

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-489

TITLE PENNSYLVANIA BUREAU OF CORRECTION Petitioner V.
UNITED STATES MARSHALS SERVICE, ET AL.

PLACE Washington, D. C.

DATE October 15, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA BUREAU OF
CORRECTION,

Petitioner

V.

UNITED STATES MARSHALS
SERVICE, ET AL.

No. 84-489

Washington, D.C.

Tuesday, October 15, 1985

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at
10:03 a.m.

APPEARANCES:

LEROY S. ZIMMERMAN, ESQ., Attorney General of
Pennsylvania, Philadelphia, Pennsylvania; on
behalf of the Petitioner.

MARK IRVING LEVY, ESQ., Assistant to the Acting
Solicitor General, Department of Justice,
Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Pennsylvania Bureau of Correction against the United States Marshals Service.

Mr. Zimmerman, you may proceed whenever you are ready. Mr. Attorney General.

ORAL ARGUMENT OF LEROY S. ZIMMERMAN

ON BEHALF OF THE PETITIONER

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

The question presented by this appeal is whether a district court has the authority to direct the United States Marshals Service to share responsibility with state officials for the production of state inmates to appear in Federal District Court at a trial of a civil action.

This question arose in the course of a civil rights action brought by a state prisoner against Philadelphia County officials for events allegedly occurring while he was in the custody of county prison officials.

The magistrate ordered the state custodians to produce the plaintiff and two witnesses. Plaintiff was incarcerated 220 miles from the federal courthouse. One witness 218 miles away and another witness 143 miles away.

Recognizing the burden that is placed on the state custodians, the magistrate ordered that state custodians

1 transport the inmates to the Philadelphia House of Detention,
2 there to transfer custody to the United States Marshals, who
3 would transport the prisoners from the House of Detention
4 to the Federal Courthouse and maintain custody of them while
5 they were inside the courthouse.

6 Well, the magistrate's order transferring custody
7 from state to federal officers and the apportion of trans-
8 portation responsibilities were based in part on his knowledge
9 that the U.S. Marshal regularly transported federal prisoners
10 between the Philadelphia House of Detention and the Federal
11 Courthouse.

12 This arrangement permitted state custodians to avoid
13 the deployment of guards from their primary responsibility,
14 that of maintaining prison security, to transferring prisoners.

15 The U.S. Marshals Service intervened to oppose the
16 orders, arguing that no authority exists to support such orders.

17 In rejecting the Marshals' contentions, the magistrate
18 recognized that the explosion of federal civil rights litigation
19 by state prisoners and strained available resources.

20 Consequently, in fashioning a procedure, the magistrate stressed
21 that his order placed considerable burden on state officials,
22 but the Marshal really would have very little burden, if any
23 at all.

24 The Court of Appeals in a split decision did not
25 dispute the magistrate's factual and pragmatic conclusions,

1 rather, Judge Gibbons, writing for the Court, concluded that
2 no statutory authority, including the All Writs Act, supported
3 the magistrate's order, apportioning the transportation
4 responsibility between state officials and the United States
5 Marshals.

6 The Court held that the Marshal is obligated to main-
7 tain custody over the prisoners while they are in the courthouse.
8 In fact, the Court of Appeals held that if security concerns
9 justify it, the Marshal could be ordered to take custody of
10 state prisoners outside the courthouse.

11 Now, it is our position --

12 QUESTION: General Zimmerman, as I understand it,
13 the state does not contest that part of the magistrate's order
14 which required transportation from a correctional facility
15 to Philadelphia.

16 MR. ZIMMERMAN: That is correct, Justice Rehnquist.

17 QUESTION: And, the government doesn't challenge
18 that part of the Court of Appeals' decision which required
19 the furnishing of security within the Federal Courthouse?

20 MR. ZIMMERMAN: That is correct, Justice Rehnquist.

21 QUESTION: So, what we are talking about is trans-
22 portation from the State Correctional Center in Philadelphia
23 to the Federal Courthouse in Philadelphia.

24 MR. ZIMMERMAN: Yes.

25 It is our position that the All Writs Act --

1 QUESTION: Do you have a Federal House of Detention
2 in Philadelphia?

3 MR. ZIMMERMAN: I beg your pardon?

4 QUESTION: Do you have a Federal House of -- Do you
5 have any place where federal prisoners are kept in Philadelphia?

6 MR. ZIMMERMAN: No. The House of Detention in
7 Philadelphia, operated by the County of Philadelphia, is a
8 designated repository by the Federal Marshals to house federal
9 prisoners.

10 QUESTION: So, what this ruling says is that they
11 can pick up their own prisoners and transfer them, but they
12 don't have to pick up these from the exact same place?

13 MR. ZIMMERMAN: This ruling -- The magistrate, in
14 fashioning this ruling, Justice Marshall, said that because
15 they regularly -- in considering this, because the Marshals
16 regularly went back and forth, that it was not a burden on
17 them to transport state prisoners to Federal Court in civil
18 rights actions.

19 QUESTION: General, I don't suppose your submission
20 would be limited to that fortuitous circumstance.

21 MR. ZIMMERMAN: No, Justice White.

22 QUESTION: You would think any time in the 1983 action
23 the Federal Marshals should be required to bring the plaintiff,
24 if he is a prisoner, and witnesses from the prison, furnish
25 any of that transportation.

1 MR. ZIMMERMAN: Justice White, so long as it is not
2 an inordinate burden on the Federal Marshals. I think that
3 that is something -- I think the source of the powers in the
4 All Writs Act, but I think that beyond that then there is a
5 matter of discretion, assuming that point of law where the
6 magistrate can take into account the respective burdens --

7 QUESTION: If it is a question of authority, why,
8 if they have authority or if they are obligated to do this
9 under the law, it wouldn't make any difference what the burden
10 is, would it?

11 MR. ZIMMERMAN: No.

12 It is our position that the All Writs Act --

13 QUESTION: Mr. Attorney General, refresh my recol-
14 lection. How far was the transportation in terms of miles?

15 MR. ZIMMERMAN: Five miles from the House of Detention
16 in Philadelphia to the Federal Courthouse.

17 QUESTION: And, you mentioned burden. I realize
18 that you can make all sorts of suppositious cases, but suppose
19 it were 50 miles. Would the rule still be the same?

20 MR. ZIMMERMAN: Well, Justice Powell, I don't think
21 that the question of burden is in this particular case. There
22 is no record in this case to determine whether it were not
23 nor is there a challenge to the magistrate's exercise of
24 discretion by the Marshals.

25 The sole source, the focus of the question in this

1 case is whether or not the All Writs Act provides the authority,
2 the power in the court, to fashion such a writ as it did in
3 this case.

4 QUESTION: And, that would apply to the 50 miles?

5 MR. ZIMMERMAN: Yes, sir.

6 It is our position that --

7 QUESTION: General Zimmerman, suppose that you are
8 somehow correct that the All Writs Act could encompass such
9 a power on the part of the Federal Court to order this
10 transportation, what requirements would you then think
11 a judge or magistrate would have to find in order to justify
12 such an order? Is it enough that the magistrate or judge
13 determine that there should be cost shifting from the state
14 to the federal government? Is that alone enough to justify
15 an order like this under the All Writs Act if you are correct?

16 MR. ZIMMERMAN: Justice O'Connor, I don't think that
17 this is a question solely of money. It is our position that
18 this is a question of allocation of manpower and getting prisoners
19 from a place where they are incarcerated to a place where their
20 rights would be vindicated.

21 Obviously, money is involved, but it is a question
22 of manpower and the allocation of manpower from maintaining
23 the operation of prisons in a secure fashion.

24 That is part of the question of this burden. It
25 does involve money.

1 QUESTION: What requirements do you think would have
2 to be met under the All Writs Act if your position about it is
3 valid --

4 MR. ZIMMERMAN: Well, I believe --

5 QUESTION: -- to justify such an order? I think
6 the language of the Act incorporates words such as necessary
7 and appropriate. What would make it necessary and appropriate?
8 What is there in this case other than a cost shifting in effect?

9 MR. ZIMMERMAN: In this particular case -- It is
10 not our argument that it is necessary, but I do believe that
11 the Act -- Of course, the Act says, "appropriate in aid of
12 the respective jurisdiction of the Court."

13 And, I suggest that in this case, as well as being
14 agreeable to the usage and the principle of law -- In this
15 case, the All Writs Act was designed to give the courts that
16 flexibility and I believe that when there is a determination
17 made and there is a burden, anything that lessens that burden,
18 that burden to produce a prisoner, and obviously there has
19 to be --

20 QUESTION: It is a burden on both the federal and
21 state agencies to have to do this. There is always a burden
22 and there is always a cost. What is to guide a court or
23 magistrate in making such a determination?

24 MR. ZIMMERMAN: As we argue, if the All Writs Act
25 is the source of the Court's power, and I believe that it is

1 here, then, of course, there will be a question in each of
2 the cases, a matter of discretion of the magistrate to exercise
3 discretion, whether or not he has acted correctly in looking
4 at the burden of producing a witness.

5 In civil rights cases, it is necessary frequently
6 for the Court to make a determination on whether or not to
7 produce the prisoner or witness in the court.

8 Now, in examining and making that decision, there
9 are burdens that are going to be placed if the Court decides
10 the prisoner should be there or the witnesses ought to be there
11 to better vindicate the rights, to have a more clearly and
12 informed court.

13 QUESTION: In this case, does the state take the
14 position that it would not have obeyed and ad testificandum
15 order to have the prisoner transported?

16 MR. ZIMMERMAN: No, it does not take that position,
17 Justice O'Connor.

18 The All Writs Act is designed to give the court the
19 flexibility you say is necessary to free the courts from the
20 constraints of historic practice where new solutions are
21 essential to solve new problems. And, this Court has reaffirmed
22 that flexibility, the All Writs Act, recognizing it as a
23 judicial arsenal from which the courts can develop new tools
24 as the need arises.

25 Now, the Act is worded broadly. As I said a moment

1 again, a new writ only satisfy two requirements, that it be
2 necessary or appropriate in aid of the court's jurisdiction,
3 and agreeable to the usages and the principles of law.

4 Now, that first requirement, we feel that there is
5 no question that the underlying civil rights action was within
6 the District Court's jurisdiction and I submit the magistrate's
7 orders were appropriate in aid of that Court's jurisdiction.

8 The explosion of civil rights litigation, especially
9 by prisoners, has increased the requirement for the production
10 of prisoners in court and the corresponding burden on the
11 custodians who must produce those prisoners.

12 QUESTION: General, if this action were in state
13 court, and it could have been there, could it not?

14 MR. ZIMMERMAN: Yes, Justice.

15 QUESTION: Then we would have no problem at all.

16 MR. ZIMMERMAN: Well, the state court --

17 QUESTION: I take it the U.S. Marshals would not
18 be involved.

19 MR. ZIMMERMAN: That is correct.

20 QUESTION: So, the expense would be that of the
21 Commonwealth.

22 MR. ZIMMERMAN: It would be.

23 Especially, in civil rights cases, the court must
24 often decide whether to require -- As I indicated, whether
25 to require the production of these prisoner witnesses in court.

1 In making that decision, the Court must weigh the relevance
2 or the importance of probable testimony against the burden
3 of producing the prisoner witnesses.

4 QUESTION: General, pursuing Justice Blackmun's question
5 another step, if this had been in the state court and the
6 plaintiff was not an indigent -- He was in prison, but he wanted
7 witnesses from the state prison, wouldn't you make him pay
8 the witness fees and wouldn't you make him pay the transportation?

9 MR. ZIMMERMAN: No, Justice White, he would not be
10 required -- If the witnesses were in prison, he would not be
11 required to pay those.

12 QUESTION: Even though the plaintiff is not an
13 indigent?

14 MR. ZIMMERMAN: Well, if he is an indigent --

15 QUESTION: Well, I said --

16 MR. ZIMMERMAN: -- he would not be required to pay.
17 If he were not indigent, yes, Justice White, he would be required
18 to pay the cost.

19 QUESTION: And, in this case then, if this person
20 were not an indigent, wouldn't he have to pay?

21 MR. ZIMMERMAN: In the case of a state prisoner here
22 in this case? He would eventually, depending on the outcome
23 of litigation, that may be taxed against him, yes.

24 QUESTION: Okay.

25 QUESTION: Mr. Attorney General, while this state

1 prisoner is in Philadelphia, who pays for his expenses there,
2 the federal government?

3 MR. ZIMMERMAN: The arrangement is entered into between
4 the Marshals Service and the Philadelphia County House of
5 Detention.

6 QUESTION: I am talking about in a case like this,
7 this prisoner here. Who would pay for his living expenses
8 in Philadelphia?

9 MR. ZIMMERMAN: The arrangement there is between
10 Philadelphia and the U.S. Marshals in this case. Ordinarily,
11 state prisoners would not be transported from the place of
12 incarceration in Philadelphia to the House of Detention.
13 They would go directly to the Federal Courthouse.

14 QUESTION: Well, suppose the case lasted more than
15 one day. Who would pay the expenses?

16 MR. ZIMMERMAN: A state prisoner would be returned
17 to the place in Philadelphia called Greaterford which is the
18 State Penitentiary there. They would not go back to the House
19 of Detention ordinarily, not as state prisoners.

20 QUESTION: Then the state would pay his expenses?

21 MR. ZIMMERMAN: That is correct.

22 QUESTION: Now, in this case, who would pay his
23 expenses?

24 MR. ZIMMERMAN: In this particular case, the expenses
25 would be worked out in accordance with a voluntary agreement

1 between the Marshals Service and the County of Philadelphia.

2 QUESTION: I am trying to find out what is that
3 voluntary agreement.

4 MR. ZIMMERMAN: Well, I don't know the correct
5 terms -- I don't know the exact terms of that agreement in
6 this particular case, Justice Marshall.

7 QUESTION: Well, you talk about the additional --
8 There are no additional expenses in this case. Is it admitted
9 that this bus goes every day?

10 MR. ZIMMERMAN: There is no record in this case,
11 but the magistrate found in making his order that the bus --
12 The Marshals traveled regularly to and from the House of
13 Detention to the Federal Courthouse.

14 QUESTION: And, is there any showing that this
15 precedent would cause additional expense?

16 MR. ZIMMERMAN: There is no showing of any kind because
17 there is no record. And, in this case, we are not arguing
18 burden. I don't think burden is involved here. It is strictly
19 a power, a power question of the Court and the authority of
20 the magistrate under the All Writs Act.

21 QUESTION: May I ask, during the day at the Federal
22 Courthouse he is in federal custody, as I understand it, and
23 nobody disputes that.

24 MR. ZIMMERMAN: Yes, Justice Stevens.

25 QUESTION: Who buys his lunch if he has to spend

1 the day there?

2 MR. ZIMMERMAN: Well, I am not certain about who
3 buys his lunch in the Federal Courthouse, but from my experience
4 as Attorney General as a prosecutor I believe that his lunch
5 would be provided by the United States Marshals because he
6 is in their custody inside the courthouse in this case.

7 QUESTION: General Zimmerman, when you say you are
8 not arguing burden, and yet I take it that the magistrate would
9 not have been free to say that the state has paid enough of
10 these costs so I am going to pick someone out of the courtroom
11 here and have him required to pay the expenses from the Detention
12 Center in Philadelphia to the Federal Courthouse. If he can't
13 just pick someone from random, why can he pick the federal
14 government?

15 MR. ZIMMERMAN: I believe that in this particular
16 case anything that will lessen that burden of proceeding --

17 QUESTION: But, you conceded, I take it, that you
18 can't call upon bystanders to lessen the burden.

19 MR. ZIMMERMAN: I don't take the position in this
20 case that Section 1651, the All Writs Act, is unlimited. There
21 are limitations. The limitations are that certainly the Court
22 cannot order somebody to do something that is not in the course
23 of their duties.

24 QUESTION: All the All Writs Act gives you is a remedy
25 if there is something you are entitled to under some other

1 standard. Why are you entitled to it?

2 MR. ZIMMERMAN: I believe the Court was entitled
3 to do what it did here in order to get these witnesses from
4 where they are incarcerated to a federal court to vindicate
5 their rights. That is a very important aspect of this.

6 QUESTION: But, it is conceded, isn't it, that the
7 magistrate also had power to bring -- to order the state to
8 bring the people from the Correction Center in Western
9 Pennsylvania to the Federal Courthouse.

10 MR. ZIMMERMAN: That is correct and that is what
11 he did in this case. And, most of the burden in this particular
12 case was on the state custodian. There was very little --

13 QUESTION: My question wasn't from the Correctional
14 Center to the Philadelphia. I said from the Correctional Center
15 all the way to the Federal Courthouse. The Marshal had the
16 authority, didn't he, to require the state to do all of that.

17 MR. ZIMMERMAN: The magistrate.

18 QUESTION: I am sorry, the magistrate, yes.

19 MR. ZIMMERMAN: The magistrate had the authority
20 and, in fact, did in this case say bring the prisoners from
21 wherever they are incarcerated throughout the Commonwealth
22 of Pennsylvania in the various institutions to Philadelphia.

23 Now, in order to lessen --

24 QUESTION: But now my question is do you or do you
25 not admit that he would have had the authority to go further

1 and say not just bring them to Philadelphia, but bring them
2 to the Federal Courthouse in Philadelphia?

3 MR. ZIMMERMAN: Yes, he would have, but I argue in
4 this case he considered the burden and an attempt to lessen
5 the burden on the state custodian somewhat.

6 In this case minimally I concede, but we are not
7 focusing on that in this case. I believe that the principle
8 in this case is whether or not the magistrate -- the problem
9 in this case is whether the magistrate had the authority to
10 do what he did and I believe the All Writs Act, of course,
11 gives him that authority because of the need, to vary writs,
12 to vary orders.

13 The question of burden in producing persons makes --
14 That has to be examined and wherever it makes it more likely that
15 the Court will be able to hear and to consider all of the evidence
16 relevant to the merits of a claim, clearly that aids the Court
17 in an informed exercise of its jurisdiction.

18 Now, the Marshalls argue that these orders are neither
19 appropriate or necessary because there already exists the general
20 habeas corpus statute which they say places the full burden
21 on the custodian to produce the prisoners in the Federal Court-
22 house.

23 This argument, we believe, ignores the point that
24 some cases may call for modification of traditional procedure.
25 And, where modification is determined to be necessary or

1 appropriate in aid of the Court's jurisdiction, the power to
2 modify is found not in the habeas corpus statute, but in the
3 All Writs Act. Thus, the habeas corpus statute is really not
4 the end for purposes of analysis as the Marshals argue, but
5 really the beginning.

6 Similar considerations, I submit, support the con-
7 clusion that the order under review is as required by the All
8 Writs Act agreeable to the usages and principles of law.

9 Certainly, transfer of custody violates no positive
10 congressional command nor does it violate any common law rule,
11 rather the order modifies traditional procedure to respond
12 to modern developments in our ever-expanding jurisprudence.

13 The essential principal underlying the writ of habeas
14 corpus ad testificandum is affording the Court an orderly and
15 an efficient means of procedure for securing the testimony
16 of prisoner witnesses. This principle hardly is subverted
17 by a modification of the writ directing the transfer of a prisoner
18 from the custodian to a substitute custodian.

19 QUESTION: Was a writ issued in this case?

20 MR. ZIMMERMAN: An order was issued in this case,
21 Justice White, by the magistrate, by Magistrate Hall.

22 QUESTION: Mr. Attorney General --

23 QUESTION: Why wasn't there just a write of habeas
24 corpus?

25 MR. ZIMMERMAN: The magistrate did not label the

1 writ. The magistrate relied on the habeas corpus statute in
2 this case.

3 It is our position, and we argued this in the Circuit
4 Court, and the Circuit Court held against us, that the authority
5 and the power to do what was done here was in the All Writs
6 Act; that it was necessary to go to that Act to find the
7 variation and the flexibility that the Court has said was in
8 that Act to do what was done, a transfer of custody.

9 The traditional habeas corpus act is concerned with
10 getting inside the prison walls of the custodian and getting
11 the prisoner to the gate. There is no question about that,
12 the habeas corpus writ generally. But, from that point, getting
13 the prisoners from the gate of the jail to the courthouse,
14 today there are many --

15 QUESTION: What if a writ of habeas corpus had just
16 been served on the custodian? What would the writ have said?
17 Bring him, wouldn't it?

18 MR. ZIMMERMAN: Yes, sir.

19 QUESTION: Bring him to the courthouse.

20 MR. ZIMMERMAN: Yes, it would have.

21 QUESTION: Well, suppose that is all that would have
22 been served on the custodian? What would have happened?

23 MR. ZIMMERMAN: Then the custodian would have been
24 required to bring him to the courthouse. But, my point is --

25 QUESTION: So, there is this provision for getting

1 witnesses to the courthouse, but the magistrate didn't use
2 that, he used an order.

3 MR. ZIMMERMAN: In the calculus of the magistrate,
4 and without a record I suggest it is impossible to be precise,
5 but in the calculus of the magistrate's order, in examining
6 that order, you will see that he took into account the principles
7 and the concerns that I say are in the All Writs Act to be
8 used by the Court.

9 In any case, whatever statutes exist to govern and
10 devine the role of the Marshal are not inconsistent with the
11 role of the Marshal, are not inconsistent with the duties that
12 are imposed by the order here.

13 Marshals are assigned regularly to go to Court.

14 QUESTION: Mr. Attorney General, assuming that the
15 week before this occurred the prisoner had been transferred
16 to California. Who would produce him?

17 MR. ZIMMERMAN: Assuming that the All Writs Act provides
18 the authorities, I urge that it does, then it would have been
19 up to the magistrate to determine.

20 We are not asking in this case that there be --

21 QUESTION: Who would you suggest in conformity with
22 your theory would be responsible for transporting him back
23 to Philadelphia?

24 MR. ZIMMERMAN: I believe that if the magistrate
25 directed and knew that the Marshal was going to Chicago once

1 a week regularly, it would not have been improper for the
2 magistrate to have fashioned an order to say, Marshal, bring
3 the prisoner from California to Chicago and the state will
4 be required to --

5 QUESTION: Let's make one little minor change, Hawaii.

6 MR. ZIMMERMAN: Well, I think --

7 QUESTION: I don't know of any Marshal that goes
8 from Philadelphia to Hawaii regularly.

9 MR. ZIMMERMAN: I don't think that the question --

10 QUESTION: You don't really mean just because he
11 goes there. It is a very simple question. Would California,
12 Philadelphia, or the federal government pay for the transportation
13 of this hypothetical prisoner?

14 MR. ZIMMERMAN: I think that either one could be
15 ordered to pay completely. It would be preferable to have
16 a sharing of transportation responsibilities.

17 Decisions in other courts of appeals demonstrate
18 that this procedure apportioning these responsibilities for
19 transportation has been employed -- have been employed in many
20 districts throughout this country.

21 Finally, I urge the Court in this case to preserve
22 the reservoir of judicial power that is found in the All Writs
23 Act, which was built by the Congress to provide the courts
24 with the necessary flexibility to craft new orders and new
25 writs that are responsive to the varied and practical challenges

1 arising out of an ever-expanding jurisprudence.

2 Thank you.

3 CHIEF JUSTICE BURGER: Mr. Levy?

4 ORAL ARGUMENT OF MARK IRVING LEVY, ESQ.

5 ON BEHALF OF THE RESPONDENTS

6 MR. LEVY: Thank you, Mr. Chief Justice, and may
7 it please the Court:

8 The state's argument here is, in essence, that the
9 magistrate's order is reasonable. The trial courts have broad
10 authority to impose reasonable obligations on the United States
11 Marshals Service and that our objection to the order are, as
12 in the words of the state's reply brief, merely dry formalism.

13 All of that is far from correct. The United States
14 Marshals Service is an arm of the Executive Branch of the federal
15 government. Marshals are appointed by the President, is part
16 of the Department of Justice, and under the supervision of
17 the Attorney General, and is funded through Department of Justice
18 appropriations.

19 In fact, this Court in its opinion in the Naggle
20 case reported in 135 U.S., specifically recognized that the
21 Marshals Service is within the Executive Branch.

22 Thus, contrary to the premise of the state's argument,
23 the Marshals Service is not the hand-maiden or the administrative
24 staff of the courts subject to whatever duties judges, in their
25 discretion, may devise.

1 Now, of course, the Marshals Service and the courts
2 have developed a sound and cooperative working relation that
3 well serves the effective administration of justice. The Marshal
4 is by law subject to the control of federal judges in many
5 respects. In addition, the Marshal often exercises his discretion
6 as an executive official and agrees to do things that legally
7 could not be required. Thus, disputes of the kind involved
8 in this case are fortunately very rare.

9 But, that cooperative arrangement does not negate
10 the principle that there must be a source of statutory authorization
11 before a court can require the Marshal, as part of the Executive
12 Branch of the federal government, to take a particular action
13 and expend its funds in a particular way.

14 The Marshal has myriad responsibilities and only
15 limited resources with which to carry them out. Among its
16 principal responsibilities are the security of the courthouse,
17 custody over and transportation of federal prisoners needed
18 in federal court, execution of arrest warrants, and seizure
19 of forfeited property, and implementation of the Witness Protection
20 Program.

21 To perform these duties, there are fewer than 1,000
22 Deputy Marshals nationwide, while there are 500 active federal
23 district judges and 250 full-time magistrates in 500 federal
24 court facilities around the country.

25 The allocation among those various duties of the

1 finite resources appropriated to the Marshal is at the heart
2 of the Executive Branch's function.

3 In the aggregate, orders of the type entered by the
4 magistrate here will impose a substantial burden on the Marshals
5 Service and interfere with its discharge of its statutorily
6 assigned responsibilities.

7 In addition, a trial court in any given case, is
8 in no position to assess these considerations and decide how
9 the Marshals' resources are to be deployed overall.

10 QUESTION: Mr. Levy, can I interrupt with a question
11 that goes to the question of power rather than whether it is
12 a good idea or not?

13 MR. LEVY: Sure.

14 QUESTION: Supposing you had an emergency situation,
15 a fire at the County Detention Center or an escape or a riot
16 or something like that, and the state was short of personnel
17 and couldn't get a witness to the courthouse and they let the
18 district judge know and the district judge said, well, we want
19 to go ahead with the trial and it is the only way we can get
20 the witness here. It is absolutely necessary in order to have
21 the trial go forward is to send a Marshal out and pick him
22 up. Would you make the same argument that he has no power
23 to do that?

24 MR. LEVY: Well, first, in those circumstances it
25 is exceedingly likely that the Marshal would agree to go out

1 and do that.

2 QUESTION: Let's assume the question is one of power.
3 In that situation, would the judge have the power to order
4 the Marshal to --

5 MR. LEVY: The answer is he might, but that is a
6 much different situation from what we have here. In that situation
7 the Marshal would not be required in the first instance to
8 bear the transportation or production burden, rather the court
9 would have entered the ad testificandum writ to the custodian
10 and when the custodian was unable or in this instance unwilling
11 to comply, the court, in effect, would enter a second order,
12 a compliance order, enforcement or sanction order.

13 QUESTION: What would be the source of the federal judge's
14 authority to enter such an order?

15 MR. LEVY: Well, for example, if the state custodian
16 simply refused to comply with an order that was within his
17 capability --

18 QUESTION: Well, take my hypothetical. It is just
19 an emergency and the judge thinks the only way he could really
20 get the witness there is to order the Marshal to go out and
21 get him.

22 MR. LEVY: Well, the question would be whether --
23 as part of enforcing an order that directive to the Marshal
24 would be appropriate. There are questions whether it would,
25 but that is a much different sort of issue than is presented

1 here, where the Marshal is required in the first instance to
2 produce that --

3 QUESTION: Well, assume you get a state of facts
4 which you would agree for purposes of my question that it is
5 either necessary or appropriate to go get him. Would there
6 be power to order the Marshal to go get him?

7 MR. LEVY: I am doubtful that there would be. I
8 am not taking a categorical position on it.

9 QUESTION: Isn't that, in jurisdictional terms, the
10 same issue that we have here?

11 MR. LEVY: Well, not necessarily. As I say the
12 jurisdictional question in this case is whether the magistrate
13 has the authority, the judicial power to require the Marshal
14 in the first instance to step into the state's shoes and become
15 the principle respondent for producing the body of the prisoner.
16 That is not the situation --

17 QUESTION: He just delivers him from the intermediate
18 point to the courthouse.

19 MR. LEVY: But, the Marshal would not be acting in
20 lieu of or as the surrogate custodian in that case. The Marshal
21 would be acting as a law enforcement official enforcing a federal
22 court order that the state was unable to comply with.

23 That enforcement responsibility of the Marshal simply
24 presents a different question than the one in this case.

25 QUESTION: Mr. Levy, getting it closer to this case,

1 a judge tells the Marshal, I have a witness who is in the House
2 of Detention in Philadelphia that I need for trial this after-
3 noon. I have discovered that you have a bus that is going
4 to bring in federal prisoners and other people from the exact
5 same place and that you have half a dozen seats vacant on there,
6 would you mind putting him in one of those seats and bring
7 him to the courthouse. What is wrong with that?

8 MR. LEVY: Nothing may be wrong with it and the Marshal
9 in most instances, I assume, would be agreeable to complying
10 in his discretion. The question is whether or not --

11 QUESTION: And, that is the difference between this
12 case?

13 MR. LEVY: Yes. In this case, the Marshal was required,
14 not asked or invited.

15 QUESTION: So, the whole question is he was ordered
16 and not asked?

17 MR. LEVY: Well, the question here is one of
18 judicial --

19 QUESTION: Is that the difference?

20 MR. LEVY: The question here is one of judicial
21 power.

22 QUESTION: Is that the difference?

23 MR. LEVY: Yes, but that has nothing --

24 QUESTION: That is what you are complaining about?

25 MR. LEVY: We are complaining about --

1 QUESTION: If he had asked it would have been all
2 right.

3 MR. LEVY: If you are asking if the Marshal chose
4 to do it because it was not inconsistent or a burden on his
5 other responsibilities.

6 In this case, as the Attorney General of Pennsylvania
7 stated, there is no record and the magistrate did not make
8 any specific findings about either the burden on the state
9 in this case. All he said generally was that there was a burden
10 on the state in general or the burden on the Marshal in this
11 case.

12 In contrast to the hypothetical, Justice Marshall,
13 I am advised, just as an illustration, that the Marshal typically
14 brings between six and twelve prisoners from the Philadelphia
15 Detention Center to the Federal Courthouse on an average day.

16 In this case, the prisoner originally sought writs
17 for nine state prisoners. The magistrate initially cut him
18 back to five. Those numbers are a substantial portion of the
19 prisoners that the federal government has need to bring in
20 for its own purposes. It might well require additional vehicles.

21 QUESTION: In the city the size of Philadelphia.

22 MR. LEVY: I beg your pardon?

23 QUESTION: In the city the size of Philadelphia.

24 MR. LEVY: That is correct. It might require additional
25 vehicles, it might require extra guards. There are any number

1 of ways in which this could impose a very serious burden on
2 the Marshal and that would interfere with the Marshal's
3 execution of its other obligations.

4 Now, Congress could certainly decide as a policy
5 matter that the United States Marshals Service should transport
6 these prisoners and Congress could make available the necessary
7 funds to do so, but we don't have that here.

8 QUESTION: Let me get one other thing straight in
9 my mind. The government concedes, as I understand it, that
10 after the prisoners and witnesses are delivered to the Federal
11 Courthouse -- I guess they are taken to a lockup downstairs
12 or something -- that the Marshal then can be ordered to continue
13 to hold custody of them in the elevators and throughout the
14 building, not merely in the courtroom.

15 MR. LEVY: Incidents with courthouse security
16 responsibility, that is correct.

17 QUESTION: Supposing you had a situation as you do
18 in Chicago where there is a Federal Detention Center about
19 a block from the Federal Courthouse. Could they be ordered
20 to take custody at the Federal Detention Center and haul them
21 back and forth across Jackson Parkway?

22 MR. LEVY: Again, it is a matter of judicial power
23 to require the Marshal to do that. We think not.

24 QUESTION: But, you would say the extent of judicial
25 power is the exterior walls of the building which houses the

1 Federal Courthouse?

2 MR. LEVY: The Court of Appeals looked over a some-
3 what broader exception where the security needed required the
4 custody be transferred outside the courthouse. It is unclear
5 exactly what that means, but they left that open.

6 But, the rationale is not that the Marshal has any
7 independent responsibility for the prisoner-witnesses, but
8 rather he has responsibility for the security of the courthouse.
9 So, when they are in the courthouse, whether it is in the lockup
10 or the elevator or the courtroom, the Marshal would be
11 responsible for custody.

12 When they are outside the courthouse, even in a federal
13 jail or detention center, that would not be within the scope
14 of 569(a), the courthouse security provision for the Marshal.

15 QUESTION: But, if the Marshal has the responsibility
16 for the courthouse, where does the judge get the power to tell
17 the Marshal what do it in the courthouse?

18 MR. LEVY: Well, the Marshal would have the dis-
19 cretion how to implement the courthouse security.

20 QUESTION: The judge can order the Marshal though
21 to be responsible for security in the elevator. That is not
22 a matter for the Marshal to decide for himself.

23 MR. LEVY: Whether he is to be responsible for security,
24 we would agree, could be imposed by the judge. Now, whether
25 it requires --

1 QUESTION: What is the source of the judge's power
2 to do that?

3 MR. LEVY: That would be under 569(a) of 28 U.S.
4 Code.

5 QUESTION: Which says what about judge's power?

6 MR. LEVY: It says that the Marshal may, in the
7 discretion of the court, be required to attend any session
8 of court.

9 QUESTION: Any session of court.

10 MR. LEVY: And, if the Marshal has agreed and not
11 raised any --

12 QUESTION: Any session of court includes riding up
13 and down an elevator.

14 MR. LEVY: The Marshal hasn't challenged that
15 construction of the statute.

16 QUESTION: But, do you think it is correct?

17 MR. LEVY: I think it is certainly within the
18 Marshal's --

19 QUESTION: No, no. Within the court's power to order
20 him in the elevator.

21 MR. LEVY: We think it is certainly a permissible
22 reading for the Marshal to make of its own statute, that this
23 confers power on the court to do that. That is correct.

24 QUESTION: In other words, the judge should defer
25 to the expertise of the Marshal in construing that statute.

1 MR. LEVY: Well, as on any statutory construction,
2 the reading of the agency whose statute it is is entitled to
3 substantial deference. It would be controlling, of course,
4 but it would be relevant and significant.

5 Now, absent legislative authorization, our sub-
6 mission is that a court cannot require the Marshal to transport
7 state prisoners regardless of its view of the reasonableness
8 of that order.

9 The question then is whether there is any lawful
10 authority for the transportation order issued in this case.
11 There plainly is no such explicit authority, so the question
12 is one of implied authority.

13 Now, our analysis starts from the proposition, which
14 is essentially undisputed, that under settled principles, it
15 is the obligation of the custodian to produce its prisoners
16 in court pursuant to a writ of habeas corpus ad testificandum.

17 Indeed, if the prisoners in this case were in federal
18 rather than state custody, it would be the responsibility of
19 the Marshal to transport them to court.

20 The result we seek here asks that state to do no
21 more with respect to its own prisoners.

22 The custodian's obligation to produce --

23 QUESTION: Of course, that isn't necessarily a
24 compelling argument, because what may be permissible as the
25 distribution of burden within the federal system may not be

1 permissible when you go outside the federal system and ask
2 the state to produce some --

3 MR. LEVY: Our point here though is that the custodian
4 has the obligation and we agree that obligation would apply
5 to us if these were federal prisoners, just as it applies to
6 the state where they are state prisoners.

7 Now, the custodian's obligation to produce its
8 prisoners existed at common law and is carried forward by the
9 express terms of the federal habeas corpus statute. In fact,
10 the whole theory of the ad testificandum writ requires that
11 the custodian be the respondents and bring its prisoners to
12 court since it is the custodian that has the control over the
13 prisoner.

14 It is the fact that custody that fixes the custodian
15 mandatory and non-delegable legal duty. This obligation reflects
16 two important considerations. First, the custodian, like ever
17 one else, has a public duty to make available evidence in its
18 possession, here, the prisoner himself, even if that imposes
19 a burden or is inconvenient.

20 And, second, the custodial state has a penal interest
21 in the continued confinement of the prisoner, since it is that
22 confinement that gives rise to the special problems and added
23 expense of obtaining the prisoner in court. It is not unfair
24 or unreasonable for the law to impose the production obligation
25 on the custodian.

1 Since time immemorial until the recent state of
2 litigation, the entire system has operated on the questioned
3 rule that the production obligation rests on the custodian.

4 QUESTION: Mr. Levy, what if someone commenced a
5 lawsuit in the Federal Court in the Eastern District of
6 Philadelphia and said we are proceeding IFP and made the
7 necessary affidavits and then decides that he wants to subpoena
8 some witnesses. Now, do the witness that an IFP plaintiff
9 subpoenas get witness fees and mileage the way the other witnesses
10 do?

11 MR. LEVY: That is something of an unanswered question.

12 QUESTION: Why should they have to come if they don't
13 get the statutory witness and mileage fees if there is no
14 exception for IFP plaintiff?

15 MR. LEVY: Well, I think that in the end is probably
16 the right argument.

17 QUESTION: So, the in forma pauperis plaintiff can't
18 compel witnesses outside of prisons to come without paying
19 mileage and witness fees.

20 MR. LEVY: As I said, it is unresolved, but I don't
21 disagree with that proposition.

22 And, it would be perfectly appropriate for the magistrate
23 in exercising his discretion, whether to issue the ad
24 testificandum writ to take into account the very same considera-
25 tions. There is no absolute right for a prisoner or any other

1 plaintiff to have an ad testificandum writ and the magistrate
2 could well say that unless you make some contribution, even
3 if you are IFP, to the expenses involved here, I won't issue
4 the writ. Certainly, if he weren't IFP, we will take the position
5 that the Marshal does that the magistrate should exercise the
6 discretion to require the non-indigent plaintiff to pay for
7 the expenses involved.

8 QUESTION: Even though it is a custodial situation
9 and not just the payment of witness fees and mileage?

10 MR. LEVY: That would be correct. The magistrate
11 would certainly have discretion to impose that obligation on
12 a non-indigent litigant. And, indeed, we cite one case in our
13 brief, United States versus \$64,000.00 in Currency, where that
14 is exactly what the trial court did.

15 QUESTION: Mr. Levy, was there any effort or is there
16 any effort now to work this out amicably between the state,
17 the federal government, the judges, and the Marshals?

18 MR. LEVY: I think there was an effort, but
19 unfortunately it was unsuccessful.

20 QUESTION: I don't see why we have this tension between
21 the magistrate and a Marshal. They are both working for the
22 same boss.

23 MR. LEVY: Yes, they are, and almost in all instances
24 they work in a cooperative way.

25 QUESTION: Were any efforts made to work this out?

1 MR. LEVY: I believe efforts were made and they were
2 simply unsuccessful. And, part of the reason for that is that
3 the order in this case departs, as the magistrate conceded,
4 from the historical practice in the Eastern District of
5 Pennsylvania. For a long time, the Marshal was not involved
6 in this. The state was responsible for transporting its
7 prisoners. In return --

8 QUESTION: Did they sit down?

9 MR. LEVY: I believe that they did try to work it
10 out.

11 QUESTION: You believe, but you don't know?

12 MR. LEVY: I was not party to the discussions. I
13 am not certain of that. But, if they did try, they were unable
14 to work out the differences.

15 QUESTION: It seems to be it would have been much
16 easier than bothering us with it.

17 MR. LEVY: But, the issue in this case is not whether
18 the parties can work it out. Clearly the Marshal would have
19 authority to entered into a cooperative agreement where it
20 thought it was proper in the exercise of its executive discretion.

21 The issue here is whether the Marshal for good and
22 sufficient reasons chooses not to enter into such a cooperative
23 agreement, whether the magistrate can require under his
24 judicial authority to require the Marshal to do so nonetheless.

25 And, although it was neither relied on by the

1 magistrate nor raised by the state in the courts below. The
2 state now places principal reliance on the All Writs Act, 28
3 U.S.C. 1651.

4 The state contends, in effect, that Section 1651
5 is a preformed and virtually unbounded grant of authority to
6 judges to devise any and all writs that they consider to be
7 desirable.

8 We disagree with that exceedingly expansive view
9 of the statute, especially as applied to the federal Executive
10 Branch.

11 The All Writs Act is not a codification of standard-
12 less discretion for judges to do good. Instead, it establishes
13 two requirements. First, the writ must be necessary or
14 appropriate for the court's exercise of its jurisdiction; and,
15 second, it must be agreeable to the usages and principles of
16 law.

17 The order in this case satisfies neither of those
18 elements. The order is not necessary or appropriate since
19 there is a well-established means available to obtain the
20 prisoners.

21 QUESTION: However, Mr. Levy, in the circumstances
22 proposed, for example, by Justice Stevens, conceivably it is
23 arguable under some extreme circumstances that might be necessary
24 and appropriate.

25 MR. LEVY: Under some extreme circumstances, it might

1 be necessary and appropriate in the literal sense.

2 And, certainly if the Court disagrees with our sub-
3 mission here, it should limit any discretion the trial court
4 has for those exceptional circumstances.

5 But, even there I still think there would be a sub-
6 stantial question whether the magistrate, as an arm of the
7 Executive Branch, could require that the Marshals transport
8 state prisoners. Considerations of separation of power and
9 sovereign immunity apply here as they do in any other case
10 and we don't think the All Writs Act circumvents those traditional
11 considerations.

12 Now, in addition to being necessary or appropriate,
13 the writ also has to be agreeable to the usages and principles
14 of law. The order in this case doesn't satisfy that requirement
15 either. Quite the contrary. The order sought by the state
16 is inconsistent with and in contravention of the custodian's
17 time-honored obligation --

18 QUESTION: Mr. Levy, is it consistent -- Would it
19 be consistent with your argument to say that the Marshal could
20 agree to have done what he was ordered to do?

21 MR. LEVY: The Marshal, as a matter of executive
22 discretion, could agree and the regulations --

23 QUESTION: Where would he have the authority to do
24 that?

25 MR. LEVY: Well, there would be two sources. First,

1 generally executive officials have broad discretion to do many
2 things that they are authorized and not required to do.

3 QUESTION: My question is where would they get the
4 authority to do it?

5 MR. LEVY: It would be an inherent exercise of
6 executive authority to --

7 QUESTION: Do you mean the Marshals can just issue
8 a writ on the Treasury of the United States without authority
9 to do so?

10 MR. LEVY: No, but our position would be that the
11 Attorney General, who supervises the Marshals, has the inherent
12 authority to direct the Marshals in the exercise of their normal
13 duties and that where there is --

14 QUESTION: Whether or not there is any express authority
15 for it.

16 MR. LEVY: There are many instances where there is
17 inherent authority or authority that is implied from the statute,
18 if you will, that is not express authority. That has never
19 been thought to be a bar to the executive exercise in his
20 discretion to take a particular act.

21 QUESTION: So, you really are just relying on the
22 separation argument to a great extent. If, without express
23 authority, the Attorney General could spend this money if he
24 wanted to, you are really just saying, well, that may be so,
25 but a judge can't order him to do it over his objection?

1 MR. LEVY: There is a considerable difference between
2 authorizing the executive to do something --

3 QUESTION: Well, there may be, but that is just about
4 where you stand, isn't it?

5 MR. LEVY: That is an important part of our argument.
6 I would also say, Justice White, that there is a statute that
7 provides that the Marshal is to be allowed the expense of
8 transporting prisoners. Now, that doesn't itself constitute
9 a substantive authorization to transport prisoners, but it
10 does mean that where the transportation is authorized, then
11 it will be covered by the United States Treasury.

12 QUESTION: May I ask as a follow-up on Justice White's
13 question that if instead of volunteering to do the transporta-
14 tion initially you had a situation in which the state had done
15 the transportation, as was true in the Seventh Circuit case,
16 and then came in and asked for reimbursement from the Marshal.
17 The Seventh Circuit held that they could be ordered to reim-
18 burse them.

19 You, of course, disagree with that case, but would
20 you agree that the Marshal could voluntarily reimburse the
21 state for the cost of transportation?

22 MR. LEVY: Where it did not itself carry out the
23 transportation?

24 QUESTION: The state just sent a bill and said we
25 produced all these prisoners and it cost us this much money.

1 MR. LEVY: Well, in the circumstances of the Seventh
2 Circuit case where there was an outstanding order to the Marshal
3 to transport them, the Marshal simply ignored that order.

4 QUESTION: Assume it just went to the state and they
5 said, well, we will decide who bears the expense later and
6 after the case is over the state just calls up the Marshals
7 and said it cost us \$400 to transport these prisoners, would
8 you mind paying it. Would the Marshal have the authority in
9 its inherent power in your view to pay that bill?

10 MR. LEVY: I am not certain of the answer. I would
11 be doubtful.

12 QUESTION: Why is it different as a matter of power
13 whether you pay it in advance or later?

14 MR. LEVY: But --

15 QUESTION: It is the same power.

16 MR. LEVY: But, the Marshals' power --

17 QUESTION: It is the same burden on the --

18 MR. LEVY: The Marshals' power would be to engage
19 in activities that are within the control of the Attorney
20 General. Where it has engaged in activities, I don't know
21 that the Attorney General would have the authority to give
22 away money of the Treasury. I simply am not certain of that.
23 It is not the issue presented here.

24 QUESTION: Well, it relates. We are dealing with
25 inherent power here, as I understand it.

1 MR. LEVY: But, the issue in this case is the power
2 of the court, not the power of the Attorney General or the
3 Executive Branch to do something on its own.

4 QUESTION: Your view is the Marshal has greater
5 discretion than the judge?

6 MR. LEVY: It is a common situation. For example,
7 the United States Attorney has discretion to prosecute or not
8 taking into consideration any number of factors.

9 It would never be thought though that simply from
10 that a court could require the U.S. Attorney to exercise that
11 authority in a particular way and at the direction of the court.

12 QUESTION: But, there must be more limits than I
13 get the impression you say there are. Supposing they are building
14 a new building for the Department of Justice and the Attorney
15 General says we are behind schedule on the building, you ten
16 marshals go down and start digging that trench. Is that a
17 permissible exercise of discretion?

18 MR. LEVY: I doubt that that would be, but here,
19 the duties are those of a kind the Marshal normally exercises
20 and I think it is within the Attorney General's control to
21 indicate how the Marshals should be deployed. That is really
22 the core of the Executive Branch's function here.

23 Now, let me say that, first, the Attorney General
24 has promulgated regulations that say the Marshal can enter
25 into intergovernmental or cooperative agreements. So, the

1 Attorney General has recognized the authority to do that.

2 And, second, the Marshal, in fact, does provide
3 assistance to states in many areas. For example, apprehending
4 fugitives from state custody even though no federal offense
5 had been committed. The Marshals will assist the states in
6 the Marshals' discretion for free or in transporting state
7 prisoners between states for state proceedings. The Marshal
8 will often help the states do that without charge.

9 QUESTION: Why is the Marshal willing to do this
10 latter thing, transport prisoners between states for state
11 proceedings, but not to do what the magistrate in this case
12 said he should do?

13 MR. LEVY: Once again, the Marshal would be free
14 in this case, but in those other instances, he decides that
15 the transportation of a particular prisoner in a particular
16 set of circumstances does not detract from the exercise of
17 his other duties.

18 He may, for example, have a plane -- this is one
19 of the hypotheticals the Court suggested -- and he knows that
20 there is empty space and no additional guards would be needed.
21 So, he exercises his discretion to assist the state.

22 The order in this case doesn't depend in any way
23 on that determination. And, the authority of a court, the
24 power of a court to order the Marshal to do simply wouldn't
25 be workable if it depended on that kind of precise deployment

1 of the Marshals' resources. The court is in no position to
2 assess those kinds of considerations or make the judgments
3 that are entrusted to the Marshal as an executive official.

4 QUESTION: But, a district judge or a magistrate
5 could under 28 U.S.C. 569. It can order the Marshals to attend
6 a session of the court.

7 MR. LEVY: That is correct.

8 QUESTION: And, it could order the Marshal to execute
9 any lawful writs, process of papers, issued out of the court.

10 MR. LEVY: Anything that is properly addressed.

11 QUESTION: Yes.

12 MR. LEVY: Let me discuss the statute there which
13 is what the magistrate specifically relied on, 28 U.S.C. 569(b),
14 which provides that the Marshal shall execute all lawful writs,
15 process and orders of federal courts.

16 That provision, which has been in the Code since
17 1789, sets for the Marshals traditional obligation to execute
18 court orders.

19 It establishes the Marshal as the designated official
20 for executing judicial process and makes clear that the Marshal,
21 even though a part of the Executive Branch, has a mandatory
22 duty to do so. We concede all of that.

23 But, Section 569(b) is not an independent, affirmative
24 source of judicial authority to address orders to the Marshal.
25 Rather, it simply requires that the Marshal execute those orders

1 that under some other source of lawful authority are properly
2 directed to it.

3 To give a specific illustration, the case at hand,
4 the fact that a trial court is empowered to issue an ad testifi-
5 candum writ to someone, that is the custodian, does not mean
6 that it can issue the writ to the Marshal.

7 A contrary conclusion would mean that the Marshal
8 can be required to perform any order whose substantive terms
9 are not prohibited.

10 Under this theory, any court -- any order that a
11 court can enter at all could be directed against the Marshal
12 in the first instance, but simply by the fact that it is addressed
13 to him the Marshal would be bound to carry it out.

14 QUESTION: But now here the Marshal could have issued
15 the subpoena ad testificandum and directed the Marshal to deliver
16 to the custodian of the state prison, could he not?

17 MR. LEVY: I am afraid I didn't understand the question,
18 Justice.

19 QUESTION: The magistrate could have issued a writ
20 of habeas corpus ad testificandum to produce these witnesses
21 from the Western State Penitentiary and directed the Marshal
22 to serve that writ on the custodian.

23 MR. LEVY: To serve the writ, yes.

24 QUESTION: Yes.

25 MR. LEVY: That is right. But, that is far different.

1 That is the sort of execution that the Marshal is authorized
2 by other provisions of law to make. There is no other
3 provision of law that authorizes or requires him at the direction
4 of the court to bring state prisoners into Federal Court in
5 order to relieve the state custodian of its legal obligations.

6 QUESTION: The writs were issued in this case, weren't
7 they?

8 MR. LEVY: They were orders. I don't believe they
9 were styled as writs, but there were orders issued here jointly
10 to the state and to the Marshals, that is correct.

11 QUESTION: Well, who served them on the state?

12 MR. LEVY: I am not certain of the answer to that.
13 It may have been that they were simply served by mail or that
14 the Marshal may have served them. The state has never challenged
15 that they were properly served.

16 QUESTION: So, the Marshal to serve them would have
17 to go to these penitentiaries.

18 MR. LEVY: It may be that there is an official for
19 service in Philadelphia. I simply don't know what arrangements
20 there are for service on the State of Pennsylvania.

21 QUESTION: Mr. Levy, as I understand it, since about
22 1976 or 1977 the circuits that have addressed this problem
23 have all gone the other way from the Third Circuit. And, has
24 the Marshals Service or the Attorney General ever asked Congress
25 to take a look at this problem in the intervening period?

1 MR. LEVY: It has not. We proposed that in our brief
2 and our position in this case, but the court stay its hand
3 to allow the legislative process to go forward. We said that
4 we would propose legislation. The Court granted certiorari
5 in this case and it is very difficult to get legislation proposed
6 or considered when the very issue is pending in a case before
7 the Court. So, no legislation has been sought so far. I can
8 only assume that after this Court has rendered its decision,
9 the losing side will then seek appropriate legislation in
10 Congress and that is where we think the issue ought to be
11 resolved, as we told the Court before. It is a matter for
12 Congress to decide in the end as a policy question, how the
13 Marshals' resources should be spent, whether the Marshal, to
14 transport state prisoners, in addition to or instead of its
15 currently prescribed duties.

16 But, absent legislative authorization of that kind,
17 there is simply no legal authority for the trial court to require
18 the Marshal as an arm of the Executive Branch, to transport
19 state prisoners to Federal Court.

20 QUESTION: But, there would be authority, inherent
21 authority, you say, for the Marshals Service to undertake that
22 obligation within its discretion. If it wanted to, it could
23 do so.

24 MR. LEVY: We think if the Marshal wanted to, it
25 could do so, that is correct. And, that is nothing more than

1 the typical instance of executive discretion to take acts within
2 its generally authorized area of responsibility.

3 The real problem in this case is that orders of the
4 type entered by the magistrate here will impair Marshals'
5 ability to carry out the existing functions that are assigned
6 to it.

7 Thank you.

8 CHIEF JUSTICE BURGER: Do you have anything further,
9 General?

10 MR. ZIMMERMAN: A very, very brief rebuttal, one
11 point.

12 ORAL ARGUMENT OF LEROY S. ZIMMERMAN, ESQ.

13 ON BEHALF OF THE PETITIONER -- REBUTTAL

14 MR. ZIMMERMAN: The government has argued finite
15 resources. Certainly there are finite resources on both sides,
16 the state and the Marshals Service in this particular case,
17 and there will always be burden to be considered here.

18 But, it is our position that the magistrate should
19 have the discretion to consider the burden in order to try
20 in more cases to have more prisoners, more witnesses in the
21 court in these civil rights cases in order to make a more
22 enlightened determination. And, frequently, in the calculus
23 that is used by the court to determine whether to issue the
24 writ, that is a factor.

25 I respectfully ask this Court to reverse the decision

1 of the Court of Appeals and to affirm the order of the magistrate
2 in this case.

3 Thank you.

4 CHIEF JUSTICE BURGER: Thank you, gentlemen.

5 The case is submitted.

6 (Whereupon, at 10:58 a.m., the case in the above-
7 entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-489 - PENNSYLVANIA BUREAU OF CORRECTION, Petitioner V.

UNITED STATES MARSHALS SERVICE, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

