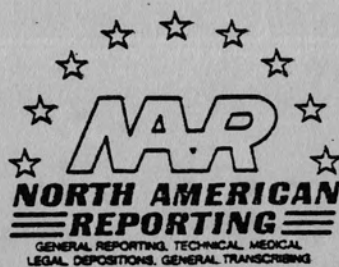


In the
Supreme Court of the United States

ROBERT HOWE, SR.,)
)
) PETITIONER,)
) No. 80-5392
)
) V.)
)
) WILLIAM FRENCH SMITH, ATTORNEY)
) GENERAL OF UNITED STATES, ET AL.)

Washington, D.C.
April 28, 1981

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202/544-1144

1 IN THE SUPREME COURT OF THE UNITED STATES

2 ----- :
3 ROBERT HOWE, SR., :

4 Petitioner, :

: No. 80-5392

5 v. :

6 WILLIAM FRENCH SMITH, ATTORNEY :
7 GENERAL OF UNITED STATES, ET AL. :

8 Washington, D. C.

9 Tuesday, April 28, 1981

10 The above-entitled matter came on for oral ar-
11 gument before the Supreme Court of the United States
12 at 11:16 o'clock a.m.

13 APPEARANCES:

14 WILLIAM A. NELSON, ESQ., Appellate Defender, Office of
15 the Defender General, State Office Building, 141
16 Main Street, Montpelier, Vermont 05602; on behalf
of the Petitioner.

17 MS. BARBARA E. ETKIND, ESQ., Assistant to the Solici-
18 tor General, U.S. Department of Justice, Washington,
D.C. 20530; on behalf of the federal Respondents.

19 JOHN J. EASTON, JR., ESQ., Attorney General, State of
20 Vermont, Department of Corrections, 103 South Main
21 Street, Waterbury, Vermont 05676; on behalf of the
22 state Respondent.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

WILLIAM A. NELSON, ESQ.,
on behalf of the Petitioner

3

MS. BARBARA E. ETKIND, ESQ.,
on behalf of the federal Respondents

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JOHN J. EASTON, JR.,
on behalf of the state Respondent

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WILLIAM A. NELSON, ESQ.,
on behalf of the Petitioner -- Rebuttal

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- - -

1 for him?

2 MR. NELSON: Well, I think that the 2nd Circuit's view
3 is reasonable, that his incarceration is not for treatment at
4 all but simply for deterrence.

5 QUESTION: Well, do you think -- in other words, you
6 think that it must be treatment of some sort?

7 MR. NELSON: Yes. We feel that the statute permits
8 inmates to come into the federal system for purposes of treat-
9 ment.

10 QUESTION: What if the Vermont penal authorities de-
11 cide that no amount of treatment can ever rehabilitate this
12 person, that he's simply got to be locked up for a good long
13 time in order to keep him from doing it again.

14 MR. NELSON: Well, they are certainly entitled to
15 that and then Mr. Howe is their problem. Then Mr. Howe must be
16 dealt with as many difficult correctional problems must be
17 dealt with by the state. There are options other than sending
18 him to the federal system.

19 QUESTION: But you say the federal system has no right
20 to receive him under these circumstances.

21 MR. NELSON: That's right. Except for treatment needs.

22 QUESTION: Did I hear you correctly to either say or
23 imply that there is some legal obligation to treat him?

24 MR. NELSON: I think there is an obligation to treat
25 him so long as he is in the federal system.

1 QUESTION: Why do you make it any different when it's
2 in federal custody as a surrogate for the state, than when he is
3 in the state custody with the state doing it on its own behalf?

4 MR. NELSON: Well, a prisoner committed to state custo-
5 dy is simply committed to the Commissioner of Corrections or to
6 the prison system for whatever purpose imprisonment may serve.
7 The same is true of a prisoner committed to federal prison. He
8 is simply committed to a penal or correctional institution.

9 QUESTION: That is, after a federal criminal trial.

10 MR. NELSON: After a federal criminal trial; precisely.
11 A state prisoner in federal prison is there under a narrower
12 statute, the statute at issue here, one which permits incarcera-
13 tion when there are adequate and proper treatment facilities
14 available.

15 QUESTION: Would it be your submission that absent
16 this statute there would be no authority to receive a state pri-
17 soner at all?

18 MR. NELSON: Yes.

19 QUESTION: Why would that be?

20 MR. NELSON: That would be because of Section 4001 of
21 Title 18, which prohibits imprisonment except pursuant to an
22 act of Congress. That would prohibit imprisonment by executive
23 order or by executive arrangement, such as the contract which
24 was made in this case.

25 QUESTION: But 5003 isn't limited to treatment.

1 It says, "Custody, care, subsistence, education, treatment,
2 and training," doesn't it?

3 MR. NELSON: That's correct.

4 QUESTION: It doesn't, it isn't limited to treatment?

5 MR. NELSON: No, it's not.

6 QUESTION: Well, I was waiting for you to say it.

7 MR. NELSON: Pardon?

8 QUESTION: I was waiting for you to say it. You kept
9 just using the one word, "treatment."

10 MR. NELSON: Well, let's look at the face of 5003.
11 It's at page 2 of our brief. Subsection (a) contains two
12 clauses; grammatically, it's an independent clause. The indepen-
13 dent clause, as Your Honor points out, permits the Attorney
14 General to contract with appropriate officials of a state for
15 the custody, care, subsistence, education, treatment, and
16 training of inmates. That's just about everything, the full
17 range of penological purposes, as one circuit court has put it.

18 That's one thing that that section does. The other
19 thing it does is it limits that power to cases where the Direc-
20 tor of the Bureau of Prisons certifies that adequate and proper
21 treatment facilities and personnel are available.

22 QUESTION: Was that done in this case?

23 MR. NELSON: No, it wasn't. There was a certification
24 that facilities were available at federal prisons. We think
25 there's a difference between dead space in a prison --

1 QUESTION: Well, couldn't that be facilities for
2 treatment?

3 MR. NELSON: Well, that's not the Government's posi-
4 tion and it's not the state's position, and --

5 QUESTION: Answer my question; it's my question.

6 MR. NELSON: I don't think that the Bureau -- no, I
7 don't think it could be construed as that. The Bureau did not
8 intend it as a certification, specifically, treatment facili-
9 ties; simply, facilities generally.

10 QUESTION: Looking at the same subsection (a) that
11 you've just been reading from, the Attorney General may,
12 "is hereby authorized to contract with the proper officials of
13 a state or a territory for the custody" of a person "when the
14 Director shall certify that proper and adequate treatment facil-
15 ities and personnel are available."

16 Now, if you contract for the custody of a person, it
17 doesn't take a whole lot in the way of trained personnel other
18 than guards, does it?

19 MR. NELSON: Justice Rehnquist, we agree that this
20 statute is talking about transfers of inmates to federal pri-
21 sons, and clearly custody is involved. The question is, when
22 may those transfers occur? Must they be, may they be at any
23 time for any purpose, or for no purpose at all, as in an intra-
24 state transfer situation? That's the respondent's view. Our
25 view is that it can occur only in cases of treatment needs where

1 there are treatment facilities available in the federal prison
2 system. Our view is supported by the construction placed on
3 this statute by the House committee which passed it. It said
4 that the section was limited to inmates with treatment needs.
5 In the Senate the same view was expressed, although perhaps not
6 quite so clearly. Senator McCarran, asked what the bill would
7 accomplish, said it would permit the transfer of state inmates
8 to federal prison in certain circumstances in a limited category
9 of cases. Neither of those sources indicates that this statute
10 gave the Attorney General a blank check to accept any state
11 inmates for any purpose.

12 QUESTION: The language of Subsection (a) does outline
13 the purposes for which the Attorney General may receive them
14 and it's custody, care, subsistence, education, treatment, and
15 training.

16 MR. NELSON: That's correct. If I invite someone to
17 dinner, I am undertaking to give him a table to eat it on, a
18 chair to sit on, a light to eat it by.

19 QUESTION: Not necessarily. Suppose it's a brunch
20 out in the back yard?

21 QUESTION: How about a luau?

22 QUESTION: Why do you say there is such a rigidity in
23 it?

24 MR. NELSON: Well, I guess I should take that back.
25 I would undertake to provide the incidentals.

1 QUESTION: Some food.

2 QUESTION: Well, what if you invite him for custody?

3 MR. NELSON: Inmates here are not invited for custody.
4 That's -- they're invited for treatment.

5 QUESTION: Well, but the reading of the statute, it
6 seems to me, it's particularly phrased in the -- with the "and" as
7 it is, would include custody as a separate facet.

8 MR. NELSON: All these are incidentals, necessary
9 incidentals to --

10 QUESTION: You're really sitting on that first certi-
11 fication?

12 MR. NELSON: We think that's crucial. We think that's
13 crucial.

14 QUESTION: And we don't have to get beyond that?

15 MR. NELSON: Well, the only way the statute could work
16 is if it had something like the broad custody, care, subsist-
17 ence, education clause in it, otherwise the Federal Government
18 would only be in charge of the treatment aspects and everything
19 else would be up in the air. There would be no authorization
20 for general custody.

21 May I refer the Court to another, to two sections of
22 the Youth Corrections Act, Sections 512 and 513 of the YCA.
23 This statute, incidentally, is right next door to the Youth
24 Corrections Act. The Youth Corrections Act permits placements
25 of youth offenders in treatment facilities; precisely the same

1 language used in 5003(a) is used in Section 512 of the Youth
2 Corrections Act. It's clear that 5003(a) was modeled after 512,
3 in part, after 512 of the Youth Corrections Act.

4 QUESTION: Mr. Nelson, it's entirely a different ques-
5 tion. I just want to get something straight in my mind. You
6 don't raise any challenge, do you, to the power of the Vermont
7 authorities to enter into contracts for the placement of people
8 in their custody elsewhere?

9 MR. NELSON: No, this case solely concerns the power
10 of the Federal Government to accept custody.

11 QUESTION: So, if there's any -- you're suggesting,
12 though, is if Vermont had entered into a contract, say, with
13 New Hampshire, for New Hampshire to take over while they re-
14 modeled their prisons or something like that, that your client
15 could attack the New Hampshire authority to accept the prisoners?

16 MR. NELSON: No, no, we're not claiming that.

17 QUESTION: Well, how do you get standing to attack the
18 Attorney General's authority to spend federal funds in housing
19 your client?

20 MR. NELSON: We assert a right not to be incarcerated
21 by the United States Government.

22 QUESTION: Well, but isn't it arguable, at least,
23 that you're really being incarcerated by the State of Vermont
24 and they in effect have entered into a contract to have the
25 Federal Government perform that state function for them during

1 a temporary period?

2 MR. NELSON: No, I don't think that's arguable. It
3 may be arguable that --

4 QUESTION: But in the first question about Vermont
5 and New Hampshire, it seems to me you're suggesting you could
6 not challenge New Hampshire's custody.

7 QUESTION: You assert a right under 18 U.S.C. 4001(a),
8 don't you?

9 MR. NELSON: That's correct.

10 QUESTION: Because of that statute.

11 MR. NELSON: That statute.

12 QUESTION: The question is whether you're being de-
13 tained by the United States, within the meaning of that statute,
14 or whether he was still being detained by Vermont. Because I
15 suppose Vermont could any time it wanted to say to the United
16 States, we've decided to let this man go free.

17 MR. NELSON: Even by -- by contract they could; yes.

18 QUESTION: So that who is the detaining authority?
19 Is it the state or the Federal Government?

20 MR. NELSON: The detaining authority is the Federal
21 Government. He is clearly under federal detention. There may
22 be a question of whether he is in custody in a legal sense of
23 the state or of the Federal Government, but I don't think that
24 there's a serious question that he is, in a real sense in
25 federal detention, that he is imprisoned or detained by the

1 Federal Government.

2 QUESTION: Could the Federal Government release him?

3 MR. NELSON: Pardon me?

4 QUESTION: Could the Federal Government release him?

5 MR. NELSON: No.

6 QUESTION: So who is he in the custody of?

7 QUESTION: Except on the say-so of Vermont.

8 QUESTION: Whose custody is that, now? Whose custody
9 is he in?

10 MR. NELSON: In a legal sense, perhaps, he's in
11 Vermont's custody.

12 QUESTION: Well, are we interested in any sense other
13 than a legal sense?

14 MR. NELSON: Yes, I think in the sense intended, in a
15 real sense, in a sense intended by 4001, he is imprisoned by
16 the United States. The question is whether that imprisonment
17 is authorized by an act of Congress.

18 QUESTION: Is it legal?

19 MR. NELSON: We say it's not.

20 QUESTION: So he's not in the legal custody of anybody.
21 That's a lovely position. I know a lot of prisoners would love
22 that position.

23 MR. NELSON: He's not demanding freedom, Your Honor.
24 He's asking his return to Vermont custody.

25 QUESTION: Well, isn't that almost a case of damnum

1 absque injuria, as we learned in law school? If he gets out
2 of the federal prison he's going to go back to a minimum
3 security in Vermont because the Vermont Legislature doesn't
4 want to appropriate the funds for a maximum security?

5 MR. NELSON: Well, no, that's not true. Vermont has
6 maximum security capacity, for one. For another thing, Vermont
7 is a signatory of a number of interstate compacts, including the
8 New England Compact. These compacts permit transfers of pri-
9 soners from jurisdiction to jurisdiction and they do not men-
10 tion treatment. They talk about transfers of custody
11 for custody reasons. They do not condition changes of custody
12 on the availability of treatment facilities, and --

13 QUESTION: Why is your client going to be better off
14 being imprisoned in the state penitentiary in New Hampshire
15 than he is in the federal penitentiary at Terre Haute?

16 MR. NELSON: For one thing, he'd be closer to home.
17 For another thing, I don't think that the question really is
18 whether the inmate is better off. He's asking, I'm advocating
19 his desire to be returned to Vermont and the question is whether
20 he has a legal right to that relief.

21 QUESTION: Well, he wouldn't be seeing much of
22 Vermont, would he?

23 QUESTION: Does the record show whether he has rela-
24 tives in Vermont?

25 MR. NELSON: I don't think the record shows it but he

1 does, yes.

2 QUESTION: So that visitation is a possible considera-
3 tion?

4 MR. NELSON: Visitation is a major consideration.
5 Visitation with family and friends, visitation with counsel.
6 I have never met Mr. Howe. Another consideration, of course, is
7 the parole possibilities. Mr. Howe is sentenced to life impri-
8 sonment. Life imprisonment in Vermont is actually zero to life.
9 He is parolable, technically, right now. It's difficult if not
10 impossible to work out any kind of even beginnings of a parole
11 plan from Terre Haute. How can --

12 QUESTION: Are not the records at the federal prison
13 maintained on the conduct and behavior of the prisoner and all
14 of the factors that go into whether a prisoner is going to be
15 eligible for parole?

16 MR. NELSON: Certainly. And that would be available
17 to the Vermont Parole Board.

18 QUESTION: Is there anything in the Vermont Constitu-
19 tion or statutes that requires that Vermont prisoners convicted
20 in Vermont courts be kept in custody within the boundaries of
21 the state?

22 MR. NELSON: No.

23 QUESTION: Then, they, theoretically, they could
24 send them to Devil's Island if they wanted to, couldn't they,
25 if there were such a place now?

1 MR. NELSON: Under constitutional restraints, yes.

2 QUESTION: That's why you focus on the power of the
3 Federal Government to receive rather than the power of the Ver-
4 mont court to transfer?

5 MR. NELSON: That's correct. We see a clear right in
6 federal law against federal imprisonment which is not authorized
7 by statute.

8 QUESTION: What can 5003 mean if it doesn't mean that
9 the federal system will help absorb -- say -- prisoners on re-
10 quest and use its unused capacity? What else was that statute
11 passed for?

12 MR. NELSON: Well, I think the legislative history
13 shows that it was passed for inmates with specialized needs,
14 treatment needs. That it was limited to cases of inmates in
15 need of treatment. The legislative history defines --

16 QUESTION: What does the language of the statute tell
17 us? If the language is clear, we don't need to worry about the
18 legislative history, do we?

19 MR. NELSON: That's true, that's true. And we think
20 that the language of of the statute is pretty clear. Let's
21 play dumb for a minute, read "treatment facilities and person-
22 nel." What does that mean? The core meaning of that phrase is,
23 I think, hospitals or mental institutions of some sort.
24 I think that's --

25 QUESTION: Well, but the core of this statute, if you

1 want to talk about the core of it, is that the Federal Govern-
2 ment can make available, Congress has said the Federal Govern-
3 ment can make available unused space in its institutions for
4 state prisoners.

5 MR. NELSON: That is -- well, one independent
6 clause says --

7 QUESTION: Well, why do you have to parse the particu-
8 lar words in order to discern that meaning?

9 MR. NELSON: It may do that, it may make federal pri-
10 son facilities available when there are adequate and proper
11 treatment facilities and personnel available. And I think it's
12 important to know what Congress meant by that term. Did it
13 mean, was that a euphemism for "prison"? The only way that this
14 statute can be construed as a general blanket authorization to
15 take state inmates to help the states out with their prison
16 problems, for whatever reason, is to read treatment facilities
17 and personnel as a euphemism for federal prison. I think there
18 are compelling reasons not to read it that way. I think -- as
19 I said, I think it has a core meaning of mental hospitals,
20 physical hospitals. It means something broader than --

21 QUESTION: Where are the words that lead you to that
22 conclusion?

23 MR. NELSON: Pardon?

24 QUESTION: Where are the words? Which words lead you
25 to the mental problem?

1 MR. NELSON: Oh, I think the words "treatment
2 facilities" in common speech means, among other things, mental
3 hospitals or hospitals.

4 QUESTION: It may mean that to you but it doesn't
5 mean that necessarily to everyone.

6 MR. NELSON: No, perhaps not. I'm not saying that it
7 means --

8 QUESTION: Adequate treatment means, do they have the
9 space, do they have the facilities to take on more inmates?

10 MR. NELSON: What does treatment mean? Treatment --
11 I'm not saying that it's confined to hospitals and mental --

12 QUESTION: Are you suggesting that treatment means
13 only treatment for a mental problem?

14 MR. NELSON: No, I'm not, I'm not arguing that. I'm
15 arguing that that's at least the core of its meaning. It can
16 also mean other kinds of therapeutic types of treatment.
17 I think in common speech, detoxification programs could be
18 called treatment facilities, and alcoholism programs could be
19 called treatment facilities. And the people in charge of that,
20 of those programs, could be called treatment personnel. But I
21 don't think, however --

22 QUESTION: In common speech, treatment is not neces-
23 sarily synonymous with custody, is your argument, really, in
24 answer to the Chief Justice?

25 MR. NELSON: No, that's correct, that's correct.

1 That it's not --

2 QUESTION: Is there any treatment in the Vermont
3 prisons that's not available in the federal prisons?

4 MR. NELSON: The record seems to say, no, that the
5 facilities are about equivalent in both places.

6 QUESTION: Equivalent?

7 MR. NELSON: Yes, that the same types --

8 QUESTION: What do you have in Vermont like Spring-
9 field?

10 MR. NELSON: Pardon?

11 QUESTION: What does the prison system in Vermont have
12 similar to Springfield in the federal prisons?

13 MR. NELSON: There is a -- there's a state hospital --

14 QUESTION: It would the whole state of
15 Vermont.

16 MR. NELSON: There is a state hospital and --

17 QUESTION: Oh, sure, but is it the equivalent?

18 MR. NELSON: Oh, it's not as good, I'm sure.

19 QUESTION: Well, that was my question; equivalent. --

20 MR. NELSON: Well, I misinterpreted it.

21 QUESTION: If Congress takes the word "treatment" out
22 would you give up?

23 MR. NELSON: Yes. I would give up. Well, I've been
24 focusing on what it means and what I think the words mean in
25 common speech. What don't they -- I mean, I don't think that

1 treatment facilities and personnel can mean prison industries
2 or other types of rehabilitative programs. I don't think that
3 the man in charge of the canvas shop at Terre Haute is a treat-
4 ment officer, or that the officers in charge of athletic pro-
5 grams or religious programming are treatment personnel. That
6 is a jargon use of the phrase.

7 There's another mark against the 2nd Circuit's reading.

8 Treatment appears twice in this statute, first in the phrase
9 "treatment facilities" and second in the list of items con-
10 tracted for. If it means custody, essentially, in its appear-
11 ance, first appearance in the statute, then it must mean some-
12 thing very different in the second appearance in the statute.

13 In the second appearance it's different from custody,
14 care, subsistence, education, and training. So the reading of
15 the statute that the respondents propose requires that treatment
16 be given two radically different meanings within one sentence.
17 And it requires also that we presume Congress was using a jar-
18 gon or technical usage when there is no indication that it was.
19 In fact, the Court, if it is of a mind to, can read Title 18 of
20 the Code from cover to cover and not find a single instance
21 where "treatment facilities" is used as a euphemism for prison,
22 or as anything but a definition of specialized types of treat-
23 ment. It is used in the Youth Corrections Act to define a type
24 of commitment different from ordinary prison. It is used in
25 the Narcotic Addiction Rehabilitation Act to define a type of

1 commitment different from ordinary prison; therapeutic.

2 QUESTION: Are you suggesting, do I take the argument
3 to mean that this institution does not have a medical unit, for
4 example, to deal with people who become ill, or that they have
5 no facilities to deal with a person who has alcoholic tendencies
6 when he arrives, although surely he couldn't become an alco-
7 holic after he got there?

8 MR. NELSON: Perhaps.

9 QUESTION: Perhaps.

10 MR. NELSON: No, certainly the facilities are avail-
11 able in the institution, but they're not available to Mr. Howe.
12 He hasn't been programmed. The district court found --

13 QUESTION: And maybe, as -- there's just no treatment
14 for him except custody.

15 MR. NELSON: That's conceivable. That's certainly true.

16 QUESTION: In which case it's your claim that he cannot
17 be transferred to a federal facility.

18 MR. NELSON: That's correct.

19 QUESTION: The first question in this case is whether
20 or not there's a private right of action, isn't there?

21 MR. NELSON: Well, the Government raises that here for
22 the first time. It was never questioned below.

23 QUESTION: But isn't that the first, threshold question?

24 MR. NELSON: That is a threshold question, but I
25 don't think it's a substantial one.

QUESTION: In other words, you're here challenging, as

1 you said earlier, not the authority of Vermont to send him but
2 the authority of the Federal Government to receive.

3 MR. NELSON: That's correct.

4 QUESTION: Where is your standing, your client's
5 standing to challenge what the Federal Government is doing,
6 even though it's holding him in custody?

7 MR. NELSON: Our stand -- we assert standing under
8 4001, Title 18. "No citizen may be confined by the United
9 States except pursuant to an act of Congress."

10 QUESTION: How have you brought the -- you've asserted
11 jurisdiction under 1346, and you do claim that you have a right
12 rooted in 4001, I take it. You might have said that you're
13 being held illegally and that you have a right to habeas corpus.

14 MR. NELSON: Well, these issues have been raised by
15 habeas corpus, but it's habeas not seeking absolute freedom
16 but seeking a change in custody.

17 QUESTION: Well, I know, but you are claiming that
18 your custody is illegal.

19 MR. NELSON: That's correct.

20 QUESTION: By the United States and I suppose if you
21 could claim, at least you have the right to habeas corpus whe-
22 ther you have the right under 4001 or not.

23 MR. NELSON: Yes, it could have been brought that way.

24 QUESTION: Well, is not 18 U.S.C. 5003 an act of
25 Congress?

1 MR. NELSON: It certainly is, but we say it doesn't
2 cover this case. As we construe it, it does not authorize the
3 transfer of the prisoner to be warehoused.

4 QUESTION: Solely because of the word "treatment?"

5 MR. NELSON: No. Solely because of the phrase,
6 "treatment facilities and personnel."

7 QUESTION: You told me, I said, if we took the word
8 "treatment" out would you be out? And you said, yes.

9 MR. NELSON: I said, yes.

10 QUESTION: So you have changed. Now what's your
11 latest?

12 MR. NELSON: Well, Justice Marshall, if we take the
13 word "treatment" out, then transfers would be authorized where
14 there were adequate and proper facilities and personnel avail-
15 able, and then we would have no case.

16 I'd like to reserve the remainder of my time for
17 rebuttal.

18 MR. CHIEF JUSTICE BURGER: Very well. Ms. Etkind.

19 ORAL ARGUMENT OF MS. BARBARA E. ETKIND, ESQ.,

20 ON BEHALF OF THE FEDERAL RESPONDENTS

21 MS. ETKIND: Mr. Chief Justice, and may it please the
22 Court:

23 The primary issue presented by this case is whether
24 a state prisoner is ineligible for transfer to federal custody
25 under 18 U.S.C. 5003 unless he has a need for specialized

1 treatment that is available in the federal prison system. It
2 is the position of the United States and the State of Vermont
3 that Section 5003 is not so limited. Rather, in our view, the
4 statutory requirements are met and any state prisoner regardless
5 of treatment needs may be transferred from state to federal
6 custody once a contract has been entered into between the state
7 and federal governments, and once the Director of the Federal
8 Bureau of Prisons has certified that facilities in federal
9 institutions are available. On behalf of the United States I
10 shall explain how the language of the statute, its legislative
11 history, and its consistent administrative application require
12 that construction. The Attorney General of the State of
13 Vermont will discuss the state's vital interest in having this
14 statute construed in the manner we urge.

15 Preliminarily, in response to Justice Marshall's ques-
16 tion, we would say that our certification saying that
17 facilities in federal institutions are available would imply
18 that treatment facilities are also available, because what we
19 have in the federal system are in fact treatment facilities;
20 they are available.

21 Also, with respect to the question regarding trans-
22 fer under the Interstate Correctional Compact, not only could
23 he be transferred to New Hampshire, in which case he could be
24 visited more easily, he could also be transferred presumably to
25 Colorado, in which case it would be even more difficult for his

1 family to visit him, yet he would assert no challenge to that
2 type of transfer.

3 There is no suggestion in the statutory language that
4 the federal prison system's authority to assume custody of a
5 state prisoner is conditioned on the prisoner's need for spe-
6 cialized treatment available in the federal system. The plain
7 language of Section 5003(a), as the Court recognizes, author-
8 izes the Attorney General to contract not only for the purpose
9 of treatment but equally for the purposes of custody, care,
10 subsistence, education, and training of state prisoners.

11 QUESTION: But why then does the statute require that
12 the Director shall certify that proper and adequate treatment
13 facilities and personnel be available?

14 MS. ETKIND: Well, there are a couple of answers to
15 that. One is that the description of treatment facilities is
16 merely, the use of "treatment facilities" is merely a correct
17 description of the federal facilities, the federal prisons,
18 because what we have are treatment facilities.

19 To be sure, other federal statutes refer to prisons as
20 penal and correctional institutions, but those provisions were
21 passed, not only were passed by Congresses other than that
22 which passed 5003, but they concern the operation and manage-
23 ment of federal prisons as institutional entities rather than the
24 slots within them that may be available for the housing of
25 state prisoners. And finally, even if the phrase, "treatment

1 facilities" were intended to refer to something narrower than
2 the typical facilities that we provide for all federal prison-
3 ers, Section 5003 still requires no more than a certification
4 that facilities are available, presumably in the case that the
5 prisoner would need them. But nothing in the statutory language
6 suggests that the Director must make an individualized determi-
7 nation in the case of each potential state transferee that he
8 needs specialized treatment available in the federal system
9 and that specific treatment facilities have been earmarked for
10 him.

11 Our argument is not merely as petitioner misconceives
12 it, that Section 5003(a) contains no implied right of action in
13 favor of state prisoners, but rather --

14 QUESTION: No, no, his implied right of action comes
15 from a different section, I think.

16 MS. ETKIND: 4001?

17 QUESTION: Yes. (a).

18 MS. ETKIND: Well, either of those. Our argument is
19 not merely that there is no implied right of action, but rather
20 that 5003 simply is not violated by the transfer of a state
21 prisoner for --

22 QUESTION: Well, that's the argument on the merits,
23 but there's a threshold question about whether or not there is
24 a right of action to bring the lawsuit such as the one that
25 was brought here, which was not habeas corpus.

1 MS. ETKIND: Right. And while we would assert that
2 there is no private right of action, we have not pressed that
3 because most of these cases have come up under habeas and
4 there certainly would be a right if the petitioner is right in
5 the way he construes the statute, then there would be a remedy
6 in habeas.

7 QUESTION: What's your normal remedy in habeas?

8 MS. ETKIND: Transfer. To transfer --

9 QUESTION: Transfer? Why wouldn't it be release?

10 MS. ETKIND: No. Habeas has been used in cases in
11 which --

12 QUESTION: But the normal remedy of habeas corpus,
13 the normal request, is for release.

14 MS. ETKIND: The normal request is for release, but it
15 has been employed in cases in which the prisoner is complaining
16 that he's in the wrong place.

17 QUESTION: That he's detained illegally?

18 MS. ETKIND: Yes. In the wrong place. He should be
19 somewhere else. And in fact, in the 7th Circuit, where we have
20 lost this issue, the remedy is that the court orders that the
21 prisoner will be returned to the state's authority and if not
22 the writ will issue and he will be released.

23 QUESTION: It would seem to me that 4001(a), the
24 purpose of that section must have been to give a citizen who
25 is detained by the United States not pursuant to an act of

1 Congress a remedy. What else would 4001(a) do?

2 MS. ETKIND: Well, the legislative history of 4001(a)
3 is very specific. That statute was passed in connection with
4 the repeal of the emergency, the Internal Security Act, a
5 provision that allowed citizens to be rounded up and detained
6 if there was just probable cause to believe that they were
7 engaged in some sort of illegal activity without conviction.
8 And the legislative history makes quite clear that 4001 was
9 enacted in order to provide that citizens would not have to be
10 afraid of that.

11 QUESTION: Well, in other words, what you're saying is
12 that a citizen who is detained by the United States not pursuant
13 to an act of Congress ought to have a remedy in court to get
14 out?

15 MS. ETKIND: That's what petitioner is saying.

16 QUESTION: What?

17 MS. ETKIND: That's what the petitioner --

18 QUESTION: Well, that's what you're telling me too.
19 Because you're saying these people were detained under this
20 internal security legislation and this was to change that and
21 give them a remedy for it.

22 MS. ETKIND: Well, but when we look to see whether a
23 private right of action is available we look at more than the
24 language of the statute itself.

25 QUESTION: No, but the first thing we look at, what group

1 does it confer a benefit on? Is there a special class of per-
2 sons? And there sure is a special class defined in 4001(a),
3 persons who are imprisoned except pursuant to an act of Congress,
4 imprisoned by the United States without any act of Congress au-
5 thorizing it.

6 MS. ETKIND: Except that the legislative history makes clear
7 that the persons for whom they were concerned and to whom they wanted
8 to give a right of action were those that were being detained without
9 conviction only upon a probable cause of engaging in some sort of illegal
10 activity. We've addressed that in our brief, I believe it's
11 page 25, Note 13.

12 Section 5003 does not provide, as petitioner would
13 have it, that no state prisoner may be transferred to the
14 federal prison system unless the Director certifies that he
15 is in need of specialized treatment available in the federal
16 system. Rather, the only condition imposed under Section
17 5003(a)'s broad authority to contract, apart from the reimbursement
18 requirement, is that the Director have certified that proper
19 and adequate treatment facilities and personnel are available.
20 That certification nowhere requires that an individualized
21 determination of treatment need and available federal resources
22 be made with respect to each potential state transferee.

23 QUESTION: Let's assume that a state, a given state,
24 not Vermont, had a provision in its criminal statutes governing
25 its institutions, that any prisoners on coming in would be

1 examined and classified, and if they were found to have particu-
2 lar problems, for example, alcoholism and emotional disorders,
3 then the statute would provide in that state, shall receive
4 treatment for such condition. Now, could that prisoner be
5 transferred to a federal institution absent a certification by
6 someone that treatment was available? In other words, absent
7 that situation, they would not be complying with the state
8 statute.

9 MS. ETKIND: That's a much closer question and I think
10 in that case there might be an expectation created by state law.

11 QUESTION: Well, the Congress in passing 5003 --

12 MS. ETKIND: Did not use that.

13 QUESTION: I would think must be assumed to have taken
14 into account that perhaps some states do require some kind of
15 treatment. And, of course, it's well known that all the federal
16 prisons do provide some forms of treatment. Would you think
17 that might have been in the contemplation of Congress in
18 drafting that?

19 MS. ETKIND: No, no, I don't think so. To go to the
20 legislative history, what Congress's basic underlying motive,
21 intent, was, was to match the needs of the states with the
22 surpluses of the Federal Government, whatever they might be at
23 that time. The requests that the Bureau of Prisons had been
24 getting was for space in the federal system for juveniles and
25 for drug addicts, and we had that space available and so we

1 determined to make that available. But in a gross sense the
2 intent of Congress was not to limit it in that way, it was just
3 to make what we had available to the states.

4 Although we view the statutory language as unambiguous
5 resort to the legislative history demonstrates, as I said, that
6 the intent was to match the states' needs with federal surpluses.
7 The petitioner's construction would frustrate that intent by
8 preventing the Federal Government, even when it has the neces-
9 sary surpluses, from meeting the urgent needs of the state cor-
10 rectional system. The Bureau's construction of Section 5003
11 has permitted it to accept custody of nearly 172 New Mexico
12 prisoners who were displaced by the massive disruption in that
13 state's penitentiary on February 2 and 3, 1980. Similarly,
14 pursuant to its broad construction of Section 5003, the Bureau
15 assumed custody of 111 Idaho state prisoners after riots occur-
16 red in that state's maximum security facility on July 23, 1980.
17 And more recently, the United States District Court for the
18 District of Maryland ordered the Maryland prison system to
19 transfer 100 of its inmates to the federal system in order to
20 partially relieve the state system's overcrowding problem.

21 None of those emergency relocations would be possible
22 under petitioner's cramped construction of the statute, nor
23 would the federal system be authorized to afford protective
24 custody to a state prisoner who was in danger from his fellow
25 state inmates or to accept custody of any state prisoner

1 regardless of how much he could benefit from or indeed desires
2 certain aspects of federal incarceration, unless such a prisoner
3 was otherwise in need of specialized treatment available in the
4 federal system.

5 As the court below put it, adopting petitioner's view
6 of the statute would mean that a wholly incorrigible prisoner
7 or on the other hand a fully rehabilitated prisoner incarcerated
8 not for treatment but solely for purposes of deterrence could not
9 be transferred from state to federal custody solely to take
10 advantage of training and educational opportunities available
11 only at federal facilities.

12 QUESTION: But, of course, you would agree, would
13 you not, that prior to 1952, when this statute was passed, that
14 was the situation? There was no statutory authorization to
15 help the states out in these situations.

16 MS. ETKIND: Well, I'm not sure that at that time
17 the Executive Branch could have entered into those contracts with
18 the states because 4001 was not passed until 1971, so I don't
19 think there would have been anything to stop the Federal
20 Government from doing it.

21 QUESTION: Do you think that the Executive Department
22 would have the power to do it if it weren't for 4001?

23 MS. ETKIND: Yes, I believe so. I don't think it
24 needs 5003 except for 4001. Vermont certainly is not unique
25 among the states in its need for maximum security or other

1 facilities for its offenders. This Court is well aware of the
2 severe overcrowding problems in state and local penal institu-
3 tions generally. As of mid-December, 1980, however --

4 QUESTION: Could I interrupt you, just to go back to
5 that question I asked before? Prior to the enactment of
6 5003, did the Federal Government ever take custody of state
7 prisoners, to your knowledge?

8 MS. ETKIND: I don't know.

9 QUESTION: So apparently the states did find some
10 other way to solve these emergency problems, because I assume
11 there were problems from time to time where state facilities
12 got into trouble. Presumably they contracted with other states,
13 I suppose.

14 MS. ETKIND: That may have been, but I also think that
15 the overcrowding problems that the states have been having have
16 been escalating; I don't know at what stage they were --

17 QUESTION: Well, there's nothing in the legislative
18 history of this statute that suggests it was enacted to handle
19 the overcrowding problem, is there?

20 MS. ETKIND: No, there isn't specifically, but as I
21 mentioned before, I think the gist of it is that if the Federal
22 Government has a surplus and a state has a need, then those
23 should be matched. Certainly, the Congress --

24 QUESTION: Well, but, there is history that your
25 opponent cites to the effect that the Federal Government was

1 developing special programs such as for alcoholics and drug
2 addicts and youth corrections and the like.

3 MS. ETKIND: Oh, we had that.

4 QUESTION: Contemporaneously with the enactment of
5 this statute.

6 MS. ETKIND: Well, the legislative history doesn't
7 indicate that we were developing them at that time. I think it
8 indicates and I think it's clear that we had them at those
9 times. As of mid-December, 1980, the entire federal system
10 was slightly short of its rated physical capacity. And to the
11 extent that such surplus federal facilities can be used to alle-
12 viate the state's problems, be they lack of maximum security
13 facilities, lack of treatment programs, or overcrowding in
14 general, we submit that the purposes of 18 U.S.C. 5003 would
15 be furthered. And this shows that from the enactment of Section
16 5003 to the present, the Bureau of Prisons consistently has
17 maintained the view that we urge here, that there are no limi-
18 tations on the purposes for which state prisoners may be trans-
19 ferred to the federal system, that simple custody is a suffi-
20 cient reason. Indeed, in its first annual report after the
21 passage of Section 5003 in 1952, the Bureau suggested as exam-
22 ples of situations in which the transfer provision might be em-
23 ployed, those in which "a state may wish to transfer a vicious,
24 intractable offender who cannot be handled readily in its own
25 institutions, or a female prisoner for whom appropriate

1 facilities are not available."

2 We submit that considerable deference is due such a
3 contemporaneous and consistent interpretation of the statute
4 by the agency that drafted the legislation, suggested its enact-
5 ment to Congress, and has been charged with its administration
6 ever since.

7 I'd like to rely on our arguments in our brief with
8 respect to the second two points, unless there are any questions
9 from the Court. Thank you.

10 MR. CHIEF JUSTICE BURGER: We'll resume there at
11 1 o'clock today.

12 (Recess)

13 MR. CHIEF JUSTICE BURGER: Mr. Attorney General, you
14 may proceed whenever you are ready.

15 ORAL ARGUMENT OF JOHN J. EASTON, JR., ESQ.,
16 ON BEHALF OF THE STATE RESPONDENT

17 MR. EASTON: Thank you, Mr. Chief Justice, and may it
18 please the Court:

19 I think above all else this case is not merely a case
20 of statutory construction but it involves the ability of
21 Vermont and similar states to provide a dignified and humane
22 approach to dealing with those who run afoul of the law.
23 Maybe stated differently, the question is, may Vermont continue
24 to operate a community-based correction system where offenders,
25 more than 95 percent of those housed in Vermont, where they

1 have the right to be integrated back into the community. Or
2 must we return to the conditions that existed in 1974, when we
3 decided to close down the maximum security prison, when we were
4 spending a full 25 percent of our resources on two percent of
5 those incarcerated? I think that's really the issue.

6 QUESTION: Mr. Easton, I take it nobody disputes the
7 statement in the opinion of the Court of Appeals for the 2nd
8 Circuit that Vermont, as contemplated in the agreement in 1975,
9 closed its only maximum security prison?

10 MR. EASTON: That's not in dispute, Justice Rehnquist.

11 QUESTION: You do have agreements with other states,
12 don't you?

13 MR. EASTON: That is correct. We are participants
14 in not only the New England compact but also the national
15 compact. We have made agreements with the New England states
16 and most of the other states in the country.

17 QUESTION: Which would allow Vermont to carry on its
18 present regimes --

19 MR. EASTON: That is true.

20 QUESTION: Even though the federal prison system were
21 not available to you.

22 MR. EASTON: One of the considerations, though,
23 Justice Stewart, is that just looking at the other New England
24 states, most of those states, they themselves have the same
25 problems that Vermont has, overcrowding, lack of humane

1 facilities, facilities just not equipped to deal with prisoners
2 such as Mr. Howe.

3 QUESTION: But New Hampshire, for example, I think,
4 has a maximum security institution.

5 MR. EASTON: That it does, and we have a compact with
6 them.

7 QUESTION: Well, doesn't that extend also to some of
8 your educational facilities? Doesn't Vermont have an agreement
9 with Maine that Vermont law students can go to Maine, the
10 University of Maine Law School, whereas University of Maine
11 residents can go to the University of Vermont Medical School?

12 MR. EASTON: Certainly it exists in veterinary school
13 and, I believe, medical school. I'm not sure if it exists in
14 law schools too.

15 QUESTION: Vermont has its own law school now.

16 MR. EASTON: It does.

17 QUESTION: But it's not state-sponsored.

18 MR. EASTON: That's correct. It's a private institu-
19 tion. I guess the thrust of my argument is that the Federal Bureau
20 of Prisons, which has been described as, in fact, I think, in
21 one of the Lono opinions as one of the best penal systems in
22 the world, that having that available to us for the five percent
23 of those prisoners who need the facilities enables us to have a
24 community-based correction system to care for the remaining
25 95 percent of those who can be integrated back into our

1 community. We're talking, in a state like Vermont, of a very
2 small correctional system. We have less than 500 prisoners.
3 We have 3,700 probationers. Our whole corrections population
4 is smaller than the size of several state institutions. Our
5 system consists of six facilities around the state, four commu-
6 nity correction centers and two state-wide centers. The largest
7 only has a capacity of less than 150. All the rest are under
8 100. These are --

9 QUESTION: I suppose the legal question is, say we
10 agree with you, that it'd be a very good idea for the Federal
11 Government to take over a large portion of these state respon-
12 sibilities, but the question is whether Congress has authorized
13 it, isn't it?

14 MR. EASTON: We're not unmindful of the fact that if
15 there's an entitlement, that then under the federal statute that
16 we have to meet that entitlement for Mr. Howe. We're saying
17 here, though, that there is no special entitlement that he is
18 entitled to, and therefore we shouldn't get bogged down on that
19 issue. There is no special constitutional or statutory entitle-
20 ment that he deserves, and so to accept his argument that he's
21 got to have some specialized treatment, then that hampers the
22 ability of Vermont to properly administer its correctional
23 system, and I think this Court has long held that such a --

24 QUESTION: Well, that really isn't quite his argument.
25 His argument is that he has a right to stay in the Vermont

1 system unless the federal system offers something that Vermont
2 does not offer in the way of special treatment.

3 MR. EASTON: Yes, I think the court below found --

4 QUESTION: The Federal Government isn't just going into the
5 business of making their facilities available on a wholesale
6 basis.

7 MR. EASTON: As the court below found, Justice Stevens,
8 even if some of the same activities and programs were available
9 in Vermont, they're less accessible to Mr. Howe because of his
10 need for maximum security incarceration. We literally do not
11 have the ability on the long-term basis to house a prisoner of
12 this sort, and so therefore, while there may be some programs
13 that are parallel from our system into the federal system, for
14 a prisoner who is there on a long-term basis, who presents a
15 maximum security risk, as Mr. Howe did, then they're far less
16 accessible. I think it's interesting, it's contained in the
17 petition of certiorari in Hawaii v. Mederios, the finding of
18 the magistrate in Illinois who said the states are literally
19 faced with the unenviable position of having, if the returned
20 prisoners like this are returned to the states, then they're
21 placed in conditions that literally are inhumane and they'd be
22 making arguments for Eighth Amendment freedom, or the states
23 have to release them. So, it puts us in a very untenable posi-
24 tion if we do not have the freedom and flexibility to contract
25 with the Federal Government for this type of prisoner.

1 QUESTION: I take it that your friend's position
2 would be the same if the federal institution to which the trans-
3 fer was made were 200 yards away from your closed institution
4 in Vermont. Do you assume that that's the case?

5 MR. EASTON: I do, Your Honor, and also --

6 QUESTION: It isn't the out-of-state factor, it's the
7 transfer to a federal institution.

8 MR. EASTON: Well, petitioner's counsel said he wants
9 to be in Vermont, but the statute which he challenges --

10 QUESTION: That's a little sweeping for the argument,
11 perhaps.

12 QUESTION: Well, it might have been the motivation
13 for his lawsuit.

14 MR. EASTON: I think, perhaps.

15 QUESTION: But his legal claim would be the same, as
16 the Chief Justice suggests, if the federal facility were 200
17 yards away from the state facility.

18 MR. EASTON: I think, regardless of where the federal
19 facility is --

20 QUESTION: Yes; the issue is the same.

21 MR. EASTON: That's correct. What I want to impress
22 upon the Court here is that there has been no finding by any of
23 the courts below that there is any constitutional right here,
24 nor is there any statutory right. So absent that, I think it's
25 very important that the state administration --

1 QUESTION: Well, the claim certainly is that there's
2 a statutory right not to be in the custody of the Federal
3 Government. Their claim is that the statute forbids custody
4 of this prisoner by the Federal Government.

5 MR. EASTON: Perhaps I stated it wrong. Let me say,
6 Justice White, that the issue is whether there is any entitle-
7 ment, despite the claim, whether the statute gives him any
8 entitlement. And we suggest that --

9 QUESTION: Well, you can call it what you want to, but
10 he says that my custody by the United States is illegal. And
11 he's making what's equivalent to a habeas corpus claim, which
12 is a classic claim under habeas corpus, that this custody is
13 illegal.

14 MR. EASTON: First of all, he's not of course chal-
15 lenging Vermont's statute, he's challenging the federal statute
16 and the federal statute has been found to say that we're
17 talking about care and custody and subsistence and education and
18 treatment and training, and he is challenging the treatment
19 aspect, trying to give that a primacy that it doesn't deserve.

20 QUESTION: But Mr. Attorney General, actually, basi-
21 cally, as my brother White suggests, he's challenging his de-
22 tention by the federal authorities as illegal in violation of
23 the laws of the United States, isn't he?

24 MR. EASTON: He has to. However --

25 QUESTION: Does that have anything to do with whether

1 he has an entitlement?

2 MR. EASTON: He has to have some basis on which to
3 challenge his custody, and he's challenging the basis in the
4 statute under 5003.

5 QUESTION: Yes, his challenge is that laws of the
6 United States expressly say you can't do this, you cannot
7 deliver me to a federal authority.

8 MR. EASTON: He's attacking 5003 and his attack on
9 5003 --

10 QUESTION: He's invoking 5003.

11 QUESTION: No, no -- no, no.

12 MR. EASTON: I'm sorry. He's invoking it and
13 attacking the concept of treatment, suggesting that --

14 QUESTION: He's claiming it under 4001 that the
15 Federal Government may not have custody of this prisoner unless
16 there is some other law that authorizes it.

17 MR. EASTON: And then we get to 5003, which he
18 invokes, as Justice Stewart suggests --

19 QUESTION: His claim isn't on 5003; his claim is on
20 4001.

21 MR. EASTON: Okay.

22 QUESTION: It's illegal; this custody is illegal under
23 4001.

24 MR. EASTON: Then he gets to 5003, piggy-backing, and
25 saying that under 5003 he's got to receive some specialized

1 treatment.

2 QUESTION: No, it's the Government that's relying on
3 5003.

4 QUESTION: No, he is.

5 MR. EASTON: Well, I think Justice White, in his ques-
6 tion that he presents, that he himself is saying that there's
7 got to be a finding under 5003.

8 QUESTION: I thought his entire argument was focusing
9 on the term "treatment" in 5003(a).

10 MR. EASTON: I believe that is correct, as his counsel
11 stated, that it involves the construction of that statute. And
12 he is suggesting that the word "treatment" in that statute be
13 given some sort of primacy that the court below found it not
14 necessary to give.

15 QUESTION: Well, then, the case should be dismissed
16 for failure to state a federal question, to raise a federal
17 question within the jurisdiction of the Court under 1346.

18 MR. EASTON: Now that it's here before this Court, I
19 think it would be helpful for the Court to dispose of it to
20 avoid this very troublesome situation that exists in the
21 circuits where the 7th Circuit has ruled one way and the 1st,
22 2nd, 3rd, and 10th Circuits -- because otherwise the states
23 will be --

24 QUESTION: What would you say if he filed a petition
25 for habeas corpus against the federals? Of course, you may not

1 even be in the case.

2 MR. EASTON: That's true. He's entitled --

3 QUESTION: And saying that, basing it on 4001 saying,
4 my custody is illegal under 4001. The United States would
5 come back and say, sorry but it's authorized under 5003, as
6 a defensive matter.

7 MR. EASTON: What would happen is, I think we'd get in
8 that position that Justice Marshall suggested earlier, is that
9 we would have the prisoner trying to wander back and forth
10 between the two systems and that's the result --

11 QUESTION: And hoping to get lost.

12 MR. EASTON: Exactly. That's the result we want to
13 avoid by construing this statute, 5003(a), not to give him some
14 special entitlement to treatment.

15 QUESTION: Your friend, I think, if I recall correctly,
16 conceded that there was nothing in Vermont law, including its
17 Constitution, to prohibit Vermont from having its penal insti-
18 tutions in another state. Now --

19 MR. EASTON: That's correct. There's no challenge
20 to that.

21 QUESTION: Hasn't the State of Vermont made this
22 federal facility its prison by making a contract under 5003,
23 making it a surrogate prison?

24 MR. EASTON: Well, I think that we haven't gone that
25 far but we have integrated the Vermont system as part of our

1 corrections philosophy, so that those who need the entitlements
2 which Vermont statutes give them, if offered by the federal
3 system, we can take advantage of that. Thank you, Your Honor.

4 MR. CHIEF JUSTICE BURGER: Very well. Mr. Nelson,
5 do you have anything further?

6 ORAL ARGUMENT OF WILLIAM A. NELSON, ESQ.,

7 ON BEHALF OF THE PETITIONER -- REBUTTAL

8 MR. NELSON: Just a few points, Your Honor.

9 QUESTION: Do you think Vermont can't make some other
10 entity a surrogate, including a private corporation? Suppose
11 some group of people got together, penologists in the universi-
12 ties, set up a private, nonprofit corporation to do better than
13 most of the penal institutions do, much like setting up the
14 postal corporation outside of the old system, do you say that
15 Vermont could not incarcerate its prisoners in that kind of an
16 institution?

17 MR. NELSON: Out of the state?

18 QUESTION: Anywhere. Two hundred yards down the road
19 or 2,000 miles away in Alaska, or 3,000 miles.

20 MR. NELSON: I can't point to anything in Vermont law
21 which would prohibit that but I don't feel confident in saying
22 that it would be authorized either. It seems fishy, on the
23 face of it. It's not -- the statutes which empower the Vermont
24 Commissioner of Corrections to incarcerate people speak of
25 incarceration generally within the state. A particular statute

1 was passed to permit incarceration in the federal system as a
2 reciprocal act to 5003. If Vermont were able without such a
3 statute to designate another agent to incarcerate its prisoners,
4 then the Vermont reciprocal statute would not have been neces-
5 sary.

6 I want to address the agency interpretation argument
7 which was presented by the Solicitor General. In the first
8 place, we think that the agency's interpretation is entitled
9 to weight only if it's reasonable. In this case we don't think
10 it's even reasonable. The circuit reached its decision, the
11 circuit said that it was construing the statute as it did, not
12 quite at face value. The district court reached the decision
13 it did, indications in the legislative history to the contrary
14 notwithstanding. Both of these sources, as well as the context
15 of other statutes in which 5003 sits, indicate that the agency's
16 current interpretation is simply not reasonable, not merely
17 that it's not preferable.

18 Secondly, the agency interpretation has varied. The
19 original agency interpretation, after all, was a letter sub-
20 mitted to the judiciary committees of both House and Senate
21 stating that federal facilities were needed for specialized
22 cases, that there were requests received for specialized cases.
23 This, I think, is an agency interpretation made directly to a
24 house of Congress.

25 The formal agency interpretation of this statute is

1 contained in the Code of Federal Regulations, and it simply
2 tracks the statutory language. It does not omit the treatment
3 facilities and personnel requirement.

4 QUESTION: Well, couldn't special cases mean Alcatraz?

5 MR. NELSON: It could, but it was, the Deputy Attor-
6 ney General said that it mostly related to juveniles, and I
7 think he was referring to the YCA, which had been passed in the
8 previous Congress, that the 82nd Congress made the YCA available
9 to the states, as well as other treatment facilities.

10 I see that my time has expired.

11 MR. CHIEF JUSTICE BURGER: Very well, thank you,
12 gentlemen. The case is submitted.

13 (Whereupon, at 1:16 o'clock p.m., the case in the
14 above-entitled matter was submitted.)

CERTIFICATE

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-5392

ROBERT HOWE, SR.

V.

WILLIAM FRENCH SMITH, ATTORNEY
GENERAL OF UNITED STATES, ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

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