusal by state officials.

Moreover, if the Agreement is applied to the United States as a receiving state, the Speedy Trial Act of 1974 would be simultaneously duplicative of, and inconsistent with, the Agreement. While both the Act and the Agreement require the United States to
guarantee a speedy trial, the Speedy Trial Act of 1974 requires trial to commence within sixty days of arraignment.\textsuperscript{227} The Agreement, however, provides for trial to be held within 180 days after the prosecutor’s receipt of the prisoner’s demand\textsuperscript{228} or within 120 days after production of the prisoner in the requesting state on a prosecutor-initiated request for custody.\textsuperscript{229} The Agreement also lacks the detailed tolling provisions provided in the Speedy Trial Act of 1974.\textsuperscript{230} Furthermore, the Act requires that a defendant be arraigned within ten days after filing an indictment or information.\textsuperscript{231} Congress expected this requirement to be complied with “where the defendant’s presence could have been obtained by the exercise of prosecutorial initiative.”\textsuperscript{232} This requirement, however, contravenes the Agreement, which requires a thirty-day delay during which the state executive can refuse to transfer the state prisoner to federal custody.\textsuperscript{233} This latter refusal is, of course, inconsistent with the Speedy Trial Act of 1974, as well. Thus, as Judge Weis noted in his Sorrell dissent, “there is a direct conflict between the Speedy Trial Act and the [Agreement] which the majority’s interpretation [holding the writ to be a detainer] does not resolve but, in fact, creates.”\textsuperscript{234}

Consequently, based on review of the history of the writ and its legal and functional differences from the detainer, and based on review of the legislative history of the Agreement together with the subsequently enacted Speedy Trial Act of 1974, it appears that the writ is not a detainer under the Agreement. Contrary to Mauro, the United States is unable “to evade and circumvent the Agreement by simply utilizing the traditional writ.”\textsuperscript{235} This concern, as stated by the First Circuit in United States v. Kenaan,\textsuperscript{236} “rests on

\begin{footnotes}
\item 229. \textit{Id.} art. IV(c), 18 U.S.C. app., at 4476.
\item 231. \textit{Id.} § 3161(c).
\item 236. 557 F.2d 912 (1st Cir. 1977), \textit{petition for cert. filed}, 46 U.S.L.W. 3158 (U.S. Sept. 20, 1977) (No. 77-206).
\end{footnotes}
a hypothetical."\textsuperscript{237} Since the writ is federal judicial process, the issuing court will be able to prevent abuse.

Accordingly, the Agreement should be construed to provide that the United States participates only as a sending state. Such a construction would harmonize the Agreement, the Speedy Trial Act of 1974, and 28 U.S.C. § 2241(c)(5), and thereby give effect to each according to the underlying congressional purpose of each. Moreover, since the legislative history is silent concerning any expectation or understanding that the Agreement would implicitly repeal the writ, the Agreement should not be so construed, especially when such a construction would contravene Congress' expressed concerns in enacting the Agreement. The writ, therefore, should continue to play its crucial role as a tool for jurisdictional potency as well as administrative efficiency. To construe the writ as a detainer would not necessarily advance the rehabilitative goals articulated by Mauro\textsuperscript{238} but would unnecessarily disrupt the smoothly functioning system of state-to-federal inmate transfer.

**IS A WRIT OF HABEAS CORPUS AD PROSEQUENDUM A "REQUEST" UNDER THE AGREEMENT?**

In *United States v. Ford*,\textsuperscript{239} the majority held that regardless of whether the writ of habeas corpus ad prosequendum is a detainer under the Agreement, it nevertheless constitutes a "written request for custody" under the Agreement.\textsuperscript{240} In so holding, the Second Circuit transformed the writ from enforceable federal court process into a mere request for the production of a prisoner, which is subject to the disapproval of the executive of the state where the prisoner is incarcerated. As the following analysis indicates, this holding is incorrect, and the federal ad prosequendum writ should not be classified as a written request under article IV(a) of the Agreement.

\textsuperscript{237} Id. at 917.

\textsuperscript{238} See United States v. Mauro, 544 F.2d 588, 592 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 76-1596). For a discussion of these rehabilitative goals, see United States v. Sorrell, 562 F.2d 227, 236-37 (3d Cir. 1977) (Weis, J., dissenting) (dissenting also in United States v. Thompson, 562 F.2d 232 (3d Cir. 1977)). Had defendant in *Sorrell* remained in federal custody, he would have been lodged in a local jail where rehabilitation programs were not offered. In contrast, had he been returned to his original place of confinement, there would have been no interruption in his rehabilitation program, because the writ would have been satisfied, thereby not disrupting his program. See *id.* at 228-29.

\textsuperscript{239} 550 F.2d 732 (2d Cir. 1977), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977) (No. 77-52).

\textsuperscript{240} Id. at 736.
Examination of the relevant legislative history reveals no evidence that either Congress or the drafters of the Agreement intended the Agreement to supplant or to modify the federal writ. There is no reference to the writ in the Agreement’s legislative history. Thus, as the Fifth Circuit stated in *United States v. Scallion*,241 had Congress intended to repeal the writ, it would be “incredible that the Judiciary Committees of both the House and Senate would fail to even mention” it.242 Consequently, the writ should remain independently viable and enforceable federal court process. Indeed, because of the mandatory nature of the writ, the federal government found it unnecessary to join the Agreement, absent concern with federal prisoners under state writs.

Nevertheless, the court in *Ford* reasoned that the provision which authorizes states to refuse to comply with prosecutors’ requests for temporary custody of prisoners,243 “plays a very minor role in the [Agreement’s] general structure.”244 Thus, this provision did not constitute an impediment to subsuming the writ as a “request” for purposes of effectuating the sanctions of the Agreement. Yet this characterization of the provision’s role is debatable. While the provision “relates to transfer mechanics,”245 it does more: It preserves preexisting law concerning interstate transfers. As the Council of State Governments indicated, the Governor’s disapproval authority is designed “to accommodate situations involving public policy which occasionally have been found in the history of extradition.”246 Thus, in the context of interstate transfers, this provision is not minor, but constitutes an essential ingredient of extradition law which did not apply to transfers of prisoners from state to federal custody. These latter transfers are probably enforceable under federal supremacy, when effected pur-

241. 548 F.2d 1168 (5th Cir. 1977), petition for cert. filed, No. 76-6559.
242. Id. at 1173.
243. Article IV(a) of the Agreement provides: “[T]here shall be a period of thirty days after receipt by the appropriate authorities before the request [for temporary custody of the prisoner] be honored, within which period the Governor of the sending State may disapprove the request . . . either upon his own motion or upon motion of the prisoner.” Interstate Agreement on Detainers Act, Pub. L. No. 91-538, § 2, art. IV(a), 84 Stat. 1397 (1970), reprinted in 18 U.S.C. app., at 4475, 4476 (1970).
245. Id. at 742.
suant to the federal writ.\textsuperscript{247} Indeed, it appears that the \textit{Ford} result might have been different had that court reached the question of enforceability of the federal writ. In addition, there is no similar executive right of disapproval with regard to prisoner-initiated transfers.\textsuperscript{248} The limitation on prosecutor-initiated transfers, then, was maintained only for traditional prisoner exchanges and was not extended to affect the newly-created right of the prisoner himself to clear outstanding detainers. This suggests that the drafters of the Agreement recognized the necessity for preserving the traditional executive right to refuse extradition with respect to the historical prosecutor demand, a practice that did not apply to federal demands for production of state prisoners.

This limitation on the procedure established to govern prosecutor-initiated transfers, therefore, is sensible in the contexts of interstate transfers or federal-to-state transfers. With respect to the federal government, however, it is another matter to hold that Congress intended to impose new conditions upon the federal government absent clear intent to do so. Moreover, there was no apparent reason to do so, because the United States obtained no discernible benefit from rejection of the time-honored method used to obtain state prisoners for federal trial. Indeed, even the court in \textit{Ford} stated that this “argument might at first blush appear to have some theoretical appeal,”\textsuperscript{249} but then rejected it.\textsuperscript{250} The court in \textit{Ford}, however, based its conclusion on an exhaustive review of materials that dealt with the general problem of detainers, rather than on actual legislative history. Since \textit{Ford} was not based on the specific problems generated by federal detainers, it does not resolve whether Congress intended the federal writ to constitute a request with its consequent limitations.

The limitation actually at issue in \textit{Ford} provides: “\textit{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 . . . .”\textsuperscript{251} This language also indi-

\textsuperscript{247} For a discussion of the enforceability of the federal writ pursuant to the supremacy clause, see text accompanying notes \textsc{155-197 supra}.

\textsuperscript{248} See note \textsc{70 supra} and accompanying text. The legislative history does not indicate why the right of the executive to disapprove prosecutor-initiated requests was preserved but not extended to the innovative concept of prisoner-initiated requests.


\textsuperscript{250} \textit{Id.} at 741.

\textsuperscript{251} Interstate Agreement on Detainers Act, Pub. L. No. 91-538, § 2, art. IV(c),
icates that the writ is not a request, since the proceeding in Ford, trial in federal court, was not made possible by article IV. The ad prosequendum writ is authorized independent of the Agreement. This conclusion is inferable from the House and Senate Committee on the Judiciary reports, which state: "The agreement also provides a method whereby prosecuting authorities may secure prisoners serving sentences in other jurisdictions for trial." As the Fifth Circuit stated: "Had there been an intent to make the Agreement exclusive and to, thereby, impliedly repeal 28 U.S.C. § 2241(c)(5), the committees would hardly have used the word 'a' to describe the method provided by the Agreement." In addition, as discussed above, enactment of the Speedy Trial Act of 1974 following adoption of the Agreement supports this view.

Thus, Congress did not intend to equate the writ of habeas corpus ad prosequendum with the "request" set forth in the Agreement. To conclude otherwise would be to write into the Agreement an unwarranted restriction on the ad prosequendum writ.

CONCLUSION

The Agreement was first proposed in the 1950's because of concern about the effect of outstanding state detainers on state defendants who were serving federal sentences in federal institutions. Such prisoners suffered various disadvantages from the existence of outstanding detainers that they were powerless to clear. Congress, however, failed to enact the Agreement on the basis of this concern alone. It was not until after the Supreme Court decided Smith v. Hooey and Dickey v. Florida that the Agreement became federal law. Thus, Congress did not aim solely to ameliorate the disabilities suffered by federal prisoners against whom state detainers were lodged. Rather, Congress' major objective was to prevent the dismissal of charges because of the inability of state authorities

254. See notes 218-234 supra and accompanying text.
routinely to obtain federal prisoners for state trials. At no time, however, did Congress express concern for the converse situation: state prisoners who were also federal defendants.

The reason for the lack of congressional interest in this latter situation is clear, although unexpressed: There was no equivalent problem and thus no corresponding need for legislation regarding state prisoners who were also federal defendants. This conclusion is buttressed by the established power of the federal government to use the traditional federal writ of habeas corpus ad prosequendum. To hold that this time-honored writ, not even discussed in the Agreement’s legislative history, was repealed or modified by the Agreement would be bizarre, especially given that the sanction for violation of the Agreement is at least as stringent as that provided for constitutional violations. Certainly, as has been said in a different but related context: “[t]he policy behind the Interstate Agreement on Detainers is no stronger than the constitutional protection against double jeopardy.”

It is unreasonable, therefore, to hold that the ad prosequendum writ constitutes a detainer under the Agreement. Likewise, the writ does not constitute a written request under the Agreement, for to equate the two would cause an unwarranted and unintended modification of the writ. If Congress had intended that result, it would have known how to do so explicitly. Thus, it seems inconceivable that Congress contemplated the construction of the Agreement given by United States v. Mauro, United States v. Ford, or United States v. Sorrell. Accordingly, the writ of habeas corpus ad prosequendum constitutes neither a detainer nor a written request under the Agreement.

260. 562 F.2d 227 (3d Cir. 1977) (en banc).