In the

Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER, v. RICHARD THOMPSON FORD, RESPONDENT.	)	No. 77-52

Washington, D. C.
February 27, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 77-52
RICHARD THOMPSON FORD, Respondent.	:	

Washington, D.C.
Monday, February 27, 1978

The above-entitled matter came on for argument at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW L. FREY, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530; for the Petitioner.

DAVID J. GOTTLIEB, Esq., The Legal Aid Society (Appeals), Federal Defender Services Unit, 509 United States Courthouse, Foley Square, New York, New York 10007; for the Respondent (pro hac vice).

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 77-52, United States against Ford.

Mr. Frey, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court:

This case is here on the grant of the Government's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which reversed respondent's conviction and ordered that the charges againt him be dismissed on the ground that the speedy trial provisions of Article IV(c) of the Interstate Agreement on Detainers had been violated.

This case began when respondent and his co-defendant robbed the Orance County Trust Company in Middletown, New York, in October, 1971. In November of that year a bench warrant issued for respondent's arrest for that robbery. He was not apprehended until nearly two years later when federal agents executing this and another federal warrant arrested him in Chicago.

Because there were older, unrelated stated charges from Massachusetts pending against respondent, he was extradited to that state, and the federal bank robbery warrant

was lodged as a detainer with Massachusetts prison authorities. Following his conviction and sentencing in Massachusetts to imprisonment for a term of eight to ten years on the state offense, an indictment was filed in the Southern District of New York charging respondent with the bank robbery.

On April 1, 1974, he was produced for arraign ent in the Federal District Court in New York, pursuant to a writ of habeas corpus ad prosequendam. Shortly thereafter, a superseding indictment was returned adding one James Flynn as a co-defendant and containing additional charges arising out of the same series of transactions surrounding the bank robbery. Trial was set for May 28, 1974.

However, co-defendant Flynn had not been apprehended, and on May 17th the prosecutor moved for the first of what was to be a series of continuances that ultimately postponed respondent's trial to September 2, 1975.

In the meanwhile, at respondent's request, he was returned to Massachusetts where he remained until brought back by another ad prosequendam writ in August of 1975, shortly before the trial. At trial, respondent was convicted on all counts and sentenced to concurrent terms of five years imprisonment on each count which Judge Motley also specified should be concurrent with his state sentence.

I will not belabor this morning the details of the various continuances since they are wholly irrelevant to the

issues before this Court. I will mention only that throughout this proceeding the respondent did request a speedy trial on a number of occasions, but at no time prior to the appeal to the Court of Appeals did he mention or invoke the provisions of the Interstate Agreement on Detainers.

On appeal a divided panel of the Second Circuit reversed respondent's convictions, holding that Article IV(c) of the Interstate Agreement on Detainers had been violated because respondent's trial had been delayed for more than 120 days from the time he was initially produced pursuant to the writ for arraignment on the original indictment, and because although several of these continuances were granted for good cause, subsequent continuances were not for good cause or violated the requirements of Article IV(c) because they were not entered in open court or with respondent or his counsel present.

We have not sought review here of the conclusion that the speedy trial provisions of the Interstate Agreement, if applicable, were violated in this case. We do contest the applicability of the provisions in the first place.

Accordingly, the posture in which this case finds itself before this Court is that there was a violation of the speedy trial provisions of the Detainer Agreement; but, by the same token, it must be assumed that there was in this case no violation of respondent's constitutional speedy trial rights

or of the rights afforded him under the prompt disposition rules of the Southern District of New York because these claims which respondent has consistently raised throughout these proceedings were not reached by the Second Circuit and would be available to respondent on remand should the United States prevail on the Detainer issues in this Court.

Both this case and the one that follows it this morning, United States against Mauro, involved important questions concerning the application of Article IV of the Interstate Agreement on Detainers to the situation in which the Federal Government utilizes the writ of habeas corpus ad prosequendam to secure the presence of a state prisoner to stand trial on federal charges.

While each case has issues that are unique to it, the bulk of my arguments this morning will relate to propositions that are equally pertinent to both cases, especially my central contention that the writ of habeas corpus ad prosequendam is neither a detainer nor a request for temporary custody under Article IV of the Interstate Agreement on Detainers.

Q What was the position of the Court of Appeals on that, Mr. Frey, that there has been an implied repeal of the body of law relating to habeas corpus ad prosequendam?

MR. FREY: I am reluctant to characterize it in terms of what the Court's position was. I think the Court looked to

the agreement itself rather than to the possible effect of the agreement on past practices; that is, it focused its attention on what it conceived to be the evils that underlay the agreement and what it conceived to be the necessity of effectuating the objectives of the agreement.

Q Do you think it held that the agreement was the only method after its passage by which the Federal Government could obtain prisoners?

MR. FREY: I think it did hold that.

Q Then is not the answer to Mr. Justice Rehnquist's question in the affirmative?

MR. FREY: We get into a semantic quibble over whether this constitutes an implied repeal of the habeas corpus writ or not. The Court would simply say that the writ still exists, that it simply now--

Q It is at least a restriction, is it not?

MR. FREY: It is a substantial imposition of additional conditions that are very significant but did not attend the use of the writ before. That is true.

I intend to proceed this morning by giving first a brief background of the problems that led to the promulgation of the Interstate Agreement on Detainers, looking briefly at the general structure of that agreement and then proceeding to set forth some of the reasons that we believe compel the conclusion that the agreement was never meant to and should not

be construed to apply when the presence of a state prisoner is procured in federal court by the traditional ad prosequendam writ. Because of the structure of these cases, I will try to begin, after the introductory remarks, to discuss those factors that are uniquely pertinent to the Ford case and then pick up with my arguments that have general applicability to both cases, which will carry over into the succeeding narrower case.

The Interstate Agreement on Detainers was an effort by the Council of State Governments to deal with the problem that had come in the 1940s and '50s to be of increasing concern to state law enforcement officials and prison administrators. This problem arose in a situation in which an individual serving a sentence of imprisonment in one state was wanted to face criminal charges in another state.

Prosecuting authorities in the requesting state encountered great, indeed often insurmountable difficulties in securing the presence of such prisoners, which could only be accomplished through cumbersome extradition procedures or special agreements between the executives of the two states involved. Because of the difficulties associated with these procedures, it became common to defer the prosecution until the defendant had completed serving his sentence in the other state. In order to ensure that at that point the defendant would be turned over to the requesting state rather than being released, a notice known as a detainer would be lodged

with the defendant's warden advising of the pendency of the criminal charges and requesting delivery of the prisoner to face those charges upon his release from the sentence he was then serving.

This system of deferred prosecution and detainers generated many problems. Judges attempting to sentence the defendant in one state against whom one or more detainers had been lodged had difficulties knowing how to impose an appropriate santence because they did not know what the disposition of these other charges would be. More relevant to the agreement, prison and parole officials would encounter the same uncertainties in attempting to plan a rational program of rehabilitation. And of course the prisoner himself might be deprived of significant prison programs or parole opportunities as a consequence of the detainer while at the same time he had no way of bringing the charges to trial so that the uncertainties that they reflected could be resolved.

In addition, the system was subject to abuses. Detainers were easy to lodge, and it appears that they were often used even though there may have been no serious prosecutive intention. Indeed, in the substantial proportion of cases the detainers apparently were dropped when the prisoner was ready to be released from his initial sentence of imprisonment.

The Interstate Agreement on Detainers was thus

proposed to serve the dual objectives of providing a simple and efficient procedure for prosecutors in one state to secure the presence for trial of a defendant imprisoned in another state while affording at the same time the prisoner a means of clearing detainers by demanding and obtaining trial on out-of-state charges.

The concerns of the drafters of the agreement as I have just outlined them were extensively canvassed in Judge Mansfield's opinion for the Court of Appeals in this case, and we really have no quarrel with his account of them except for the conclusion that he draws from them.

Q Who were the drafters of the legislation?

MR. FREY: The Council of State Governments conducted a series of meetings beginning in 1949 and then resuming in 1955 and 1956, which were attended by various prison and parole authorities, district attorney associations, and other state and local government entities that were concerned with the problems. And then the Council formulated the proposed agreement along with a number of other matters that were of common interest to states and publish them in a booklet called "Suggested State Legislation Program." This is one for 1957.

Q Was there any participation by representatives of the Federal Government in this series of meetings?

MR. FREY: At one of the meetings there is an indication in the report that Department of Justice

representatives participated. I believe that Judge Garth's opinion in the Thompson case suggests that these were Bureau of Prison representatives, which is the most likely group. But I have not pinned down exactly who was there. But that was a fairly large meeting with over 60 people, including somebody from the Department of Justice.

Our quarrel with Judge Mansfield is not with this history but with the fact that although the Council of State Governments did contemplate federal adherence to this agreement--and the discussion sets forth some of the considerations that relate to the production of federal prisoners--there is absolutely no suggestion in the materials surrounding the promulgation of the agreement that there was any consideration given to the needs of federal prosecutors to have a new mechanism for securing state prisoners to face trial on federal charges.

I do not have time to go into the agreement in detail, but I would just like to say a word or two about it. The critical operative provisions of the agreement are Article III and Article IV. Article III sets forth the procedures for the prisoner who wishes to demand trial on charges contained in a detainer lodged against him. Article III(c) obligates the warden to inform the prisoner of a detainer and of his right to demand trial on it. Article III(a) provides that the prisoner demanding trial must be brought to

trial within 180 days of delivery of his demand for the prosecutor, requires the warden to attach a certificate along with the demand containing various information about the status of his sentence in the sending state.

Article III(d) contains among other things a provision requiring that the indictment must be dismissed with prejudice, that the prisoner is returned to the sending state without having them tried after he is delivered to the receiving or requesting state.

Article IV sets forth the rules that are applicable when the prosecutor invokes the agreement to obtain the prisoner from another state for trial. And both of the cases this morning involve Article IV if they involve the agreement at all.

Article IV(a) specifies that the prosecutor shall deliver to the appropriate authorities of the state in which the prisoner is being held a written request for temporary custody of the prisoner. Article IV(c) contains the speedy trial provision relied upon by respondent in this case. Article IV(e) contains the prohibition against return of the prisoner prior to trial, subject to the sanction of dismissal with prejudice if the return in made prior to trial, which is invoked by the respondents in the next case.

Article V then covers a number of housekeeping details that were important to the state, such as the management

of expenses, ensuring that the prisoner would receive credit for his sentence from the sending state while he was in the receiving state and so on.

The Unitsd States joined the agreement by act of Congress in December, 1970. Legislation was urged by the Department of Justice and was adopted without recorded opposition of any kind. It went into effect in March, 1971. It proved to be a time bomb that ticked quietly away for nearly five years and then exploded with the decision of Judge Bartels in the Mauro case in December, 1975. This since generated a veritable landslide of litigation by state prisoners seeking dismissal of federal charges against them. The proper disposition of much of this litigation may turn on the decision of the cases being heard today. The quite extraordinary potential for disruption of this pedestrian-appearing piece of legislation becomes evident when one realizes that the Federal Government issues an estimated 5,000 ad prosequendam writs annually for state prisoners, according to the Marshal Service. Incidentally, about 3,000 of these involve cases in which a detainer has previously been lodged as in Ford and about 2,000 cases in which no detainer has been previously lodged.

Since it is quite clear that no one, prosecutors, courts or the defense bar, appreciated the possible application of the Interstate Agreement on Detainers to these cases

before the Mauro decision, these cases were routinely being processed without regard to the prohibition against return to state prison prior to trial and without regard to the 120-day and related speedy trial requirements of Article IV(c). If the United States loses the cases being heard today and if it is held that claims under the Detainer Agreement can be raised for the first time in collateral attack, untold numbers of convictions may be vulnerable.

Q The Justice Department was kind of asleep at the switch in 1970, were they not?

MR. FREY: I intend to discuss later on--I do not think we were asleep at the switch.

Q At least in not seeing the possibilities of this very kind of litigation.

MR. FREY: In that sense, that is right. They certainly did not perceive the possibility that there would be this problem.

Q If your basic contention is right, that the Federal Government agreed to this only on the basis of unilaterally being on only one side as between the sending and receiving state, there is just no indication at all, either in the recommendation of the Justice Department or in the action of Congress, was there, of any such limitation?

MR. FREY: There is no explicit statement of such a limitation. But I do intend to go over later this morning the

evidence which I think is absolutely plain, that there was no affirmative intention to bind the United States as a receiving state. And I would like to make a point here, which is important to keep in mind. You do not have to hold today for these cases or indeed to deal with most of the problems that have been generated by the Interstate Agreement on Detainers in the federal context that the United States is not a receiving state. We have made that argument because we think that will best harmonize the Detainer Agreement with the Speedy Trial Act and the habeas corpus statute.

Q If the Court holds that this is not a request but that it is a demand, as distinguished from a request, a demand under the habeas corpus, unmodified, unaffected, by Article IV, what does that do to this case?

MR. FREY: The government would prevail, and that is the point I was just going to make to Mr. Justice Stewart, that the arguments--in our brief we advance the general proposition, which I am now defending, that the United States ought not to be treated as a receiving state at all. But for purposes of this case, the more important thing and one which I think is much less jurisprudentially difficult is that the writ of habeas corpus is not a request and therefore--

Q For purposes of this precise case, you also have the waiver argument.

MR. FREY: That is true, and I am going to come to

that shortly. But--

Q That does not get you very far along the line of all these hundreds of cases you say are backed up, waiting for this.

MR. FREY: That will answer many cases because in the past it was frequent not to raise them. That will not, however, deal the problems that will continue to be perpetuated into the future by the agreement in terms of the interrelationship with the Speedy Trial Act and the really substantial difficulties that are created in trying to comply with the no-return provisions of the act in the context where the Federal Government is the prosecuting state, receiving someone from another state.

Q Mr. Frey, as another point, I hate to use the phrase "get around," but how do you escape crossing the state line? You do not have to go through any removal proceeding of any kind, do you?

MR. FREY: I believe that is right. The Government has never--the removal proceedings apply when a person is arrested on the charge in the distant district.

Q Right.

MR. FREY: But the Interstate Agreement works no change from past proceedings.

Q It has never been litigated, has it?

MR. FREY: I am not aware of any cases that deal with

the right of the prisoner to litigate his removal, the state prisoner to litigate his removal.

Q I am not talking about the prisoner litigating. I am talking about the government having to litigate.

MR. FREY: There has never been a case in which there has been a confrontation between the Government and a state warden in which the supremacy clause issue, which has been discussed in the briefs in this case, has really had to be resolved.

Q Mr. Frey, when a request is made, a request under Article IV, what form does that take?

MR. FREY: I have--

Q Compared with the writ now.

MR. FREY: If I could briefly address the waiver argument that--

Q What I would like to have you do is clarify for me the difference between the request that is made under Article IV and the command that results from a writ of habeas corpus issuing from a court.

MR. FREY: I have asked the clerk to distribute to the Justices--

Q We have that.

MR. FREY: --a document which is a--this is from materials that were sent out by the Bureau of Prisons at the time the United States adhered to the Interstate Agreement

on Detainers, and it is from a package of forms which follow a model proposed by the Council of State Governments when it proposed the Interstate Agreement on Detainers, so that this is a standard form of the kind that a federal warden might receive when a state prosecutor is asking to have a federal prisoner for trial.

Q A function of the judge's signature on this is an authentication, is it not?

MR. FREY: On this form the judge's signature I believe complies with the requirement of Article IV(a) of the agreement that there be, if I am recollecting--

Q I am trying to distinguish between the judge's signature on this piece of paper, this form, and a judge's signature on a writ of habeas corpus.

MR. FREY: The reason the judge's signature is on this form is that Article IV(a) contains a proviso which states that the court having the jurisdiction of the indictment shall have duly approved, recorded, and transmitted the request, and that is the designation that is here. This is not a court order. This is a request that issues from the prosecutor. You will notice that it is labeled "Request for temporary custody."

You will notice further that after the listing of offenses, there is a statement, "I propose to bring this person to trial on this indictment, information, or complaint

within the time specified in Article IV(c) of the agreement." And in the next paragraph it says, "I hereby request temporary custody of such persons pursuant to Article IV(a) of the Agreement on Detainers."

Q "The judge vouches that the facts are correct." How can he do that?

MR. FREY: The correctness of the facts for which he is vouching is that there is an indictment, information, or complaint on file, which is something that he can do. This is to prevent the prosecutor--one of the problems under the old detainer practice was that a prosecutor, even a police officer, could lodge a detainer. And the agreement requires that a judge certify that indeed there are such charges pending and that indeed the person who is making the request is the responsible prosecuting officer.

Q The signature of the Judge on this piece of paper, the form you have filed with us, does not command anyone to do anything, does it?

MR. FREY: That is right. It is just a certification by the judge and not an order from the Court in any sense.

Q Mr. Frey, is this a form that the Federal Government has used?

MR. FREY: No, the Federal Government--this is a form that was sent out to the wardens because it is the form that we have received from state prosecutors. As far as I

know, we have virtually--

Q So, there would be no occasion for a federal judge ever to sign this form. So, you do not have the problem of differentiating a request from a habeas corpus writ. Has any federal judge ever signed this form, to your knowledge?

MR. FREY: I am advised that at some prisons in Pennsylvania they have asked that we proceed by means of the Interstate Agreement on Detainers rather than by means of the writ, and they reject the writ and ask for a request on this form--

Q What does the federal judge do in that district? What is the federal practice in that district then? Does it use this form?

MR. FREY: The practice is still to use the ad prosequendam writ--

Q The answer to my question is that as far as you know, no federal judge has ever signed this particular form?

MR. FREY: No, because if in fact--

Q I mean, it is a factual inquiry. I am not--

MR. FREY: No, no, but I cannot tell you the answer for sure, but I think that in those instances where the state asked for us to proceed by means of the request rather than the write, we have gone to the judge and had him sign this form and sent them a request. So, to the extent that it has

been used then, the federal judge signing it has treated the United States as a receiving state.

MR. FREY: If we used the request--

Q I am trying to find out whether you did or not. You kind of said you did not, but then you said maybe you did in one district. I do not know what the answer is.

MR. FREY: For purposes of my argument that the writ is not a request--

Q I am trying to find out what the facts are first. Perhaps the answer is you do not know.

MR. FREY: I assume that the prosecutor in such a case has proceeded under Article IV as though the United States was the receiving state and has asked the judge to act that way.

Q At least to the extent that this form has been used by the Federal Government, it has been used on the assumption that the United States is the receiving state?

MR. FREY: That is right. I mean, we are prepared, I suppose--I mean, it is not a matter of standing on principle in these cases; if the warden of state prison wants us to use the form and--

Q And am I not also correct, with regard to the Chief Justice's questions about the distinction between a command and a request, that in so far as the term "request" in the Speedy Trial Act is concerned, that term is construed

by the United States to cover the writ. Is that not correct?

MR. FREY: That is correct, but there is a difference because the term "request" in the Speedy Trial Act occurs only in connection with Section 3161(j)'s provision for the state prisoner to request trial, and then the federal prosecutor to request production, whereas here we are talking about request in Article IV(a), which is where the federal prosecutor initiates the proceedings. In the Speedy Trial Act there is no comparable use of the word "request" when the proceeding is initiated by the federal prosecutors.

Q But in either event, the word "request" in the statute does contemplate the issuance of the writ?

MR. FREY: In the Speedy Trial Act the request can be satisfied by issuance of the writ. But I think it is clear that the mere fact that in a slightly different context in another statute the writ satisfies the requirement of a request does not mean that the writ should be treated as a request. Under the detainer statute under Article IV where the results are clearly results that were never intended by Congress and that would have dire--

Q If you say they were never intended by Congress, how do you respond to Section IV of the statute adopting the Agreement on Detainers which describes the federal courts as an appropriate court, which can only be in the context of the United States being a receiving state?

MR. FREY: I have two points to make about that. The first is that it is quite clear, if you look at what happened was the Council on State Government circulated the proposed draft of the agreement, and these additional sections after the agreement were mostly sections that were proposed by the Council of State Governments with blanks, filling in the blank. And Congress, which I think clearly gave no thought to the question of what the consequences of its adoption of the agreement would be for the United States as the receiving state, simply filled in the blanks. And I think that actually is what happened.

Q But you would agree that those blanks would only have to be filled in on the assumption that the United States was the receiving state.

MR. FREY: Yes, but that of course is not--

Q Maybe it was a stupid thing to do, but at least that is the only way it makes any sense at all.

MR. FREY: Yes, but it is not at all inconsistent with my argument that the writ is not a request because--

Q Oh, no, I understand that.

MR. FREY: All right.

Q It goes only to your argument as to whether the Federal Government ever thought that the United States should ever be a receiving state.

MR. FREY: I do not deny that a close linguistic

analysis of a sentence or two in the legislative history and of a provision like the appropriate court provision shows that those things only have meaning if the United States is the receiving state. The question is whether you are compelled to give that meaning in the face of the other considerations.

Q What if we were to rule in the Government's favor on the basis that it is a receiving state but nonetheless the writ of habeas corpus ad prosequendam was left intact. The Government then would have two alternative means of going about procuring a prisoner. And I suppose if it chose a writ of habeas corpus ad prosequendam, it would have to face the problem of whether the state had to turn over simply by virtue of the statute.

MR. FREY: We are quite willing to face that problem. While there are one or two scattered cases where there has been some problem, it simply is not a practical problem. States routinely in thousands of cases supply prisoners under the writ, and they have no idea when they are doing this that they are doing it under the Interstate Agreement on Detainers. In this case the state authorities did not provide the certificate that they are supposed to provide under Article IV(b) if they were proceeding under the agreement.

I see my time is up.

MR. CHIEF JUSTICE BURGER: Mr. Gottlieb.

ORAL ARGUMENT OF DAVID J. GOTTLIEB, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GOTTLIEB: Mr. Chief Justice, and may it please the Court:

I would like to begin with the Government's principal submission, which is that the Federal Government participates only as a sending state in the Agreement on Detainers. I think that the language is clear. This is more than a case where there is no disclaimer that the Government is a receiving state. The language is explicit and unambiguous.

In addition to the language of Article II and Article VIII, the agreement applies with full force and effect. As Mr. Justice Stevens has noted, Section IV can apply to the Government only in its capacity as a receiving state. Where the language is this clear, this Court has previously held that resort to legislative history is not even necessary. But at the very least on a point this fundamental, the Government should be required, in order to overturn this clear language, to show some definitive expression that Congress did not intend to do what the language so clearly says it did do.

The Government in its brief points to four sources: The legislative reports, the history preceding enactment, certain passages which they consider to be awkward, and the subsequent passage of the Speedy Trial Act. We would like to

take each one of these in turn.

With respect to the legislative reports, there is no explicit statement in either of the reports limiting the federal role. In fact, as we noted in our brief, there are specific references to support the view that federal participation in the agreement was not restricted. The reports note that the agreement was designed to apply with full force and effect. When they discussed the agreement, there is no restriction on federal participation. And the reports include a letter from the Assistant Commissioner, the District of Columbia, which explicitly states that the agreement provides a means for Justice Department attorneys to obtain state prisoners.

Q Why would the Assistant Commissioner of the District of Columbia have any unusual authority to speak for the Justice Department?

MR. GOTTLIEB: Your Honor, we do not contend that he was speaking with the authority of the Justice Department--

Q Or of the Federal Government.

MR. GOTTLIEB: --when he made this statement. I think what the letter does show is, first of all, that there was no statement in the report whatsoever contradicting it and that it accords with the plain language of the statute. That letter was included in the legislative reports that were before Congress at the time that Congress enacted the

agreement.

Q You treat it then just as if the, say, Assistant Attorney General of New Jersey had written in and said that?

MR. GOTTLIEB: We do not claim that there was any specific jurisdiction. But we certainly believe that there would have been if Congress had thought that the role was limited, that there would be some indication that--some attempt to disabuse the Assistant Commissioner of his impression which accords so completely with the language of the statute.

It is true that most of the references in the reports refer to the Government's participation as the sending state. But they are by no means exclusive.

A major part of the Government brief is devoted to showing that the Government had no need for the procedures in Articles III and IV since since their use of the writ was guaranteeing speedy trials without the problems caused in the detainer system. And the Government claims that this fact should be reflected in the agreement. I think there are two problems with this argument.

First, the picture is not entirely correct. And, second, there is absolutely no evidence that the view was adopted in the legislation.

The Government claimed that the writ was used to provide prompt trials, and they contrast this with the

procedure used by the states. Unexplained is the frequent use of detainers by the Government since detainers were filed to hold rather than produce people. In fact, we believe the record shows that speedy trials are not always provided prior to the agreement and that the writ was not always honored.

Q Is there some history that suggests that the detainer procedure was used and no final decision on prosecution had been reached but that it was a sort of holding operation until a decision on an indictment had been arrived at?

MR. GOTTLIEB: I do not believe that there is any indication in the history that the Government's use of the detainer was that restricted.

Q Not restricted, but was that not one of the uses of the detainer? Some of the detainers are filed before an indictment, are they not?

MR. GOTTLIEB: Yes, as in this case. I do not believe, however, that the use of federal retainers was that restricted, to only that reason. And I do not think that there is any evidence--

Q But it included that practice; is that your position?

MR. GOTTLIEB: I would certainly suppose so.

Q Mr. Gottlieb, did you say that sometimes the writs were not honored?

MR. GOTTLIEB: Yes, Your Honor.

Q Give me one instance where a state dishonored a writ of habeas corpus and got away with it.

MR. GOTTLIEB: There was the Gordon case, which we cite. There were attempts by federal prosecutors to produce two defendants in an Ohio prison--

Q As I read it, it was not with a writ.

MR. GOTTLIEB: Your Honor, my recollection was that they attempted to produce them by writ and that the Ohio warden refused to produce them.

Q He did not refuse. He just ducked.

MR. GOTTLIEB: In the Perez case, which involved the Arkansas warden, the warden just simply explicitly stated that he was not going to honor the writ, and the Federal Government made no attempt to produce.

Q Somebody had better leave the Shipp case to somebody. That is a case where a sheriff in Florida was put in jail.

MR. GOTTLIEB: At any rate, Your Honor, the law at the time the agreement was passed in 1970 was certainly unsettled as to the power of the Federal Government to compel production. As a matter of fact, there was no case that held that federal power, the Federal Government, could compel production under the writ of habeas corpus ad prosequendam, whereas there are a slew of decisions stating that production

was only accomplished as a matter of comity.

Q Are you saying that compliance with with a mandate of a writ of habeas corpus from a federal court was complied with only as a matter of comity?

MR. GOTTLIEB: That is certainly the view of the overwhelming number of cases that have expressed an opinion on this issue.

Q Mr. Gottlieb, you are only talking about the writ of habeas corpus ad prosequendam.

MR. GOTTLIEB: Ad prosequendam when issued to somebody incarcerated in state.

Q Outside the territorial jurisdiction of the issuing court?

MR. GOTTLIEB: Correct. In fact, I would submit that the proof that the Government was intended as the receiving and sending state and their history is not quite correct is that the Council of State Governments, when they drafted this agreement, specifically intended and included the Government as a receiving and sending state. And in their commentary on the draft agreement there is specific language that the agreement is designed to give a means for state prisoners to dispose of federal detainers and to help work out the situation involving the lodging of detainers, federal detainers, against state prisoners.

Q Mr. Gottlieb, do you contend that the

enactment of the Interstate Detainers Act impliedly repealed 2241(c)(5) of the habeas corpus ad prosequendam section of the Judicial Code?

MR. GOTTLIEB: No, we do not, Your Honor. And what is more important, the Court did not in the Ford case--

Q Do you think it said in the issuance of a writ has to be brought somehow within the Detainers Act as a request?

MR. GOTTLIEB: No. The Ford case is very clear that that is limited to the situation in which the Government has actually lodged detainer and has triggered the deprivations that the Interstate Agreement on Detainers was designed to alleviate.

Q But in the Ford case the Government did issue a writ of habeas corpus ad prosequendam.

MR. GOTTLIEB: Yes. This would go to the question of whether the writ has to be construed as a request. But the Ford case does not hold that the agreement is the exclusive means of producing prisoners.

Q But it necessarily holds that the Interstate Detainers Act modified the previously unbridled jurisdiction of the federal courts to at least issue the writ, whether or not it would be honored or not.

MR. GOTTLIEB: I do not believe that it modifies the authority to issue the writ. It construes the writ as a

request. Under the agreement, the Government is free to issue the writ.

Q But the writ of habeas corpus ad prosequendam is nonetheless subject to all the burdens that a request under the Detainers Act would.

MR. GOTTLIEB: That was an issue which in fact Judge Mansfield did not exclusively reach. The only exception in the Interstate Agreement on Detainers which can possibly be construed as a partial repeal of the writ of habeas corpus ad prosequendam, in our view, is the requirement of Article IV(a) that there be a 30-day waiting period and that the governor be given power to dishonor. The requirement that a trial be held in 120 days when a prisoner is produced is no more a repeal of the writ than the provisions of the Speedy Trial Act, that somebody be tried in a certain period of time. It is a consequence of the United States filing a detainer and producing a prisoner for trial. It is not a repeal in any way of the writ.

Q You simply say that the act makes it mandatory, even when the prisoner is produced by writ of habeas corpus, that he be tried within 120 days.

Q And not be returned until he is to be tried.

MR. GOTTLIEB: Yes, Your Honor, although there is freedom to waive that. And only in cases--it is very clear from the Ford opinion that it is limited to those cases in

which the detainer has actually been lodged. It is not restricted--I mean, it does not hold that it is the exclusive means of producing someone. If the Government chooses to proceed without a detainer, they may very well be outside of the Agreement on Detainers, and that is the question which the Court will be deciding in the next case, in Mauro. But the prepondarance of the Circuit Court opinion on this issue is that the Government has its choice; it can file the writ and produce the prisoner, or it can file a detainer and subject itself to the terms of the Interstate Agreement on Detainers. And that is done by the recognition of the substantial burden that detainers cost and of the substantial problems caused by detainers.

Q Let me phrase it a little differently. Certainly your argument implicates a dramatic alteration of the effect of the writ of habeas corpus ad prosequendam.

MR. GOTTLIEB: Your Honor, that was the--the reach of Article IV(a) was an issue that Judge Mansfield did not determine. The only exception of Article IV which implicates the power of a writ in any way is Article IV(a) which we concede was written in and which the commentary in the Council of State Governments states was written as a means of preserving the existing right to extradition. Our position is that the law, at least at the time the agreement was enacted by Congress, was very unclear as to whether or not there was a power to

refuse. As a matter of fact, virtually all the authority said that the writ was honored only as a matter of comity. Therefore, to have put that in Article IV(a) does not, in our view, limit what Congress thought was the power of the writ at that time. Judge Mansfield--

Q Did they not even make it more effective than it was?

MR. GOTTLIEB: It is ironic that the Government complains about the limitation in the writ because prior to 1970 there were problems in terms of production of prisoners when federal writs of habeas corpus ad prosequendam were issued, and there is absolutely no evidence that there has been a problem since the enactment of the Interstate Agreement on Detainers. It seems to have worked very well.

Q Is not what the Government is saying though that they were going to proceed by the Detainer Agreement with its burdens and benefits as one alternative. But they think that Congress intended that the habeas corpus ad prosequendam be retained as written without being subjected to the Detainers Act, so that the Government really has two ways to go, each of which presumably may have burdens for the Government.

MR. GOTTLIEB: Our position is that a construction of that sort, particularly in light of the evidence that the Government in our view has been using the writ as a request

under the agreement, the use of that would just simply write the Government out of Article IV of the agreement, and it would create situations like the present case where there was a detainer lodged for some two years where the Government produces a prisoner, took him out of state custody, where the prisoner constantly complained that he was being denied furlough opportunities because of the pendency of the detainer, where the delay deprived the prisoner of an opportunity to serve more of his sentence concurrently--

Q But if the State of Massachusetts objects to that and is served with a writ of habeas corpus ad prosequendam, it can presumably litigate this question that you say and I gather most everybody concedes--it is certainly undecided in this Court--whether it is mandatory or a matter of comity. The State of Massachusetts could insist that they proceed under the Detainers Act.

MR. GOTTLIEB: That is undoubtedly correct. But by reading it that way, it would wipe the Government out of Article IV since the vast preponderance of their transfers now are by writ of habeas corpus ad prosequendam. It would be a peculiar way, we submit, to construe an agreement which states in Article IX that it is to be liberally construed to effectuate its purposes.

Q Mr. Gottlieb, is it not entirely possible that the Government might retain the alternatives of going under the

Agreement on Detainers Act or going by way of the habeas corpus writ, but the choice would have to mean as to whether they filed a detainer or not? And if they filed no detainer at all--and then of course this will be decided in the next case--perhaps the Agreement on Detainers Act does not apply, and then they can go ahead with their habeas corpus alternative.

MR. GOTTLIEB: Your Honor, that is precisely our position. And it also is in accord with the decisions of the vast majority of the circuits that have considered this issue.

Q So, if the Government had not filed a detainer here, you would not think the habeas corpus writ would be subject to conditions in there?

MR. GOTTLIEB: Your Honor, that is the question that you are going to have to decide--

Q I want to know what you think.

MR. GOTTLIEB: I think it can very easily be construed as an alternative procedure. And that happens to be the resolution that the Fifth Circuit took in Scallion and the First Circuit indicated in Kenaan. I apologize if I seem to be dodging the question.

Q That issue is not in your case, but you had made some statements about it. And I just wanted to be clear. I am sorry if I interrupted your--

MR. GOTTLIEB: Yes, I think it is just absolutely essential to remember that this case does not require a

decision on whether or not the agreement is the exclusive means of production for a prisoner in state custody.

We submit that in order to effectuate the purposes of the agreement, it is absolutely necessary to construe the writ in cases where a detainer has been filed as a request. The agreement was designed to get at abuses of detainers, and the Government has stated what those abuses are, although they denied that prisoners with federal detainers were subject to those abuses.

The agreement itself provides that the lodging of a detainer triggers two sets of procedures with corresponding rights and responsibilities. Once a detainer has been lodged, the prisoner may request disposition. Once a detainer has been lodged, the prosecutor has the ability to secure the prisoner. In both cases trial must be prompt to avoid the lingering effect of detainers. As Judge Mansfield noted below, the provisions of Article IV are more than a quid pro quo for production. They are a counterpart to Article III to prevent the prosecutor from circumventing that article by simply arraigning the prisoner and waiting before trying him. In order to effectuate the purposes of Article III, it is necessary to construe the writ as a request in those cases where a detainer has been filed because the effect of detainers, which was the reason for the adoption of the agreement in the first place.

If there are no further questions--

Q Does the compact define "detainer" somewhere?

MR. GOTTLIEB: There is a definition in the Council of State Governments' commentary, and there is also a definition by Representative Kastenmeier in the legislative history.

Q And not in the act itself.

MR. GOTTLIEB: There is no definition in the act itself.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[The case was submitted at 10:55 o'clock a.m.]

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