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# TRANSPORTATION OF STATE PRISONERS TO THEIR FEDERAL CIVIL RIGHTS ACTIONS

## INTRODUCTION

Section 1983 of the Civil Rights Act of 1871<sup>1</sup> authorizes United States citizens whose constitutional rights have been violated by persons acting under color of state law to bring suit<sup>2</sup> in federal court.<sup>3</sup> State prisoners often bring suits under the Act.<sup>4</sup> Although they do not have a right to be

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1. Ch. 22, § 1, 17 Stat. 13, 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1982)).

2. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.*

3. 28 U.S.C. § 1343(a)(3), (4) (1982) grants federal district courts original jurisdiction of actions brought under the Civil Rights Act.

4. Between 1972 and 1979, the number of actions brought by state prisoners under § 1983 increased from 3348 to 11,195. Federal Judicial Center, Prisoner Civil Rights Committee, Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 2 n.9 (1980) [hereinafter cited as Aldisert Report]. The number continues to rise. *Id.* at 8; see *California Dep't of Corrections v. United States*, 104 S. Ct. 1425, 1426 (1984) (Rehnquist, J., dissenting from denial of certiorari); *Gast v. Daily*, 577 F. Supp. 14, 15 (E.D. Wis. 1984). In some districts, the number of filings is very high. In 1979, for example, 923 such actions were filed in the Eastern District of Virginia, 705 in the Middle District of Florida, 511 in the District of Maryland, and 431 in the Southern District of Texas. Aldisert Report, *supra*, at 8 n.14. For a more detailed analysis of the number of § 1983 suits, see Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 613-16, 658-63 (1979).

The number of filings has burdened the judicial system. The courts have had difficulty in managing the sheer numbers. See, e.g., *Gast v. Daily*, 577 F. Supp. 14, 15 (E.D. Wis. 1984); *Franklin v. Oregon*, 563 F. Supp. 1310, 1316-17 (D. Or. 1983), *aff'd in part and rev'd in part sub nom. Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984); *Green v. Camper*, 477 F. Supp. 758, 759-69 (W.D. Mo. 1979). One judge has stated that he has spent as much as 47% of his working time on prisoner cases. See Aldisert Report, *supra*, at 8 n.14. Another problem is that most of the complaints are filed pro se, *id.* at 2-3, and are consequently difficult to understand, *id.* at 11-12. Moreover, pro se pleadings must be given special consideration by the courts. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). The fact that the cases are brought pro se also means that few will be settled, because "meaningful negotiations between prisoners acting pro se and states' attorneys are practically impossible." Turner, *supra*, at 637; see Aldisert Report, *supra*, at 13-14 & n.26 (use of counsel would limit frivolous cases). In addition, there is no restraint on unwarranted litigation because the plaintiff, usually proceeding in forma pauperis, is undaunted by the expense of the suit. See *Braden v. Estelle*, 428 F. Supp. 595, 597-98 (S.D. Tex. 1977) (because of their poverty, prisoners are immune from later tort actions for malicious prosecution) (quoting *Jones v. Bales*, 58 F.R.D. 453, 463 (N.D. Ga. 1972), *aff'd*, 480 F.2d 805 (5th Cir. 1973) (per curiam)). Furthermore, preparing for cases provides the plaintiff with "relief from the tedium of prison life." Aldisert Report, *supra*, at 3 (footnote omitted); see Note, *Limitation of State Prisoners' Civil Rights Suits in the Federal Courts*, 27 Cath. U.L. Rev. 115, 116 (1977) [hereinafter cited as *Civil Rights Suits*]. Thus, many cases brought by prisoners under the Civil Rights Act are frivolous.

See Aldisert Report, *supra*, at 9-10; Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 586-87 (1972). 28 U.S.C. § 1915(a) (1982) permits any United States court to "authorize the commencement, prosecution or defense of any suit . . . without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor." Prisoners have been quick to take advantage of this provision. See, e.g., *In re Green*, 669 F.2d 779, 781-82 (D.C. Cir. 1981) (prisoner able to file hundreds of complaints in forma pauperis); *Boyce v. Alizaduh*, 595 F.2d 948, 950 (4th Cir. 1979) (court should permit filing under § 1915(a), then proceed to next step of determining whether complaint is "frivolous or malicious" within meaning of § 1915(d) which provides that the court may dismiss frivolous in forma pauperis suits); *Carter v. Telectron, Inc.*, 452 F. Supp. 944, 947 (S.D. Tex. 1977) (prisoner able to carry on "lengthy private wars and vendettas . . . at no monetary expense to himself"). But see *Braden v. Estelle*, 428 F. Supp. 595, 598-601 (S.D. Tex. 1977) (adopting plan whereby prisoner would make a partial payment of fees). The statute makes no special provisions for the attendance of witnesses, however. See 28 U.S.C. § 1915(c) (1982) ("[w]itnesses shall attend as in other cases"). In other cases involving indigent parties, the government may pay witness' fees on behalf of the indigent party. See *Morrow v. Igleburger*, 584 F.2d 767, 772 n.7 (6th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979); cf. *United States v. McGaha*, 205 F. Supp. 949, 951 (E.D. Tenn. 1962) (criminal case). Prisoner-witnesses have no equivalent entitlement to payment of witness fees. See *Meadows v. United States Marshal*, 434 F.2d 1007, 1008 (5th Cir. 1970) (*per curiam*), *cert. denied*, 401 U.S. 1014 (1971); *Marchese v. United States*, 453 F.2d 1268, 1270-71 (Ct. Cl. 1972).

Courts may dismiss frivolous in forma pauperis suits. 28 U.S.C. § 1915(d) (1982). Although Congress has not defined frivolity, courts have held that a complaint is frivolous if it is without arguable merit. See *Pace v. Evans*, 709 F.2d 1428, 1429 (11th Cir. 1983) (*per curiam*); see, e.g., *McFadden v. Lucas*, 713 F.2d 143, 145 (5th Cir.) (forced shaving not violative of civil rights), *cert. denied*, 104 S. Ct. 499 (1983); *Franklin v. Oregon*, 563 F. Supp. 1310, 1325, 1326 (D. Or. 1983) (complaints that prisoner was not awakened from his afternoon nap and that prison guards wore "clipping heels" held to be frivolous), *aff'd in part, rev'd in part on other grounds sub nom. Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984).

Courts have acted to protect themselves from being overwhelmed by the morass of frivolous prisoner suits. See, e.g., *In re Green*, 669 F.2d 779, 787 (D.C. Cir. 1981) (court threatened to hold petitioner in contempt if he continued to file frivolous complaints); *Gast v. Daily*, 577 F. Supp. 14, 15 (E.D. Wis. 1984) (court will not allow prisoner to file second in forma pauperis action without court's permission); *Franklin v. Oregon*, 563 F. Supp. 1310, 1334 (D. Or. 1983) (court will only accept six in forma pauperis suits from same prisoner within each twelve-month period), *aff'd in part, rev'd in part on other grounds sub nom. Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984); see also *Civil Rights Suits, supra*, at 122-30 (examining other means of reducing the burden on the courts). Compare Aldisert Report, *supra*, at 54-58 (recommending ways of handling in forma pauperis complaints) with *Turner, supra* note 3, at 646-47 (arguing against increased requirements for proceeding in forma pauperis). Because so many prisoner actions are frivolous "it is difficult to ensure that the meritorious complaint is found and given careful attention." Aldisert Report, *supra*, at 11; see Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 587 (1972).

A significant number of prisoners' civil rights claims are meritorious. See Aldisert Report, *supra*, at 11; see, e.g., *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (suit for law library); *Bienvenu v. Beauregard Parish Police Jury*, 705 F.2d 1457, 1460 (5th Cir. 1983) (allegations of cold, rainy and roach-infested conditions sufficiently stated a cause of action); *Madyun v. Thompson*, 657 F.2d 868, 873 (7th Cir. 1981) (intentional taking of plaintiff's property constituted a cause of action).

The burden on the courts, however, may be exaggerated for several reasons. Many cases are dismissed quickly, court appearances and trials are rare, and the litigation is not

present at their civil trials,<sup>5</sup> justice may require a prisoner's presence in

complex. See Turner, *supra*, at 637. But see Aldisert Report, *supra*, at 3, 11-12 (because the cases are pro se, it is often difficult to understand even the nature of the complaint).

The number of prisoner § 1983 actions has also caused problems for correctional officers who are frequent defendants. See, e.g., *McFadden v. Lucas*, 713 F.2d 143, 144 (5th Cir.), *cert. denied*, 104 S. Ct. 499 (1983); *McGee v. Rankin*, 584 F. Supp. 1202, 1203 (W.D. Ark. 1984); *Allen v. Coughlin*, 527 F. Supp. 1096, 1096 (N.D.N.Y. 1981). In a successful suit, the prisoner may be entitled to a money judgment from his keepers. See *Monroe v. Pape*, 365 U.S. 167, 174 (1961) (Congress, in enacting the Civil Rights Act, intended to provide a remedy), *overruled on other grounds*, *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978); see also C. Bartollas, *Introduction to Corrections* 224-25 (1981); V. Fox, *Introduction to Corrections* 411-14 (2d ed. 1977). In order to protect themselves from liability, many correctional administrators have placed their property in their spouses' names. See V. Fox, *supra*, at 412-13.

The prisoner cases also impose a burden on the states. The state may have to expend funds to correct what the federal judiciary has found to be unconstitutional prison conditions. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (requiring prison authorities to provide inmates with law libraries); *Jones v. Diamond*, 636 F.2d 1364, 1375-76 (5th Cir.) (en banc) (upholding injunction against overcrowding), *cert. dismissed*, 453 U.S. 950 (1981); see also *Smith v. Sullivan*, 611 F.2d 1039, 1044 (5th Cir. 1980) (federal courts have power and duty to intervene to prevent constitutional deprivations). See *infra* note 51. The state may also suffer monetary losses if it has agreed to indemnify its employees. See C. Bartollas, *supra*, at 273.

The most pervasive effect on the prison system, however, is not dependent on whether the suit is successful. Although not long ago prisons operated without written rules, "today prison authorities are engulfed in bureaucratic paper. There are regulations, guidelines, policy statements, and general orders; there are forms, files and reports for virtually everything." Turner, *supra*, at 639. This bureaucratization is the result of a perceived need for accountability to the courts, *id.*, and a real need for protection from prisoner suits, see V. Fox, *supra*, at 411-15. In addition, litigation is a time consuming process, especially when one warden may be served with several suits. See C. Bartollas, *supra*, at 273.

5. See *Holt v. Pitts*, 619 F.2d 558, 560 (6th Cir. 1980); *Stone v. Morris*, 546 F.2d 730, 735 (7th Cir. 1976); *Moeck v. Zajackowski*, 541 F.2d 177, 180 (7th Cir. 1976); *Clark v. Hendrix*, 397 F. Supp. 966, 968-69 (N.D. Ga. 1975). Prisoners do, however, have a right of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *Andrade v. Hauck*, 452 F.2d 1071, 1072 (5th Cir. 1971); see *Cruz v. Beto*, 405 U.S. 319, 321 (1972); *Ex parte Hull*, 312 U.S. 546, 549 (1941). Access to the courts must be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977); see *Wolff v. McDonnell*, 418 U.S. 539, 579-80 (1974) (inmates may assist each other in pursuing civil rights claims); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (inmates may assist each other in habeas corpus actions); *Spears v. Chandler*, 672 F.2d 834, 835 (11th Cir. 1982) (*per curiam*) (access not adequate when "prisoner's *pro se* § 1983 action is dismissed for lack of prosecution" when court has refused to order prisoner's presence); *Bonner v. City of Prichard*, 661 F.2d 1206, 1212 (11th Cir. 1981) (right of access not limited to preparation and presentation of complaints). Nonetheless, the right of access is not unlimited. See *Ross v. Moffitt*, 417 U.S. 600, 616 (1974) (state need not provide counsel for indigent in discretionary appeal); *Johnson v. Hubbard*, 698 F.2d 286, 289 (6th Cir.) (right of access does not require court to pay party's witness fees), *cert. denied*, 104 S. Ct. 282 (1983); *cf. Price v. Johnston*, 334 U.S. 266, 285 (1948) ("[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights"). Prisoners do not have "an absolute and unrestricted right to file any civil action they might desire. Otherwise, penitentiary wardens and the courts might be swamped with an endless number of unnecessary and even spurious law suits." *Tabor v. Hardwick*, 224 F.2d 526, 529 (5th Cir. 1955), *cert. denied*, 350 U.S. 971 (1956). "In cases challenging the validity of confinement in which there are material factual disputes as to events in which the prisoner participated, the Supreme Court has all but mandated the presence of the prisoner." Ball

the courtroom either to act as a witness<sup>6</sup> or to prosecute his claim pro se.<sup>7</sup>

The writ of habeas corpus ad testificandum is the traditional procedural means of securing a prisoner's presence to testify.<sup>8</sup> The writ, by

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v. Woods, 402 F. Supp. 803, 807 (N.D. Ala. 1975), *modified mem.*, 541 F.2d 279 (5th Cir. 1976); *see* United States v. Hayman, 342 U.S. 205, 222-23 (1952); Walker v. Johnston, 312 U.S. 275, 285 (1941). *See supra* note 4.

Prisoners may bring suits other than under the Civil Rights Act, *see* Corpus v. Estelle, 551 F.2d 68, 70 (5th Cir. 1977) (access to courts includes general civil matters), but because of the nature of confinement, most prisoner actions are brought under § 1983, *see* Turner, *supra* note 4, at 610 ("Prison life creates the potential for an enormous number of cases under section 1983."). This Note, therefore, discusses only prisoner cases brought pursuant to § 1983 of the Civil Rights Act, 42 U.S.C. § 1983 (1982).

6. *See, e.g.*, Ford v. Allen, 728 F.2d 1369, 1370 (11th Cir. 1984) (*per curiam*); Wiggins v. County of Alameda, 717 F.2d 466, 469 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1425 (1984); Story v. Robinson, 689 F.2d 1176, 1178 (3d Cir. 1982); Spears v. Chandler, 672 F.2d 834, 835 (11th Cir. 1982) (*per curiam*); ITEL Capital Corp. v. Dennis Mining Supply & Equip., Inc., 651 F.2d 405, 406 (5th Cir. 1981); Ford v. Carballo, 577 F.2d 404, 406 (7th Cir. 1978); Ballard v. Spradley, 557 F.2d 476, 480 (5th Cir. 1977); Stone v. Morris, 546 F.2d 730, 737 (7th Cir. 1976).

Courts may also summon prisoners to testify on another's behalf. *See, e.g.*, Garland v. Sullivan, 737 F.2d 1283, 1284 (3d Cir. 1984) (plurality opinion), *cert. granted sub nom.* Pennsylvania Bureau of Correction v. United States Marshals Serv., 105 S. Ct. 1166 (1985); Jerry v. Francisco, 632 F.2d 252, 255-56 (3d Cir. 1980) (*per curiam*); Marks v. Calendine, 80 F.R.D. 24, 26 (N.D. W. Va. 1978); *cf.* United States v. Rigdon, 459 F.2d 379, 380 (6th Cir. 1972) (court has broad discretion to order presence of prisoners as witnesses in criminal cases), *cert. denied*, 409 U.S. 1116 (1973); United States v. Hathcock, 441 F.2d 197, 200 (5th Cir. 1971) (court should have mandated presence of prisoner, even though defense counsel in criminal case did not state that he would definitely use prisoner as witness).

7. *See, e.g.*, Ford v. Allen, 728 F.2d 1369, 1370 (11th Cir. 1984) (*per curiam*); Jerry v. Francisco, 632 F.2d 252, 253 (3d Cir. 1980) (*per curiam*); *cf.* Price v. Johnston, 334 U.S. 266, 284 (1948) (court may order presence of prisoner to argue his habeas corpus appeal).

8. The writ of habeas corpus ad testificandum permits a court, at its discretion, to order the in-court production of a prisoner. *See* United States v. \$64,000.00 in U.S. Currency, 722 F.2d 239, 246 (5th Cir. 1984); Spears v. Chandler, 672 F.2d 834, 835 (11th Cir. 1982) (*per curiam*); Jerry v. Francisco, 632 F.2d 252, 255 (3d Cir. 1980) (*per curiam*); Ballard v. Spradley, 557 F.2d 476, 480 (5th Cir. 1977); Stone v. Morris, 546 F.2d 730, 737 (7th Cir. 1976); Malinauskas v. United States, 505 F.2d 649, 655-56 (5th Cir. 1974); Maurer v. Pitchess, 530 F. Supp. 77, 80 (C.D. Cal. 1981), *aff'd in part and rev'd in part*, 755 F.2d 936 (9th Cir. 1985); Ball v. Woods, 402 F. Supp. 803, 808 (N.D. Ala. 1975), *modified mem.*, 541 F.2d 279 (5th Cir. 1976); Clark v. Hendrix, 397 F. Supp. 966, 969 (N.D. Ga. 1975); *cf.* United States v. Rigdon, 459 F.2d 379, 380 (6th Cir. 1972) (criminal case), *cert. denied*, 409 U.S. 1116 (1973); United States v. Hathcock, 441 F.2d 197, 199-200 (5th Cir. 1971) (same).

The power to issue the writ is explicitly granted to the federal courts by 28 U.S.C. § 2241(c) (1982), which states: "The writ of habeas corpus shall not extend to a prisoner unless— . . . (5) It is necessary to bring him into court to testify or for trial." *Id.*

The writ of habeas corpus ad testificandum was one of the early common law writs used "by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice." 3 W. Blackstone, Commentaries \*129; *see id.* at \*130. The writ of habeas corpus ad testificandum should be distinguished from "the great and efficacious writ" of habeas corpus ad subjiciendum, issued to inquire into the legality of the prisoner's confinement. *Id.* at \*131; *see* Carbo v. United States, 364

statute, must be directed toward the custodian of the detainee.<sup>9</sup> The person to whom the writ is directed "shall be required to produce at the hearing the body of the person detained."<sup>10</sup> There is no equivalent statu-

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U.S. 611, 614-15 (1961); *Maurer v. Pitchess*, 530 F. Supp. 77, 78 (C.D. Cal. 1981), *aff'd in part and rev'd in part*, 755 F.2d 936 (9th Cir. 1985).

The Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, 81-82 (1789) (current version at 28 U.S.C. §§ 1651, 2254 (1982)) authorized federal courts to issue writs of habeas corpus. The Act stated that the writ could be issued to prisoners if it were necessary for them "to be brought into court to testify." *Id.*; see *Carbo v. United States*, 364 U.S. 611, 614 (1961) (quoting Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, 81-82 (1789)); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99 (1807); *Ballard v. Spradley*, 557 F.2d 476, 479-80 (5th Cir. 1977).

Courts have differed as to whether they may issue the writ *ad testificandum* to require the transportation of prisoners incarcerated outside their territorial jurisdiction. The habeas corpus statute provides that the writ may be granted by courts only "within their respective jurisdictions." 28 U.S.C. § 2241(a) (1982). The majority view, therefore, had been that courts could not issue such writs extraterritorially. See *Ederly v. Kennelly*, 215 F.2d 420, 422-23 (7th Cir. 1954), *overruled*, *Stone v. Morris*, 546 F.2d 730, 737 (7th Cir. 1976); *Clark v. Hendrix*, 397 F. Supp. 966, 974 (N.D. Ga. 1975); *Silver v. Dunbar*, 264 F. Supp. 177, 179 (S.D. Cal. 1967). The Supreme Court has held, however, that the territorial limitation set out in the statute applies only to the "Great Writ," see *Carbo v. United States*, 364 U.S. 611, 619 (1961), and that the writ may be issued as long as the custodian can be reached by service of process, see *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 495 (1973). Thus, the emerging majority view, relying on these two cases, is that the writ of habeas corpus *ad testificandum* may be issued extraterritorially. See *ITEL Capital Corp. v. Dennis Mining Supply & Equip., Inc.*, 651 F.2d 405, 406-07 (5th Cir. 1981); *Stone v. Morris*, 546 F.2d 730, 737 (7th Cir. 1976), *overruling Ederly v. Kennelly*, 215 F.2d 420 (7th Cir. 1954); *Maurer v. Pitchess*, 530 F. Supp. 77, 79 (C.D. Cal. 1981), *aff'd in part and rev'd in part*, 755 F.2d 936 (9th Cir. 1985); *Ball v. Woods*, 402 F. Supp. 803, 807 (N.D. Ala. 1975), *modified mem.*, 541 F.2d 279 (5th Cir. 1976).

9. See *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494-95 (1973); *Wales v. Whitney*, 114 U.S. 564, 574 (1885); *Garland v. Sullivan*, 737 F.2d 1283, 1287 (3d Cir. 1984) (plurality opinion), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985); *Story v. Robinson*, 689 F.2d 1176, 1179 (3d Cir. 1982); *McGee v. Rankin*, 584 F. Supp. 1202, 1205 (W.D. Ark. 1984).

10. 28 U.S.C. § 2243 (1982). At common law, the person to whom the writ was directed could "return no satisfactory excuse for not bringing up the body of the prisoner." 3 W. Blackstone, Commentaries \*132. Congress has followed the common law. See 28 U.S.C. § 2243 (1982); see also *Garland v. Sullivan*, 737 F.2d 1283, 1286 (3d Cir. 1984) (plurality opinion) (noting "obligation of state custodians to respond to witness process."), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985); *McGee v. Rankin*, 584 F. Supp. 1202, 1205 (W.D. Ark. 1984) (obligation to produce prisoners must be borne by custodian); *United States ex rel. Griffin v. McMann*, 310 F. Supp. 72, 73 (E.D.N.Y. 1970) ("duty to produce the prisoner lies upon the Warden and the State"); *cf. Story v. Robinson*, 689 F.2d 1176, 1181 (3d Cir. 1982) ("state custodians will be in compliance with writs of habeas corpus *ad testificandum* . . . if they transport the prisoners to the county jail nearest the federal courthouse").

If the custodian fails to respond, he may face contempt charges. *Cf. Ex parte Young*, 50 F. 526, 526-27 (C.C.E.D. Tenn. 1892) (custodian of child held in contempt for failure to produce child in court pursuant to a writ of habeas corpus); *United States v. Williamson*, 28 F. Cas. 682, 686 (E.D. Pa. 1855) (No. 16,725) (custodian of slave held in contempt for failure to produce slave in court pursuant to writ of habeas corpus). Moreover, the custodian, as an officer of the state, must obey the mandates of the federal judiciary pursuant to the supremacy clause, U.S. Const. art. VI, cl. 2. See *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958); *Sterling v. Constantin*, 287 U.S. 378, 397-98 (1932); *cf. United*

tory authorization for a writ of habeas corpus ordering a state custodian to produce a prisoner to prosecute his claim pro se.<sup>11</sup> Under these circumstances, the court may, pursuant to the All Writs Act,<sup>12</sup> issue a writ of mandamus directing the custodian to produce the prisoner in court.<sup>13</sup>

The decision to order the transfer of a prisoner is within the discretion of the trial court.<sup>14</sup> The court may consider the state's interests in maintaining confinement<sup>15</sup> and minimizing disruption of prison routine,<sup>16</sup> as well as the costs of transferring an indigent prisoner to court.<sup>17</sup> This cost

States v. Peters, 9 U.S. (5 Cranch) 115, 136 (1809) ("If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, . . . the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

11. See Price v. Johnston, 334 U.S. 266, 281-84 (1948).

12. 28 U.S.C. § 1651(a) (1982) provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Like the writ of habeas corpus ad testificandum, the All Writs Act (Act) traces its roots to § 14 of the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, 81-82 (1789) (current version at 28 U.S.C. §§ 1651, 2254 (1982)). See United States v. Morgan, 346 U.S. 502, 506 (1954); Price v. Johnston, 334 U.S. 266, 282 (1948). Courts have used the All Writs Act to secure the presence of prisoners. See, e.g., United States v. Hayman, 342 U.S. 205, 220-21 (1952) (court may use Act to order production of prisoner at proceeding to set aside his sentence); Price v. Johnston, 334 U.S. 266, 278-79 (1948) (Act empowers courts to order that prisoners be brought before them to argue their own appeals). Appellate courts generally use the Act to supervise actions of lower courts. See Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 Buffalo L. Rev. 37, 37-39 (1982); Ward, *Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils*, 1980 B.Y.U. L. Rev. 233, 238-47.

13. See Price v. Johnston, 334 U.S. 266, 278-79 (1948).

14. See *supra* note 8.

15. Jerry v. Francisco, 632 F.2d 252, 255 (3d Cir. 1980) (per curiam); Stone v. Morris, 546 F.2d 730, 736 (7th Cir. 1976); Moeck v. Zajackowski, 541 F.2d 177, 180 (7th Cir. 1976).

16. See Holt v. Pitts, 619 F.2d 558, 561 (6th Cir. 1980); Tabor v. Hardwick, 224 F.2d 526, 529 (5th Cir. 1955); Maurer v. Pitchess, 530 F. Supp. 77, 81 (C.D. Cal. 1981), *aff'd in part and rev'd in part*, 755 F.2d 936 (9th Cir. 1985); Seybold v. Milwaukee County Sheriff, 276 F. Supp. 484, 488 (E.D. Wis. 1967); *cf.* Bell v. Wolfish, 441 U.S. 520, 547 (1979) (correctional officials should be given deference in adoption of policies "needed to preserve internal order"); Meachum v. Fano, 427 U.S. 215, 229 (1976) ("federal courts do not sit to supervise state prisons"); Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam) (same); Sostre v. McGinnis, 334 F.2d 906, 908 (2d Cir.) (only in extreme cases will court interfere with discipline by prison officials), *cert. denied*, 379 U.S. 892 (1964).

17. See United States v. \$64,000.00 in U.S. Currency, 722 F.2d 239, 246 (5th Cir. 1984) (quoting Ballard v. Spradley, 557 F.2d 476, 480 (5th Cir. 1977)); ITEL Capital Corp. v. Dennis Mining Supply & Equip., Inc., 651 F.2d 405, 407 (5th Cir. 1981) (same); Jerry v. Francisco, 632 F.2d 252, 255 (3d Cir. 1980) (per curiam) (quoting Stone v. Morris, 546 F.2d 730, 735 (7th Cir. 1976)); Holt v. Pitts, 619 F.2d 558, 561 (6th Cir. 1980); Moeck v. Zajackowski, 541 F.2d 177, 180 (7th Cir. 1976); Maurer v. Pitchess, 530 F. Supp. 77, 81 (C.D. Cal. 1981), *aff'd in part and rev'd in part*, 755 F.2d 936 (9th Cir. 1985); Ball v. Woods, 402 F. Supp. 803, 809 (N.D. Ala. 1975), *modified mem.*, 541 F.2d 279 (5th Cir. 1976); Silver v. Dunbar, 264 F. Supp. 177, 181 (S.D. Cal. 1967).

This focus on costs is unfortunate because if the court is protecting constitutional

factor has caused discontent among state custodians, who claim that they

rights, it should not consider the costs of transporting the prisoner. See *Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977). A court should not determine that the prisoner's testimony would actually assist it in its fact-finding capacity, and then "be deterred from obtaining the prisoner because the state is unable to pay the full costs of witness production and because the similarly strapped Marshals Service is itself hard pressed to shoulder any such burden." *Garland v. Sullivan*, 737 F.2d 1283, 1291 (3d Cir. 1984) (Becker, J., concurring), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985).

Although some district courts have refused to issue the writ of habeas corpus ad testificandum and have then dismissed the complaint when the prisoner failed to appear to prosecute his claim, this result has consistently been held to be erroneous because it constitutes a denial of "[a]dequate access to the courts." *Spears v. Chandler*, 672 F.2d 834, 835 (11th Cir. 1982) (per curiam); see *Holt v. Pitts*, 619 F.2d 558, 562 (6th Cir. 1980) (court "clearly abused its discretion when it dismissed plaintiff's action for failure to prosecute"); *Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978) ("dismissal of the action could not properly be based on the fact that the plaintiff failed to come to court"). See *supra* note 5.

In exercising their discretion, courts may also consider risk of danger to the public, whether the prisoner's presence will substantially aid the resolution of the suit, see *United States v. \$64,000.00 in U.S. Currency*, 722 F.2d 239, 246 (5th Cir. 1984) (quoting *Ballard v. Spradley*, 557 F.2d 476, 480-81 (5th Cir. 1977)); *ITEL Capital Corp. v. Dennis Mining Supply & Equip., Inc.*, 651 F.2d 405, 407 (5th Cir. 1981) (same); *Jerry v. Francisco*, 632 F.2d 252, 255 (3d Cir. 1980) (per curiam); *Holt v. Pitts*, 619 F.2d 558, 561 (6th Cir. 1980) (quoting *Stone v. Morris*, 546 F.2d 730, 735-36 (7th Cir. 1976)); *Moeck v. Zajackowski*, 541 F.2d 177, 180 (7th Cir. 1976); *Maurer v. Pitchess*, 530 F. Supp. 77, 81 (C.D. Cal. 1981), *aff'd in part and rev'd in part*, 755 F.2d 936 (9th Cir. 1985); *Ball v. Woods*, 402 F. Supp. 803, 809 (N.D. Ala. 1975), *modified mem.*, 541 F.2d 279 (5th Cir. 1976); *Silver v. Dunbar*, 264 F. Supp. 177, 181 (S.D. Cal. 1967), and whether the suit can be stayed until the prisoner's release, see *United States v. \$64,000.00 in U.S. Currency*, 722 F.2d 239, 246 (5th Cir. 1984) (quoting *Ballard v. Spradley*, 557 F.2d 476, 480 (5th Cir. 1977)); *ITEL Capital Corp. v. Dennis Mining Supply & Equip., Inc.*, 651 F.2d 405, 407 (5th Cir. 1981) (same); *Jerry v. Francisco*, 632 F.2d 252, 255 (3d Cir. 1980) (per curiam) (quoting *Stone v. Morris*, 546 F.2d 730, 735-36 (7th Cir. 1976)); *Holt v. Pitts*, 619 F.2d 558, 561 (6th Cir. 1980) (same); *Moeck v. Zajackowski*, 541 F.2d 177, 181 (7th Cir. 1976); *Seybold v. Milwaukee County Sheriff*, 276 F. Supp. 484, 487 (E.D. Wis. 1967). *But see* *Wimberly v. Rogers*, 557 F.2d 671, 673 (9th Cir. 1977) (indefinite stay of proceedings is "tantamount to a denial of due process"); *Maurer v. Pitchess*, 530 F. Supp. 77, 81 (C.D. Cal. 1981) (same), *aff'd in part and rev'd in part*, 755 F.2d 936 (9th Cir. 1985). Courts may also consider the substantiality of the matter at issue, see *Jerry v. Francisco*, 632 F.2d 252, 255 (3d Cir. 1980) (per curiam) (quoting *Stone v. Morris*, 546 F.2d 730, 735-36 (7th Cir. 1976)); *Holt v. Pitts*, 619 F.2d 558, 561 (6th Cir. 1980) (same); *Maurer v. Pitchess*, 530 F. Supp. 77, 80 (C.D. Cal. 1981) (same), *aff'd in part and rev'd in part*, 755 F.2d 936 (9th Cir. 1985), the need for an early determination of the matter, see *Jerry v. Francisco*, 632 F.2d 252, 255 (3d Cir. 1980) (per curiam) (quoting *Stone v. Morris*, 546 F.2d 730, 735-36 (7th Cir. 1976)); *Holt v. Pitts*, 619 F.2d 558, 561 (6th Cir. 1980) (same); *Maurer v. Pitchess*, 530 F. Supp. 77, 80 (C.D. Cal. 1981) (same), *aff'd in part and rev'd in part*, 755 F.2d 936 (9th Cir. 1985); *cf. Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978) (court should consider interest of defendant in not having case left pending against him), and the probability of success on the merits, see *Holt v. Pitts*, 619 F.2d 558, 561 (6th Cir. 1980) (quoting *Stone v. Morris*, 546 F.2d 730, 735-36 (7th Cir. 1976)). *But see* *Jerry v. Francisco*, 632 F.2d 252, 255 (3d Cir. 1980) (per curiam) (courts should not consider merits in deciding whether to order transfer); *Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977) (courts should not consider merits because that looks to the "ultimate result of the action rather than the need for the prisoner's testimony").

The Supreme Court in *Price v. Johnston*, 334 U.S. 266 (1948), noted some considera-



are unable alone to bear the costs of transportation.<sup>18</sup> In an attempt to reduce this burden, many custodians have petitioned federal courts to order the United States Marshals Service to assist in producing inmates.<sup>19</sup> Several courts, relying on various statutory authorities, have

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tions for determining whether to order the production of a prisoner to argue a case personally:

If it is apparent that the request of the prisoner to argue personally reflects something more than a mere desire to be freed temporarily from the confines of the prison, that he is capable of conducting an intelligent and responsible argument, and that his presence in the courtroom may be secured without undue inconvenience or danger, the court would be justified in issuing the writ. But if any of those factors were found to be negative, the court might well decline to order the prisoner to be produced.

*Id.* at 284-85 (footnote omitted).

Thus, before exercising its discretion, the court should be certain that the issues raised are substantive and that a courtroom appearance would be clearly useful to a determination of the facts.

The court may also consider other less costly and less dangerous alternatives, including use of depositions. *See Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978); *Ball v. Woods*, 402 F. Supp. 803, 811 (N.D. Ala. 1975), *modified mem.*, 541 F.2d 279 (5th Cir. 1976); *Silver v. Dunbar*, 264 F. Supp. 177, 181 (S.D. Cal. 1967). This option may be unsatisfactory when issues of credibility are to be determined, *see Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978), presumably because the finder of fact will be unable to observe the witness' demeanor. The parties may also agree to hold the trial without jury at the prison. *See Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978). Alternatively, the court may delay the trial until the prisoner's release. *See id.* This is a sensible alternative when the prisoner will be released within a reasonable time. When the plaintiff will be imprisoned for many more years or is seeking injunctive relief, however, this option is not viable. *See id.* Moreover, an indefinite stay of proceedings may constitute a denial of due process. *See Wimberly v. Rogers*, 557 F.2d 671, 673 (9th Cir. 1977); *Maurer v. Pitchess*, 530 F. Supp. 77, 81 (C.D. Cal. 1981), *aff'd in part and rev'd in part*, 755 F.2d 936 (1985). The statute of limitations may also pose a problem for the prisoner-plaintiff. The Civil Rights Act, 42 U.S.C. § 1983 (1982), does not provide a statute of limitations; therefore, "[t]he applicable period of limitations is that which the state itself would enforce had an action seeking similar relief been brought in a court of that state." *Beard v. Stephens*, 372 F.2d 685, 688 (5th Cir. 1967); *see Seybold v. Milwaukee County Sheriff*, 276 F. Supp. 484, 487 (E.D. Wis. 1967) (where state law did not toll statute of limitations for prisoner's entire period of imprisonment, court granted requests to file actions to save prisoner's loss of rights); *Silver v. Dunbar*, 264 F. Supp. 177, 181 (S.D. Cal. 1967) (tolling applicable statute of limitations until prisoner released from prison).

In order to avoid the need for the prisoner's presence when the prisoner seeks only to argue his case pro se, the court may appoint counsel for him, *see* 28 U.S.C. § 1915(d) (1982); Aldisert Report, *supra* note 4, at 12-13, or the prisoner may be able to secure counsel on a contingency fee basis, *see Silver v. Dunbar*, 264 F. Supp. 177, 181 (S.D. Cal. 1967). Given the low success rate of prisoner civil rights actions, *see Ball v. Woods*, 402 F. Supp. 803, 810 (N.D. Ala. 1975) (historically, few actions have succeeded), *modified mem.*, 541 F.2d 279 (5th Cir. 1976); *see also* Aldisert Report, *supra* note 4, at 9-10 (in 1979, 96.5% of § 1983 actions were dismissed or otherwise concluded before trial), this may be an unrealistic option.

18. *See, e.g., Garland v. Sullivan*, 737 F.2d 1283, 1285 (3d Cir. 1984) (plurality opinion), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985); *Wiggins v. County of Alameda*, 717 F.2d 466, 468 (9th Cir. 1983) (per curiam), *cert. denied*, 104 S. Ct. 1425 (1984); *Story v. Robinson*, 689 F.2d 1176, 1178 (3d Cir. 1982); *Ford v. Carballo*, 577 F.2d 404, 405 (7th Cir. 1978); *McGee v. Rankin*, 584 F. Supp. 1202, 1203 (W.D. Ark. 1984).

19. *See supra* note 18.

rendered such orders.<sup>20</sup> These orders, which are in the nature of a *mandamus*,<sup>21</sup> have been strongly opposed by the Marshals Service.<sup>22</sup>

This Note examines the purported bases for the issuance of such orders and demonstrates that federal courts are not authorized to compel the Marshals Service to bear any costs for the production of state prisoners in federal court. Although this imposes an undue burden on the states, congressional action would be required to correct the imbalance.

## I. STATUTORY AUTHORIZATION FOR THE TRANSPORTATION OF STATE PRISONERS

The United States Constitution states that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>23</sup> Federal courts, as courts of limited jurisdiction, possess only that power granted to them by either the Constitution or an act of Congress.<sup>24</sup> Federal courts, therefore, may not order the United States Marshals Service to use federal funds to transport state prisoners without some express statutory authority.<sup>25</sup>

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20. See, e.g., *Ford v. Allen*, 728 F.2d 1369, 1370 (11th Cir. 1984) (per curiam) (relying on 28 U.S.C. §§ 567(2), 569(a), (b) (1982)); *Ford v. Carballo*, 577 F.2d 404, 407-08 (7th Cir. 1978) (relying on the All Writs Act, 28 U.S.C. § 1651(a) (1976) (current version at 28 U.S.C. § 1651(a) (1982))); *Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977) (relying on 28 U.S.C. §§ 567, 569(a), (b) (1976) (current version at 28 U.S.C. §§ 567, 569(a), (b) (1982)) and on 28 C.F.R. §§ 0.111(b), (i), 0.138a, 0.142 (1976) (current version at 28 C.F.R. §§ 0.111(b), (i), 0.138, 0.142 (1984))). See *infra* notes 26-70 and accompanying text.

The circuits have disagreed not only on the statutory bases, but also on how the burden should be split between the United States marshal and the custodian, if at all. See *California Dep't of Correction v. United States*, 104 S. Ct. 1425, 1426 (1984) (Rehnquist J., dissenting from denial of certiorari). Compare *Garland v. Sullivan*, 737 F.2d 1283, 1286 (3d Cir. 1984) (plurality opinion) (responsibility for transportation must rest on state), *cert. granted sub nom.* *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985) and *Wiggins v. County of Alameda*, 717 F.2d 466, 469 (9th Cir. 1983) (per curiam) (responsibility may rest on state), *cert. denied*, 104 S. Ct. 1425 (1984) and *McGee v. Rankin*, 584 F. Supp. 1202, 1205 (W.D. Ark. 1984) (absent showing of unreasonable burden, responsibility must rest on state) with *Ford v. Allen*, 728 F.2d 1369, 1370 (11th Cir. 1984) (per curiam) (responsibility may rest on United States marshal) and *Ford v. Carballo*, 577 F.2d 404, 408 (7th Cir. 1978) (same) with *Story v. Robinson*, 689 F.2d 1176, 1181 (3d Cir. 1982) (state and United States marshal may split responsibility) and *Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977) (same).

21. See *Garland v. Sullivan*, 737 F.2d 1283, 1286 (3d Cir. 1984) (plurality opinion), *cert. granted sub nom.* *Pennsylvania Bureau of Corrections v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985).

22. See, e.g., *id.*; *Ford v. Allen*, 728 F.2d 1369, 1370 (11th Cir. 1984) (per curiam); *Ford v. Carballo*, 577 F.2d 404, 408 (5th Cir. 1977); *McGee v. Rankin*, 584 F. Supp. 1202, 1203 (W.D. Ark. 1984).

23. U.S. Const. art I, § 9, cl. 7.

24. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807) (opinion by Marshall, C.J.); see *Kentucky v. Powers*, 201 U.S. 1, 24 (1906); *Holmes v. Goldsmith*, 147 U.S. 150, 158 (1893); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850).

25. See *Garland v. Sullivan*, 737 F.2d 1283, 1285 (3d Cir. 1984) (plurality opinion) (without statutory authority, such an order would constitute a "raid . . . on the United States Treasury"), *cert. granted sub nom.* *Pennsylvania Bureau of Correction v. United*

### A. Statutes Dealing with the Powers of the Marshal

Several sections of the Judiciary Act delineate the powers of the United States marshal.<sup>26</sup> One such section provides that the marshal of each district "may, in the discretion of the respective courts, be required to attend any session of court."<sup>27</sup> Some courts have held this to be authority for the federal judiciary to order the Marshals Service to transport state prisoners.<sup>28</sup> Although it "quite clearly authorizes the district court to require the attendance of the marshal at any judicial proceeding, including any proceeding at which the testimony of a state prisoner may be required,"<sup>29</sup> the plain meaning of the statute necessitates the conclusion that it concerns only courthouse security.<sup>30</sup> Indeed, protection of the judiciary is one of the primary functions of the Marshals Service.<sup>31</sup>

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States Marshals Serv., 105 S. Ct. 1166 (1985); *see, e.g.*, Ford v. Allen, 728 F.2d 1369, 1370 (11th Cir. 1984) (per curiam) (district court had statutory authority to impose full costs on Marshals Service); Story v. Robinson, 689 F.2d 1176, 1179 (3d Cir. 1982) (no authority to compensate for compliance); McGee v. Rankin, 584 F. Supp. 1202, 1203-04 (W.D. Ark. 1984) (finding no statutory authority); Ball v. Woods, 402 F. Supp. 803, 810 (N.D. Ala. 1975) (paying for attendance of prisoner is "beyond any statutory authority"), *modified mem.*, 541 F.2d 279 (5th Cir. 1976). *But see* Wiggins v. County of Alameda, 717 F.2d 466, 469 (9th Cir. 1983) (per curiam) (no congressional authority to order reimbursement, but district court has discretion to allocate costs "in any number of combinations"), *cert. denied*, 104 S. Ct. 1425 (1984).

"The general 'rule is that a court may not authorize the commitment of federal funds to underwrite the necessary expenditures of an indigent litigant's civil action.'" Moss v. ITT Continental Baking Co., 83 F.R.D. 624, 625 (E.D. Va. 1979) (quoting Haymes v. Smith, 73 F.R.D. 572, 574 (W.D.N.Y. 1976)). Although 28 U.S.C. § 1915(d) (1982) allows courts to appoint counsel for indigents, it makes no provision for payment of fees. Courts have been unwilling to order the federal government to compensate attorneys appointed to represent indigents in civil actions. *See* Tyler v. Lark, 472 F.2d 1077, 1078-80 (8th Cir.), *cert. denied*, 414 U.S. 864 (1973); Dreyer v. Jalet, 349 F. Supp. 452, 487 (S.D. Tex. 1972), *aff'd*, 479 F.2d 1044 (5th Cir. 1973) (per curiam). *But see* Allison v. Wilson, 277 F. Supp. 271, 275 (N.D. Cal. 1967) ("Appointment of counsel to an indigent incarcerated plaintiff in a civil action implicitly authorizes the commitment of federal funds to underwrite necessary expenditures."), *rev'd on other grounds*, 434 F.2d 646 (9th Cir. 1970), *cert. denied*, 404 U.S. 863 (1971).

26. 28 U.S.C.A. §§ 561-575 (West 1968 & Supp. 1984).

27. 28 U.S.C.A. § 569(a) (West 1968 & Supp. 1984).

28. *See, e.g.*, Ford v. Allen, 728 F.2d 1369, 1370 (11th Cir. 1984) (per curiam); Ballard v. Spradley, 557 F.2d 476, 481 (5th Cir. 1977).

29. Story v. Robinson, 689 F.2d 1176, 1180 (3d Cir. 1982).

30. In interpreting statutes, one should look first to the statute's plain meaning. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see* 2A N. Singer, *Sutherland Statutory Construction* § 45.01, at 1 (C. Sands rev. 4th ed. 1984).

28 U.S.C. § 569(a) (1982) may provide authority for a court, in the interest of courthouse security, to direct the Marshals Service to take prisoner-witnesses into custody at a point outside the courthouse. *See* Garland v. Sullivan, 737 F.2d 1283, 1287-88 (3d Cir. 1984) (plurality opinion) (presumption that there is no federal court security interest until prisoner is delivered to courthouse may be overcome if prisoner is particularly dangerous or if his own safety is at risk), *cert. granted sub nom.* Pennsylvania Bureau of Correction v. United States Marshals Serv., 105 S. Ct. 1166 (1985). *But see* McGee v. Rankin, 584 F. Supp. 1202, 1205 (W.D. Ark. 1984) (prisoner must be delivered to courthouse for federal interest to arise).

31. "Since 1789 the United States has depended upon its own marshals for the security of its own court facilities, and few if any federal judges would be comfortable with any

Other sections of the Judiciary Act allow the United States marshal the expense of transporting prisoners,<sup>32</sup> and provide that the marshal "shall execute all lawful writs, process and orders . . . of the United States."<sup>33</sup> These sections, however, enumerate obligations of the United States marshal,<sup>34</sup> who must obey the mandates of the federal courts<sup>35</sup> and

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other arrangement." *Garland v. Sullivan*, 737 F.2d 1283, 1287 (3d Cir. 1984) (plurality opinion), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985); *see In re Neagle*, 39 F. 833, 861 (C.C.N.D. Cal. 1889) (duty of United States marshals to protect federal judges), *aff'd*, 135 U.S. 1 (1890); 28 C.F.R. § 0.111(d) (1984) (Director of United States Marshals Service responsible for courtroom security).

32. "Under regulations prescribed by the Attorney General, each United States marshal shall be allowed— . . . the expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards . . ." 28 U.S.C. § 567(2) (1982); *see also* 28 C.F.R. § 0.111(j) (1984) (Marshals Service may transport prisoners under "cooperative or intergovernmental agreements"). Courts have found sufficient authority in these provisions to order the transportation of state prisoners. *See, e.g., Ford v. Allen*, 728 F.2d 1369, 1370 (11th Cir. 1984) (*per curiam*); *Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977).

33. 28 U.S.C. § 569(b) (1982). Courts have relied on this section to impose the burden of transporting state prisoners on the Marshals Service. *See Ford v. Allen*, 728 F.2d 1369, 1370 (11th Cir. 1984) (*per curiam*); *Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977).

34. *See Garland v. Sullivan*, 737 F.2d 1283, 1285 (3d Cir. 1984) (plurality opinion), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985); *Story v. Robinson*, 689 F.2d 1176, 1179-80 (3d Cir. 1982); *McGee v. Rankin*, 584 F. Supp. 1202, 1203-04 (W.D. Ark. 1984).

Although 28 U.S.C. § 567(2) (1982), which allows for the expense of transporting prisoners, demonstrates that Congress envisioned the use of marshals for the transportation of prisoners, the statute is silent as to state prisoners. Even if Congress did intend to include state inmates, the statute requires that such transportation be made under the supervision of the Attorney General, not the federal judiciary. *See* 28 U.S.C. § 567(2) (1982); *see also Story v. Robinson*, 689 F.2d 1176, 1179-80 (3d Cir. 1982) (even if statute did encompass state prisoners, it does not authorize marshal to relieve state custodians of their obligations).

28 U.S.C. § 569(b) (1982), which requires marshals to execute all lawful writs, merely provides for "executive branch enforcement of federal judicial process." *Story v. Robinson*, 689 F.2d 1176, 1179 (3d Cir. 1982); *see McGee v. Rankin*, 584 F. Supp. 1202, 1203 (W.D. Ark. 1984). Only when the custodian fails to respond to the writ does an obligation on the part of the United States marshal arise. *See Story v. Robinson*, 689 F.2d 1176, 1179 (3d Cir. 1982).

35. *See Levy Court v. Ringgold*, 30 U.S. (5 Pet.) 451, 454 (1831) (United States marshals are "mere ministerial officers, to execute process when put into their hands, and [are] not made the judges whether such process shall be issued."); *United States ex rel. Brown v. Malcolm*, 350 F. Supp. 496, 498 (E.D.N.Y. 1972) (when writ came into marshal's hands, it became his mandatory duty to execute it); 3 Op. Att'y Gen. 496, 498 (1840) (same).

In *Ford v. Carballo*, 577 F.2d 404 (7th Cir. 1978), the court issued a writ directing the production of a state prisoner to both the United States marshal and the state custodian. *See id.* at 405. When the marshal served the writ on the custodian, the marshal informed the custodian that the Marshals Service would not transport the prisoner. *Id.* at 405-06. Thereafter, the state custodian produced the prisoner. *See id.* at 406. The court noted that "[t]he fact that a controversy may have existed as to who should actually transport and suffer the expense of producing the prisoner had no effect upon the existing writ and did not authorize the Marshal to independently disregard a direct order of the court." *Id.* at 407.

is empowered to transport prisoners if the court so orders.<sup>36</sup> The court's authority to issue an order such as a writ of mandamus, however, must itself derive from some other statutory source.<sup>37</sup>

### B. *The All Writs Act*

The All Writs Act (Act)<sup>38</sup> authorizes the federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."<sup>39</sup> The Act does not confer federal jurisdiction,<sup>40</sup> but it does grant broad powers once jurisdiction has been established in some other manner.<sup>41</sup> Because federal civil rights actions fall within federal jurisdiction,<sup>42</sup> courts may, pursuant to the Act, issue orders to nonparties to the original action,<sup>43</sup> including United

36. See *supra* note 32 and accompanying text.

37. See *supra* note 24 and accompanying text.

38. 28 U.S.C. § 1651(a) (1982).

39. *Id.*

40. *Baker Perkins, Inc. v. Werner & Pfeleiderer Corp.*, 710 F.2d 1561, 1565 (Fed. Cir. 1983); *United States v. Illinois Bell Tel. Co.*, 531 F.2d 809, 814 (7th Cir. 1976); *Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir. 1972); *CCCO-Western Region v. Fellows*, 359 F. Supp. 644, 648 (N.D. Cal. 1972); see *United States v. Morgan*, 346 U.S. 502, 515 (1954) (Minton, J., dissenting); *Price v. Johnston*, 334 U.S. 266, 279 (1948); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272-73 (1942); *Whitney v. Dick*, 202 U.S. 132, 136-37 (1906); *Bath County v. Amy*, 80 U.S. (13 Wall.) 244, 249 (1871); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 616 (1838); *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813); *United States ex rel. Wisconsin v. First Fed. Sav. & Loan Ass'n*, 248 F.2d 804, 808-09 (7th Cir. 1957), *cert. denied*, 355 U.S. 957 (1958).

41. See *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942) ("federal court may avail itself of all auxiliary writs as aids in the performance of its duties . . . to achieve the ends of justice entrusted to it"); *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1971) ("once jurisdiction has attached, powers under § 1651(a) should be broadly construed"), *cert. denied*, 406 U.S. 945 (1972); see, e.g., *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (although Congress has not established fact-finding procedures for habeas corpus actions, courts may use the Act to "fashion appropriate modes of procedure" to accomplish discovery); *Price v. Johnston*, 334 U.S. 266, 284 (1948) (court may "issue an order in the nature of a writ of *habeas corpus* commanding that a prisoner be brought to the courtroom to argue his own appeal"); *American Lithographic Co. v. Werckmeister*, 221 U.S. 603, 608-09 (1911) (Act encompasses power to issue subpoena duces tecum); *Bethlehem Shipbuilding Corp. v. NLRB*, 120 F.2d 126, 127 (1st Cir. 1941) (court may issue subpoenas under the Act); *Franklin v. Oregon*, 563 F. Supp. 1310, 1333 (D. Or. 1983) ("It is well within the broad scope of the All Writs Act . . . for a district court to issue an order restricting the filing of meritless cases . . ."), *aff'd in part and rev'd in part on other grounds sub nom. Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984); *Mississippi Valley Barge Line Co. v. United States*, 273 F. Supp. 1, 6 (E.D. Mo. 1967) (federal courts have statutory "authority to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments, and to prevent them from being thwarted and interfered with by force, guile, or otherwise").

Courts issue orders under the Act at their discretion. See *United States v. New York Tel. Co.*, 434 U.S. 159, 177 (1977); *Price v. Johnston*, 334 U.S. 266, 284-86 (1948); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

42. See 28 U.S.C. § 1343(a)(3), (4) (1982).

43. See *United States v. New York Tel. Co.*, 434 U.S. 159, 177-78 (1977); *Application of United States*, 610 F.2d 1148, 1155 (3d Cir. 1979). See *infra* note 44.

States marshals,<sup>44</sup> if the burdens imposed by such orders are reasonable<sup>45</sup>

44. United States marshals must obey the mandates of the federal courts. See *supra* note 35.

One court has held that the Act does not grant power to federal courts to order the Marshals Service to transport state prisoners. See *Garland v. Sullivan*, 737 F.2d 1283, 1286 (3d Cir. 1984) (plurality opinion), *cert. granted sub nom.* Pennsylvania Bureau of Correction v. United States Marshals Serv., 105 S. Ct. 1166 (1985). The Opinion Announcing the Judgment of the Court followed a syllogism: Because writs of habeas corpus ad testificandum may be issued only to the custodian of the prisoner, any order to the United States Marshals Service to produce state prisoners must be a writ in the nature of a mandamus; under two hoary Supreme Court decisions, *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821) and *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504 (1813), federal courts are not empowered to issue writs of mandamus to officers of the executive branch; therefore, because United States marshals are members of the executive branch, federal courts may not compel them to produce prisoners. See *Garland*, 737 F.2d at 1286.

Although it has been said that the marshal "acts concurrently as an officer of the federal judiciary and as an executive officer," *United States v. Krapf*, 285 F.2d 647, 649 (3d Cir. 1960), the President appoints the marshal for each judicial district, see 28 U.S.C. § 561(a) (1982), and the Attorney General supervises the Marshals Service, *Garland*, 737 F.2d at 1291 (Becker, J., concurring); 28 U.S.C. § 569(c) (1982). Thus, United States marshals "belong emphatically to the executive department of the government." *In re Neagle*, 135 U.S. 1, 63 (1890); see *Martin v. Tobin*, 451 F.2d 1335, 1336 (9th Cir. 1971) (per curiam) (United States marshal is a purely executive officer who may be removed from office by the President at any time); *Farley v. United States*, 139 F. Supp. 757, 758 (Ct. Cl.) (same), *cert. denied*, 352 U.S. 891 (1956).

The Third Circuit's reliance on *McClung* and *M'Intire*, however, is misplaced.

Both cases involve the same plaintiff attempting to secure title to certain land in Ohio. See *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 599 (1821); *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504, 505 (1813). The question certified for review in *M'Intire* was whether the circuit court had the "power to issue a writ of mandamus to the [federal] register of a land-office in Ohio, commanding him to issue a final certificate of purchase to the plaintiff for certain lands in that state." *Id.* at 504-05 (emphasis in original). The Court held that § 14 of the Judiciary Act of 1789 (the predecessor of the current All Writs Act) conferred power only when it was "necessary" to the exercise of a court's jurisdiction. See *id.* at 505-06. Because the issue, possession of land, was essentially local and could be determined without issuance of the writ, it was not "necessary" to the court's jurisdiction for the writ to be issued. See *id.* Moreover, the Court stated, § 14 did not grant federal jurisdiction; thus, the court had no jurisdiction to hear the case at all. See *id.* *M'Intire* therefore does not apply to the issue at hand, because federal courts have jurisdiction over actions brought under 42 U.S.C. § 1983 (1982). See 28 U.S.C. § 1343(a)(3), (4) (1982).

After his setback in *M'Intire*, the plaintiff returned to Ohio and pursued two new courses of action: Again seeking a writ of mandamus, he sued in state court, see *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 599 (1821), and in federal court, this time claiming federal diversity jurisdiction, see *id.* at 599-600. The state court found that it had jurisdiction, see *id.* at 599, but on the merits refused to issue the writ of mandamus, see *id.* at 599, 602. The Supreme Court affirmed the state court, but on jurisdictional grounds, holding that a state court may not issue a writ of mandamus against a federal executive officer, because of "the supremacy of the United States." *Id.* at 605.

Regarding the petitioner's claim of diversity jurisdiction, the Court interpreted *M'Intire* as holding simply that federal courts do not have the power to issue writs of mandamus to executive officers in original actions for mandamus. See *id.* at 600-02. Thus, in *M'Intire* the Court read the Act as not granting jurisdiction, and in *McClung* refused to find the jurisdiction to issue the writ, even though the Court already had federal diversity jurisdiction. "Why there would be no jurisdiction in such a case is a mystery that perhaps only those deeply schooled in the mindset of that era could solve." *Garland v. Sullivan*, 737 F.2d 1283, 1290 & n.3 (3d Cir. 1984) (Becker, J., concurring) (resisting the temptation to interpret the case against the historic reluctance of the early

and the issuance of the writ is "necessary or appropriate" to the court's

Court to act against "a hostile executive"), *cert. granted sub nom.* Pennsylvania Bureau of Correction v. United States Marshals Serv., 105 S. Ct. 1166 (1985). Apparently the court did not have jurisdiction to hear the case because it did not have the power to grant writs of mandamus against executive officers in original actions for mandamus. Although the court had diversity jurisdiction, the action was nevertheless in the nature of an original mandamus action against an executive officer insofar as mandamus was the only remedy the plaintiff sought. *See McClung*, 19 U.S. (6 Wheat.) at 605.

*M'Intire* and probably *McClung* have since been legislatively overruled, *see* *Perez v. Rhiddlehoover*, 247 F. Supp. 65, 69 n.8 (E.D. La. 1965), by the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (1982), which provides that "[t]he district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *Id.* The writ will be issued only when the plaintiff has a clear right to relief, the defendant has a plainly defined duty to do the act in question, and no other remedy is available. *See Schulke v. United States*, 544 F.2d 453, 455 (10th Cir. 1976) (*per curiam*); *Billiteri v. United States Bd. of Parole*, 541 F.2d 938, 946 (2d Cir. 1976). The Mandamus and Venue Act was intended to correct a historical aberration whereby only federal courts in the District of Columbia could grant mandamus relief in an original action. *See* *Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 310-13 (1967). Federal courts have always had the power to mandamus executive officers when the writ's issuance is ancillary to some other jurisdiction, *see* *Rosenbaum v. Bauer*, 120 U.S. 450, 453 (1887); *Bath County v. Army*, 80 U.S. (13 Wall.) 244, 249 (1871); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 616-18 (1838), as long as the writ was to compel a ministerial and not a discretionary act, *id.* at 616-18; *see* *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218-19 (1930); *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 324 (1903); *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 303-04 (1854). United States marshals, when acting as officers of the court, perform ministerial functions. *Levy Court v. Ringgold*, 30 U.S. (5 Pet.) 451, 454 (1831); *United States v. Persinger*, 562 F. Supp. 557, 561 (W.D. Pa. 1982); *see* 3 Op. Att'y Gen. 496, 498 (1840). A court order to a United States marshal to produce a state prisoner in a § 1983 action is ancillary to pre-existing jurisdiction. *See* 28 U.S.C. § 1343(a)(3), (4) (1982).

45. In *United States v. New York Tel. Co.*, 434 U.S. 159 (1977), the Supreme Court held that a district court did not abuse its discretion when it ordered a public utility to assist the Federal Bureau of Investigation to install pen registers on telephones for surveillance purposes, even though the telephone company was not a party to the action. *See id.* at 177-78. The Court noted that such an order would not be burdensome because it provided that the telephone company be "fully reimbursed at prevailing rates." *See id.* at 175. *New York Tel.* establishes that the All Writs Act empowers federal courts to impose reasonable burdens on nonparties. *See id.* at 172-74; *United States v. McHie*, 196 F. 586, 588 (N.D. Ill. 1912); *see, e.g., Application of United States*, 610 F.2d 1148, 1155 (3d Cir. 1979) (not an unreasonable burden to order telephone companies to trace calls when companies are to be compensated); *Michigan Bell Tel. Co. v. United States*, 565 F.2d 385, 389 (6th Cir. 1977) (same); *United States v. Illinois Bell Tel. Co.*, 531 F.2d 809, 813-14 (7th Cir. 1976) (telephone company must make available its aid and know-how); *cf. Mississippi Valley Barge Line Co. v. United States*, 273 F. Supp. 1, 6 (E.D. Mo. 1967) (Act "applies whether or not the person charged with the violation of the judgment or decree was originally a party defendant to the action"), *aff'd per curiam sub nom. Osbourne v. Mississippi Valley Barge Line Co.*, 389 U.S. 579 (1968).

In his dissent in *New York Tel.*, Justice Stevens argued that the holding was too broad and that its only precedent was the common law writ of assistance, which "authorized the indiscriminate search and seizure of undescribed persons or property based on mere suspicion." *New York Tel.*, 434 U.S. at 180 n.3 (Stevens, J., dissenting in part). "The use of that writ by the judges appointed by King George III was one British practice that the Revolution was specifically intended to terminate." *Id.* at 190 (Stevens, J., dissenting in

jurisdiction.<sup>46</sup> One court has interpreted this reasonableness standard as entitling the state—a nonparty to the proceedings—to reimbursement by the Marshals Service for the costs incurred by the state custodian in transporting a prisoner.<sup>47</sup> The court reasoned that imposing any expense on the custodian was unreasonable, but failed to justify alleviating the burdens of one nonparty by placing them on another.<sup>48</sup> In addition, although the state is not technically a party to the litigation,<sup>49</sup> it has an interest in the outcome of the action.<sup>50</sup> If the plaintiff prevails, the state

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part). Justice Stevens' main concern was that the telephone company's assistance in securing the pen registers would not aid the court's jurisdiction. *See id.* Similarly, the United States marshal is not a party in cases involving the transportation of state prisoners; the marshal is, however, statutorily obligated to obey the federal judiciary. *See* 28 U.S.C. § 569(b) (1982). *See supra* notes 34-35 and accompanying text.

46. 28 U.S.C. § 1651(a) (1982). Recent Supreme Court interpretations of what is "necessary or appropriate" to the jurisdiction of federal courts have been liberal. *See United States v. New York Tel. Co.*, 434 U.S. 159, 173 (1977) (Court has applied Act flexibly to "'achieve the ends of justice entrusted to it'") (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)); *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (courts may rely on act to "assist them in conducting factual inquiries"); *Price v. Johnston*, 334 U.S. 266, 282 (1948) (Act is not "an ossification of the practice and procedure of more than a century and a half ago"); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942) (Act is a procedural instrument "for achieving the rational ends of law").

47. *See Ford v. Carballo*, 577 F.2d 404, 407-08 (7th Cir. 1978).

48. *See id.* The court reasoned that the state's interest was minimal because its "only real relationship to the federal proceeding is the fact that it has custody over the particular plaintiff." *Id.* at 408. Although the warden has an obligation to respond to the writ, "to additionally require that this be done at the state's own expense would present an unreasonable burden." *Id.* Therefore, the court ordered that the state be reimbursed. *See id.*; *see also Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977) (although state has real interest in outcome of action, it does not so outweigh that of federal government in preserving civil rights that state should "be required to bear complete responsibility for the prisoners' transportation"). The court ignored that once the decision is made to transfer the prisoner, the cost will be placed on a nonparty, either the state or federal government, and the current statutory mechanism places the burden on the state custodian. *See supra* notes 8-10 and accompanying text.

49. The Civil Rights Act states that "[e]very person . . . shall be liable." 42 U.S.C. § 1983 (1982) (emphasis added). The eleventh amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States." U.S. Const. amend. XI. Thus, federal courts have no jurisdiction to hear suits against a state unless the state consents. *See Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 & n.13 (1952); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945); *Hans v. Louisiana*, 134 U.S. 1, 16 (1890). Local government units, which are not considered to be part of the state for eleventh amendment purposes, may be sued. *See Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690 & n.54 (1978). A municipality cannot be held liable on a theory of respondeat superior, however. *Id.* at 691; *see McCowen v. City of Evanston*, 534 F. Supp. 243, 246 (N.D. Ill. 1982). Rather, a local government employee must have acted under an official policy. *See Monell*, 436 U.S. at 694; *Smith v. City of Oklahoma City*, 696 F.2d 784, 786 (10th Cir. 1983); *Occhino v. United States*, 686 F.2d 1302, 1310 (8th Cir. 1982).

50. *See McGee v. Rankin*, 584 F. Supp. 1202, 1205 (W.D. Ark. 1984) (because custodian is substantially involved with the litigation, it will be excused from its obligation only if it demonstrates an "extremely unreasonable burden"). *But see Ford v. Carballo*, 577 F.2d 404, 408 (7th Cir. 1978) ("interest of the state is minimal").



may be forced to expend its funds to improve conditions at its correctional facility<sup>51</sup> or to indemnify its employees.<sup>52</sup> Moreover, the defendants are alleged to have acted "under color of" state law.<sup>53</sup>

The argument against unduly burdening a nonparty is better advanced by the Marshals Service. Its interest is less than that of the state because it is essentially indifferent to the outcome of the action,<sup>54</sup> and its burden is greater because it has fewer resources available in each state for the long distance transfer of prisoners.<sup>55</sup> More importantly, however, even if the burdens sought to be imposed on the Marshals Service were reasonable, the Act grants mandamus power only when "necessary or appropriate" to the court's jurisdiction<sup>56</sup> and required to reach "rational ends of law."<sup>57</sup> The Supreme Court has stated that what is "necessary or appropriate" to a court's jurisdiction may be determined by looking to common law analogies.<sup>58</sup> Thus, for example, because there is no statutory

51. See *Nadeau v. Helgemoe*, 561 F.2d 411, 419 & n.7 (1st Cir. 1977). Although the eleventh amendment prohibits private parties from seeking to impose a liability to be paid from the state treasury, see *supra* note 49, prospective relief is permissible, see *Milliken v. Bradley*, 433 U.S. 267, 290 & n.22 (1977) (decree mandating creation of vocational schools permissible); *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974) (prospective relief permissible even though it may have impact on state treasury); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 631 F.2d 162, 165 (2d Cir. 1980) ("In the face of constitutional violations at a state institution, a federal court can order the state either to take the steps necessary to rectify the violations or to close the institution. Thus, a state cannot avoid the obligation of correcting the constitutional violations of its institutions simply by pleading fiscal inability."); *Municipal Auth. v. Pennsylvania*, 496 F. Supp. 686, 689 (M.D. Pa. 1980) (eleventh amendment only prohibits retrospective relief directing the state to pay money from its treasury). The eleventh amendment, therefore, "does not immunize the state prison from judicial supervision," even though the prospective relief may be costly. *Nadeau v. Helgemoe*, 561 F.2d 411, 419 & n.7 (1st Cir. 1977); see *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (prison authority required to provide inmates with law library). See *supra* note 4.

52. See *C. Bartollas*, *supra* note 4, at 273.

53. See 42 U.S.C. § 1983 (1982).

54. "[T]he Marshals Service . . . is only related to the litigation by its federal status." *McGee v. Rankin*, 584 F. Supp. 1202, 1205 (W.D. Ark. 1984). *But see Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977) ("rights invoked are federal in nature"). In addition, the federal interest may be limited because custody itself is not at issue. *Seybold v. Milwaukee County Sheriff*, 276 F. Supp. 484, 487 (E.D. Wis. 1967).

55. The President appoints one United States marshal for each judicial district. See 28 U.S.C. § 561(a) (1982). There are presently over 90 judicial districts. See 28 U.S.C. § 133 (1982). Approximately 1600 Deputy United States marshals are scattered throughout these districts. The District of Columbia District, with 120, employs the most deputy marshals. Telephone interview with William Dempsey, Public Information Officer, United States Marshals Service (Mar. 8, 1985).

In contrast, state prisons employ a large number of correctional officers. In 1981, for example, Illinois employed 3667 correctional officers; California, 3603; Texas, 3044; Maryland, 1552; Alabama, 1040; Connecticut, 920; North Dakota, 94. Bureau of Justice Statistics, U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics—1982*, Table 1.65, at 136-37 (1983).

56. 28 U.S.C. § 1651(a) (1982).

57. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

58. See *United States v. Hayman*, 342 U.S. 205, 221 n.35 (1952); see also *United States v. New York Tel. Co.*, 434 U.S. 159, 187 (1977) (Stevens, J., dissenting in part).

authority for a writ of habeas corpus ordering the custodian to produce a prisoner to prosecute his claim pro se, a federal court may, pursuant to the Act, issue a writ of mandamus.<sup>59</sup> The writ should be directed to the state custodian because at common law the only means of securing a prisoner's presence was to issue a writ of habeas corpus,<sup>60</sup> to which it was the custodian's duty to respond.<sup>61</sup>

Similarly, when a state prisoner's in-court testimony is required, the writ of mandamus to the Marshals Service is not "necessary or appropriate" to the court's jurisdiction because there is another method for securing the prisoner's presence: the writ of habeas corpus ad testificandum.<sup>62</sup> It does not become "necessary or appropriate" to the court's jurisdiction to impose costs on the Marshals Service simply because the state claims that it lacks funds to transport a prisoner.<sup>63</sup> "The fact that a party may be better able to effectuate its rights or duties if a writ is issued never has been . . . a sufficient basis for issuance of the writ."<sup>64</sup> Mandamus is an extraordinary remedy to be used when no other option exists.<sup>65</sup>

Although section 1983 of the Civil Rights Act<sup>66</sup> creates rights that are

59. In *Price v. Johnston*, 334 U.S. 266 (1948), the Supreme Court held that a federal court could, pursuant to the Act, order a federal prisoner to be produced in court to argue his habeas corpus appeal. In determining whether such an order would be "necessary" to a court's jurisdiction, the court compared it to the common law writs of habeas corpus. See *id.* at 281-84.

60. See *supra* note 8.

61. See *supra* note 10.

62. 28 U.S.C. § 2241(c) (1982). See *supra* note 8.

63. See *supra* notes 56-60 and accompanying text.

64. *United States v. New York Tel. Co.*, 434 U.S. 159, 189 (1977) (Stevens, J., dissenting in part). The writ should be issued to aid the court's duties and jurisdiction, not to reduce burdens placed on others. See *id.*; see also *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (courts may fashion appropriate modes of procedure to aid their habeas corpus jurisdiction); *cf., e.g., FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966) (injunction under Act used to "prevent impairment of the effective exercise of appellate jurisdiction"); *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978) ("conduct not shown to be detrimental to the court's jurisdiction . . . could not have been enjoined under the Act"); *Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1355-56 (10th Cir. 1972) (order restraining sheriff's sale reversed because order did not aid court's jurisdiction).

Therefore, an interpretation of the Act as a grant of authority to transfer to the United States Treasury the cost of complying with writs of habeas corpus ad testificandum is without support. "Any other interpretation of section 1651 would permit district courts to impose the expenses of litigation upon the Treasury of the United States whenever that seemed to the court to be a good idea." *Garland v. Sullivan*, 737 F.2d 1283, 1286-87 (3d Cir. 1984) (plurality opinion), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985).

65. "[I]f a court is able to effect a full and complete resolution of the issues before it without resorting to the extraordinary measures contemplated under the Act, then such measures cannot be employed." *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978); see *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (*per curiam*) ("mandamus is . . . to be invoked only in extraordinary situations"); *cf. Ex parte Fahey*, 332 U.S. 258, 259 (1947) ("Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies.").

66. 42 U.S.C. § 1983 (1982).

federal in nature,<sup>67</sup> the claim flows from the state-imposed incarceration or other action.<sup>68</sup> The state must therefore bear ultimate responsibility for the transportation costs of indigent prisoners unless Congress decides that federal aid is appropriate.<sup>69</sup> Courts are without power to order federal aid because that determination is one which Article I of the Constitution expressly leaves to Congress.<sup>70</sup>

## II. A PROPOSED COMPROMISE

One court,<sup>71</sup> recognizing the budgetary constraints that have arisen in many states and the federal government,<sup>72</sup> has ordered the state to deliver the inmate to the state or county prison facility closest to the United

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67. The Civil Rights Act, 42 U.S.C. § 1983 (1982), is important to "our constitutional scheme." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); see *Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977) (rights invoked are federal in nature); Aldisert Report, *supra* note 4, at 11 ("A significant number of conditions-of-confinement complaints raise constitutional questions of great importance.").

68. See 42 U.S.C. § 1983 (1982).

69. See *Garland v. Sullivan*, 737 F.2d 1283, 1292 (3d Cir. 1984) (Becker, J., concurring) (recommending that Congress consider the issue), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985). See *supra* notes 17, 25, 64 and accompanying text, and cases cited *supra* note 5.

In *Johnson v. Hubbard*, 698 F.2d 286 (6th Cir.), *cert. denied*, 104 S. Ct. 282 (1983), the district court had dismissed an indigent's action for failure to prosecute because the indigent could not pay his witness fees. See *id.* at 288. As the court of appeals noted, "[i]t is paradoxical to provide an indigent plaintiff with the right to proceed in court, then deny him a meaningful chance to exercise that right by not providing him assistance in paying routine costs in so exercising that right." *Id.* at 291. The court nevertheless upheld the dismissal because there was no statutory basis on which to award a payment of witness fees. See *id.* But see *United States ex rel. Helwig v. Cavell*, 171 F. Supp. 417, 423-24 (W.D. Pa. 1959) (allowing payment of witness fees), *aff'd sub nom. United States ex rel. Helwig v. Maroney*, 271 F.2d 329 (3d Cir. 1959), *cert. denied*, 362 U.S. 954 (1960).

As a matter of comity, it may be argued that "[t]o charge the states for actions brought in the federal courts, as well as for actions brought in the state courts, would be inequitable. Each sovereign should assume responsibility for the conduct of in forma pauperis litigation within its own court system." *United States ex rel. Griffin v. McMann*, 310 F. Supp. 72, 75 (E.D.N.Y. 1970); cf. *Bounds v. Smith*, 430 U.S. 817, 835 (1977) (Burger, C.J., dissenting) (doubtful proposition that federal government can grant rights to citizens by statute and then impose costs on state as a constitutional matter).

70. See U.S. Const. art. I, § 9, cl. 7. One court has noted that there is no authority for the proposition . . . that the question of who should pay for a state prisoner's presence is to be determined by reference to the varying interests of the parties that may be held responsible for these costs. Instead, the proper inquiry is whether Congress . . . ever authorized reimbursement for the costs of compliance with a writ.

*Wiggins v. County of Alameda*, 717 F.2d 466, 469 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1425 (1984). Indeed, the balancing of these burdens is a task more appropriate for Congress than for the courts. See *Garland v. Sullivan*, 737 F.2d 1283, 1292 (3d Cir. 1984) (Becker, J., concurring), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985).

71. *Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977).

72. See *Garland v. Sullivan*, 737 F.2d 1283, 1291-92 (3d Cir. 1984) (Becker, J., concurring) (discussing vexing financial problems of state and federal governments, and "financial realities"), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985).

States courthouse requiring the prisoner's presence.<sup>73</sup> The federal marshal was then responsible for delivering the prisoner to court and later returning him to the same facility.<sup>74</sup>

Although under present law courts are without power to issue such orders, this splitting of costs and responsibility is fair to both parties. The state is not unduly burdened when it transfers a prisoner from one state facility to another; such transfers occur regularly.<sup>75</sup> Nor is a great burden imposed on the United States marshal, as it is unlikely that he will have to travel out of the municipality in which he is stationed.<sup>76</sup> Transfer of custody will take place at a prison, not at a courthouse or some other neutral location, thereby minimizing security risks.<sup>77</sup> Moreover, if costs are divided, courts will be less likely to consider financial burdens when deciding whether to order the production of a prisoner.<sup>78</sup> The result would be to enhance courts' fact-finding abilities.<sup>79</sup>

The ideal resolution would be for the states and the Marshals Service to reach an agreement among themselves.<sup>80</sup> The Marshals Service is already empowered to enter into intergovernmental agreements for transporting prisoners.<sup>81</sup> In the absence of an agreement, congressional action

73. See *Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977); Aldisert Report, *supra* note 4, at 16 n.29.

74. See *Ballard v. Spradley*, 557 F.2d 476, 481 (5th Cir. 1977). This was the custom in at least one district. See *Story v. Robinson*, 689 F.2d 1176, 1178 (3d Cir. 1982).

75. See *Moeck v. Zajackowski*, 385 F. Supp. 463, 465 (W.D. Wis. 1974) ("there are frequent occasions for travel outside the prison by inmates of the prison for such purposes as medical treatment, attendance at funerals of close relatives, and appearances in state courts for various reasons"), *rev'd on other grounds*, 541 F.2d 177 (7th Cir. 1976); see, e.g., *United States v. Mauro*, 436 U.S. 340, 344 & n.3 (1978) (prisoner transferred between facilities); *Carmona v. Warden of Ossining Correctional Facility*, 549 F. Supp. 621, 621 (S.D.N.Y. 1982) (same). In addition, state officials may transfer prisoners between correctional facilities as a means of punishing them. See *Millemann & Millemann, The Prisoner's Right to Stay Where He Is: State and Federal Transfer Compacts Run Afoul of Constitutional Due Process*, 3 Cap. U.L. Rev. 223, 225-27 (1974); Note, *No Process Due Prisoners in Intrastate Transfers: Due Process Imprisoned Within the Entitlement Doctrine*, 38 U. Pitt. L. Rev. 561, 567-71 (1977).

76. The federal courts are located in major cities, see 28 U.S.C. §§ 81-131 (1982), where there are likely to be local jails and holding facilities.

77. Risk of escape and harm to the public is one of the factors courts consider when deciding whether to order the production of prisoners. See *supra* note 17.

78. See *Garland v. Sullivan*, 737 F.2d 1283, 1291-92 (3d Cir. 1984) (Becker, J., concurring), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985). Many jurisdictions consider financial burdens in determining whether to order the production of prisoners. See *supra* note 17.

79. See *Garland v. Sullivan*, 737 F.2d 1283, 1291-92 (3d Cir. 1984) (Becker, J., concurring) (to deny such orders because of costs may hinder "the ability of the federal courts to find facts accurately" and so "impair the vindication of civil rights"), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985).

80. See *Wiggins v. County of Alameda*, 717 F.2d 466, 469 (9th Cir. 1983) (*per curiam*) (decrying the inability of state and federal governments to reach a fair resolution of the matter), *cert. denied*, 104 S. Ct. 1425 (1984).

81. See 28 C.F.R. § 0.111(j) (1984).

is required.<sup>82</sup>

#### CONCLUSION

Federal courts may require the presence of state prisoners at civil rights trials. Under present law, the state must bear the cost and responsibility of producing a prisoner in court. This unfairly burdens the states because the prisoner is pursuing a federally based claim. The states and the United States Marshals Service should agree to share expenses. Failing that, Congress should grant courts the flexibility to apportion costs to the Marshals Service. Such flexibility would enhance the fact-finding abilities of the federal courts and thereby further the vindication of state prisoners' civil rights.

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82. See *Garland v. Sullivan*, 737 F.2d 1283, 1292 (3d Cir. 1984) (Becker, J., concurring) (suggesting that Congress consider this issue), *cert. granted sub nom. Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 105 S. Ct. 1166 (1985). Any congressional action should give courts sufficient flexibility in mediating the financial problems of the sovereigns. Cf. *id.* (Becker, J., concurring) (flexibility and creativity in mediating financial problems of state and federal governments should be encouraged); *Taylor v. Gibson*, 529 F.2d 709, 717 (5th Cir. 1976) (courts should develop "imaginative and innovative methods of dealing with the flood of prisoner complaints and suits").