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The Effect of Violations of the Interstate Agreement on Detainers on Subject Matter Jurisdiction

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THE EFFECT OF VIOLATIONS OF THE INTERSTATE AGREEMENT ON DETAINERS ON SUBJECT MATTER JURISDICTION

INTRODUCTION

The Interstate Agreement on Detainers (IAD)[1] is an interstate compact[2] that furnishes a procedure by which a prisoner currently incarcerated in one state[3]—the "sending state"[4]—can be transferred to another state—the "receiving state"[5]—to dispose of outstanding criminal charges

1. Initially proposed in 1956 by the Council of State Governments, *see* Council of State Governments, Suggested State Legislation Program for 1957, at 78-85 (1956) [hereinafter cited as Council of State Governments—1956], the Interstate Agreement on Detainers (IAD) has been enacted in 48 states, Puerto Rico, the United States Virgin Islands, Washington, D.C., and the United States. Carchman v. Nash, 105 S. Ct. 3401, 3403 (1985). Only Mississippi and Louisiana have not enacted it. *See* 18 U.S.C.A. app. § 1 historical note (West 1985) (listing complementary state versions of the IAD). "A detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." S. Rep. No. 1356, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4864, 4865; *see also* H.R. Rep. No. 1018, 91st Cong., 2d Sess. 2 (1970).

2. A compact is an agreement, a contract. The word is applied often to agreements between nations and states. *See, e.g.*, Texas v. New Mexico, 462 U.S. 554, 557-59 (1983) (negotiated agreement between those two states); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 95 (1938) (agreement entered into by Colorado and New Mexico with approval of Congress); Poole v. Fleeger, 36 U.S. (11 Peters) 185, 209 (1837) (nations and states have the sovereign power to enter into compacts establishing their boundaries). Agreements between nations are usually called treaties. Courts have spoken of compacts as "treaties" between states. *See Hinderlider*, 304 U.S. at 104; Burrus v. Turnbo, 743 F.2d 693, 700 (9th Cir. 1984), *vacated as moot sub nom.* Hijar v. Burrus, 106 S. Ct. 562 (1985). One major difference between treaties and compacts is that while Congress can invalidate or modify a treaty through subsequent legislation, *see* Chae Chan Ping v. United States, 130 U.S. 581, 600-01 (1889); Whitney v. Robertson, 124 U.S. 190, 195 (1888); The Head Money Cases, 112 U.S. 580, 599 (1884); F. Zimmermann & M. Wendell, The Interstate Compact Since 1925, at 32 (1951), a party to a compact cannot change its terms unilaterally. See *infra* note 38 and accompanying text.

The compact clause of the United States Constitution provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." United States Constitution, art. I, § 10, cl. 3. Congress consented in advance to the IAD by enacting the Crime Control Consent Act of 1934, ch. 406, 48 Stat. 909 (codified as amended at 4 U.S.C. § 112(a) (1982)) (consent "given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies"); *see* Cuyler v. Adams, 449 U.S. 433, 441 & n.9 (1981); S. Rep. No. 1356, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4864, 4866; H.R. Rep. No. 1018, 91st Cong., 2d Sess. 3 (1970). *But cf. Cuyler*, 449 U.S. at 450-52 (Rehnquist, J., dissenting) (the IAD is not a law that requires congressional consent under the compact clause).

3. Since Congress enacted the Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397 (1970) (codified at 18 U.S.C. App. (1982)), the United States and Washington, D.C. participate fully in the IAD as "states." *See* United States v. Mauro, 436 U.S. 340, 343 (1978).

4. *See* 18 U.S.C. app. § 2, art. II(b) (1982).

5. *See* 18 U.S.C. app. § 2, art. II(c) (1982).

against him in the receiving state.[6] Its main objective is "to encourage the expeditious and orderly disposition" of these charges[7] to reduce the prisoner and prison officials' period of uncertainty concerning the total length of the prisoner's sentence.[8] This benefits the prisoner,[9] officials working in the penal system[10] and society in general.[11] The procedures governing transfer and disposition of charges may be initiated either by the prisoner[12] or by the prosecuting authorities of the receiving state.[13]

6. A detainer may be filed for purposes other than prosecuting outstanding charges, for example, to merely question the individual. *See* Note, *The Interrelationship Between Habeas Corpus Ad Prosequendum, The Interstate Agreement on Detainers, and The Speedy Trial Act of 1974*: United States v. Mauro, 40 U. Pitt. L. Rev. 285, 289 (1979) [hereinafter cited as *Habeus Corpus Ad Prosequendum*]. This Note, however, will discuss only those situations where detainers are interposed for the purpose of bringing the individual to trial in receiving states. This is the case in approximately one-half to two-thirds of the instances where detainers are lodged against prisoners. *See* Carchman v. Nash, 105 S. Ct. 3401, 3417 & n.13 (1985) (Brennan, J., dissenting).

7. *See* 18 U.S.C. app. § 2, art. I (1982).

8. See *infra* note 63.

9. See *infra* note 63.

10. See *infra* notes 63, 128-34 and accompanying text.

11. See *infra* text accompanying note 127.

12. 18 U.S.C. app. § 2, art. III (1982). Article III was included in the IAD so that prisoners could force disposition of any detainer lodged against them. *See* Council of State Governments—1956, *supra* note 1, at 78-79 (distinguishing IAD art. III from art. IV; the former "makes the clearing of detainers possible at the instance of the prisoner"). See *infra* note 89. Detainers harm the prisoner's current term of incarceration. *See* Bennett, *The Correctional Administrator Views Detainers*, 9 Fed. Probation, July-Sept. 1945, at 8, 9 [hereinafter cited as Bennett I]. The mere existence of a detainer has caused prisoners to be denied parole. *Id.* at 9-10. In one case, the court noted that the lodging of a detainer caused the prisoner to be sent to a "maximum medium" security state penitentiary, rather than to an institution for youthful offenders along with his older codefendant, even though the two had prior records that were "practically identical;" it also affected his work assignments and barred him from working outside the penitentiary. *See* United States *ex rel.* Giovengo v. Maroney, 194 F. Supp. 154, 156 (W.D. Pa. 1961); *see also* United States v. Candelaria, 131 F. Supp. 797, 799 (S.D. Cal. 1955) (prisoner will be denied the privileges accorded a well-behaved prisoner, such as trusty status, desirable work assignments within the prison, work outside the prison, and parole, throughout his term solely because a detainer has been lodged against him); Pellegrini v. Wolfe, 225 Ark. 459, 464, 283 S.W.2d 162, 165 (1955) (Robinson, J., dissenting) (due to the lodging of a detainer, prisoner ineligible for parole, so that he must serve 15 years in prison rather than possibly as few as 5 years; he will also be denied trusty status); Note, *The Effect of the Interstate Agreement on Detainers Upon Federal Prisoner Transfer*, 46 Fordham L. Rev. 492, 510 (1977) [hereinafter cited as *Prisoner Transfer*]; Note, *The Interstate Agreement on Detainers: Defining the Federal Role*, 31 Vand. L. Rev. 1017, 1019-20 (1978). Detainers often have been abused, because the responsible authorities do not need to make out a prima-facie case. Many police departments and sheriffs can file them merely on suspicion. Bennett I, *supra*, at 9. Mr. Bennett, then the acting Director of the Federal Bureau of Prisons, *see* Bennett, *"The Last Full Ounce"*, 23 Fed. Probation, June 1959, at 20, 20 [hereinafter cited as Bennett II], stated that in fiscal 1958 there were 380 detainers filed against prisoners at Leavenworth Federal Penitentiary. *See id.* at 21. Of those, 211 were withdrawn without prosecution. *Id.* Bennett referred to them as a "nuisance," and he implied that many were placed in the prisoners' files vindictively. *See id.* (the lifting of detainers from a prisoner's file "usually" occurred "about the time the prisoners involved were finishing their sentences"); *see also* Barker v. Municipal Court, 64 Cal. 2d 806, 810, 415 P.2d 809, 812, 51 Cal. Rptr. 921, 924 (1966) (en banc) (prosecutor refused to act on

The process established by the IAD is rigorous;[14] the penalties for noncompliance are severe.[15]

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filed detainers, despite repeated requests by the prisoners, writing: "As far as I am concerned . . . [the prisoners] can sit and rot in prison for the rest of their lives."). For these reasons, the prisoner may be sufficiently confident of his innocence of the charges underlying the detainer or desirous of minimizing the harm to his present term of incarceration to request disposition of the detainer.

The IAD and its intrastate counterpart, which the Council initially named the "Intrastate Detainer Statute", *see* Council of State Governments—1956, *supra* note 1, at 76, but later renamed the Uniform Mandatory Disposition of Detainers Act (UMDDA), see *infra* text accompanying note 83, are both intended to give the prisoner subject to a detainer the opportunity to eliminate its harmful effects to his rehabilitation by "provid[ing] a way for him to test the substantiality of detainers placed against him and to secure final judgment on any indictments, informations or complaints outstanding against him." Council of State Governments—1956, *supra* note 1, at 76-77; *see also* Carchman v. Nash, 105 S. Ct. 3401, 3412-13 (1985) (Brennan, J., dissenting); United States v. Mauro, 436 U.S. 340, 351 (1978).

For further discussion of the well recognized harmful effects of detainers, see generally United States v. Ford, 550 F.2d 732, 737-40 (2d Cir. 1977) (citing cases), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978); L. Abramson, Criminal Detainers 29-35 (1979); Dauber, *Reforming the Detainer System: A Case Study*, 7 Crim. L. Bull. 669, 691-99 (1971); Shelton, *Unconstitutional Uncertainty: A Study of the Use of Detainers*, 1 Prospectus 119, 119-27 (1968); Note, *The Detainer: A Problem in Interstate Criminal Administration*, 48 Colum. L. Rev. 1190, 1191-94 (1948); Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rutgers L. Rev. 828, 835-36 (1964); Note, *Detainers and the Correctional Process*, 1966 Wash. U.L.Q. 417, 418-23.

13. 18 U.S.C. app. § 2, art. IV (1982). The IAD provides no mechanism whereby the sending state can initiate transfer and disposition of charges. This probably is not accidental, because prosecutors and correction officials in the sending state may have no desire to enforce the IAD strictly against the receiving state. *See* Bennett II, *supra* note 12, at 23 ("opposition to [the IAD] may continue to be expected from officials who have no interest in the rehabilitative aspects of criminal justice and who wish to continue manipulating detainers for quasi-judicial and vengeful purposes"). See *infra* note 52. The author has been unable to locate any cases where the sending state moved to intervene to enforce its rights under the IAD.

14. *See* 18 U.S.C. app. § 2, arts. III(a)-(e), IV(a)-(d) (1982).

15. *See id.* arts. III(d), IV(e), V(c) (1982). IAD art. III(d) reads, in relevant part:

> If trial is not had on any indictment, information, or complaint contemplated [under art. III] prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Art. IV(e) reads:

> If trial is not had on any indictment, information, or complaint contemplated [under art. IV] prior to the prisoner's being returned to the original place of imprisonment [at the earliest practicable time consonant with the purposes of this agreement], such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Art. V(c) reads:

> If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III [(180 days)] or article IV [(120 days)] hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the

While the Supreme Court has not addressed the issue,[16] the courts of appeals have disagreed, in the context of habeas corpus proceedings, on the nature of IAD violations. If IAD violations are "strictly jurisdictional" in nature,[17] they may be raised for the first time in federal or state

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same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

Although there have been no reported challenges to the constitutionality of the time limitations contained in the IAD, the similarly restrictive, legislatively-imposed time limits of the Speedy Trial Act of 1974 (STA), 18 U.S.C. §§ 3161-3174 (1982), see *infra* notes 102-03, were twice declared unconstitutional by the same district court judge as violative of the doctrine of separation of powers. *See* United States v. Brainer, 515 F. Supp. 627, 630 (D. Md. 1981) (Young, J.), *rev'd and remanded*, 691 F.2d 691 (4th Cir. 1982); United States v. Howard, 440 F. Supp. 1106, 1109 (D. Md. 1977) (Young, J.), *aff'd on other grounds*, 590 F.2d 564 (4th Cir.), *cert. denied*, 440 U.S. 976 (1979); *see also* United States v. Martinez, 538 F.2d 921, 923 & n.4 (2d Cir. 1976). The Fourth Circuit rejected Judge Young's position, holding that "trial rights are a proper subject of legislation," and that the time limits contained in the STA do not "intrude upon the zone of judicial self-administration to such a degree as to 'prevent[] the [judiciary] from accomplishing its constitutionally assigned functions.' " United States v. Brainer, 691 F.2d 691, 698 (4th Cir. 1982) (brackets in original).

16. *See* Kerr v. Finkbeiner, 106 S. Ct. 263, 264 (1985) (White, J., dissenting from denial of certiorari).

17. The critical question is whether violations of the IAD divest courts of subject matter jurisdiction. Generally, appellate court review is restricted to points addressed at trial. *See, e.g.*, Steagald v. United States, 451 U.S. 204, 209-11 (1981); Singleton v. Wulff, 428 U.S. 106, 120 (1976); Hormel v. Helvering, 312 U.S. 552, 556 (1941). One issue that may be raised initially on appeal is absence of subject matter jurisdiction. *See* Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379, 382 (1884); United States v. McGrath, 558 F.2d 1102, 1106 (2d. Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); United States v. Isaacs, 493 F.2d 1124, 1140 (7th Cir.) (per curiam), *cert. denied*, 417 U.S. 976 (1974); Sewell v. United States, 406 F.2d 1289, 1292 (8th Cir. 1969); Fed. R. Crim. P. 12(b)(2).

This issue may be raised initially on appeal because absence of subject matter jurisdiction is fatal to a prosecution; a judgment rendered without subject matter jurisdiction is void. *See* Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 704 & n.10 (1982); Jones v. Giles, 741 F.2d 245, 248 (9th Cir. 1984). Two situations must be distinguished. Certain facts are "strictly jurisdictional," Noble v. Union River Logging R.R., 147 U.S. 165, 173 (1893), while other facts are "*quasi* jurisdictional." *Id.* (emphasis in original). The latter category of facts, if erroneously found by the court, are subject only to direct attack, and are not subject to collateral attack. *See id.* This category of facts includes:

> allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a Federal court, . . . the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors; . . . and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act.

Id. at 173-74 (citations omitted).

On the other hand, strictly jurisdictional facts are those which, if not present, leave the court's judgment void. *Id.* at 173. "Only in the rare instance of a clear usurpation of power will a judgment be rendered void." Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 649 (1st Cir. 1972); *see* Hooks v. Hooks, 771 F.2d 935, 949 (6th Cir. 1985); Coleman v. Court of Appeals, 550 F. Supp. 681, 684 (W.D. Okla. 1980); Hobbs v. United States Office of Personnel Mgmt., 485 F. Supp. 456, 458 (M.D. Fla. 1980); J. Moore, J. Lucas & K. Sinclair, Jr., 7 Moore's Federal Practice ¶ 60.25[2], at 60-226 to -227 (2d ed. 1985).

A "clear usurpation of power" occurred in Kalb v. Feuerstein, 308 U.S. 433 (1940). In

habeus corpus proceedings.[18] The Third and Fifth Circuits hold that a

Kalb, the question presented was whether a state court that had properly exercised jurisdiction originally had its jurisdiction divested automatically when one party filed a petition for bankruptcy. *See id.* at 435-36. The Court held that through the Frazier-Lemke Act "Congress intended to, and did deprive the [state court] of the power and jurisdiction to continue or maintain in any manner" its proceedings once the state court received notice of the filing of the bankruptcy petition. *Id.* at 440. The court granted relief in the collateral proceeding before it. *See id.* at 436, 443-44. The Court found the statutory exclusion to be "self-executing," *id.* at 443, that is, the act of filing the petition automatically relieved the petitioner "of the necessity of litigation elsewhere and its consequent expense." *Id.*

Like the Frazier-Lemke Act, the IAD commands, through mandatory language, that upon the occurrence of IAD violations, the court in the receiving state divest itself of jurisdiction over the charges "with prejudice." *Compare Kalb*, 308 U.S. at 440 ("The filing of a petition . . . shall immediately subject the [petitioner] and all his property . . . to the exclusive jurisdiction of the [bankruptcy] court.") (quoting Frazier-Lemke Act § (n)) *with* 18 U.S.C. app. § 2, art. III(d) (1982) ("If trial is not had on any [charge] contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such [charge] shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."), *id.* art. IV(e) ("If trial is not had on any [charge] contemplated hereby prior to the prisoner's being returned to the original place of imprisonment . . ., such [charge] shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.") *and* IAD art. V(c) (on the occurrence of certain events, "the appropriate court of the jurisdiction where the [charge] has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect"). These provisions are statutorily self-executing, just as the Frazier-Lemke Act is.

One reason many courts have not viewed IAD violations as jurisdictional is that in State v. West, 79 N.J. Super. 379, 191 A.2d 758 (App. Div. 1963), it was held that the IAD's provisions are not self-executing. *See id.* at 387, 191 A.2d at 763; *see also* Gayles v. Hedman, 309 Minn. 289, 291, 244 N.W.2d 154, 155-56 (1976); State v. Lippolis, 107 N.J. Super. 137, 147, 257 A.2d 705, 711 (App. Div. 1969) (Kolovsky, J., dissenting), *rev'd per curiam*, 55 N.J. 354, 262 A.2d 203 (1970); People v. White, 33 A.D.2d 217, 221, 305 N.Y.S.2d 875, 878 (1969); People v. Squitieri, 91 Misc. 2d 290, 295, 397 N.Y.S.2d 888, 892 (Sup. Ct. 1977). The *West* court correctly held that a court in the sending state had no power to dismiss charges of the receiving state. *See West*, 79 N.J. Super. at 386-87, 191 A.2d at 762. Its error occurred in confusing the place in which the provisions of the IAD are self-executing with the fact of whether they are self-executing. Although the IAD does "contemplate[] a judicial proceeding or act in the receiving state resulting in dismissal of the pending indictments," *id.* at 387, 191 A.2d at 763, the very existence of the violation mandates the judicial proceeding or act in the receiving state, making the provisions self-executing. *Cf.* Kalb v. Feuerstein, 308 U.S. 433, 440-43 (1940) (provisions of the Frazier-Lemke Act are self-executing when bankruptcy petition is filed).

18. If IAD violations are strictly jurisdictional, they may be raised for the first time in a proceeding under the federal habeas corpus statutes, *see* 28 U.S.C.A. §§ 2241-2255 (West 1971 & Supp. 1986), or in a proceeding under their state counterparts, *see, e.g.*, Cal. Penal Code §§ 1473-1508 (West 1982 & Supp. 1986); Ill. Ann. Stat. ch. 65, §§ 1-39 (Smith-Hurd 1959 & Supp. 1985); N.J. Stat. Ann. §§ 2A:67-1 to -36 (West 1976 & Supp. 1985); N.Y. Civ. Prac. Law §§ 7001-7012 (McKinney 1980 & Supp. 1986). In these proceedings, the petitioned court will act only to correct "fundamental defects" in the prior proceedings, or if there are "exceptional circumstances where the need for the remedy afforded by the writ of *habeus corpus* is apparent." *See* Hill v. United States, 368 U.S. 424, 428 (1962) (quoting Bowen v. Johnston, 306 U.S. 19, 27 (1939)); *see also* Davis v. United States, 417 U.S. 333, 346 (1974); Shack v. Attorney General, 776 F.2d 1170, 1172 (3d Cir. 1985); Kerr v. Finkbeiner, 757 F.2d 604, 607 (4th Cir.), *cert. denied*, 106 S. Ct. 263 (1985); United States v. Williams, 615 F.2d 585, 590 (3d Cir. 1980); Edwards v. United States, 564 F.2d 652, 654 (2d Cir. 1977) (per curiam). Absence of subject matter

violation of the IAD can merit relief under the habeas corpus statutes,[19] although neither court appears to have adopted the position that IAD violations divest courts of subject matter jurisdiction.[20] The First,[21] Fourth,[22] Seventh,[23] Eighth[24] and Tenth Circuits[25] hold that IAD violations alone do not warrant relief under the habeas corpus statutes unless the prisoner at least demonstrates that actual prejudice resulted from the violation.[26] The Second Circuit holds that IAD violations never merit habeas corpus relief.[27] The Ninth Circuit has tried to reconcile conflicting intracircuit decisions by ruling that only violations of the IAD's time

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jurisdiction is such a fundamental defect. See *supra* note 17. It always entitles a petitioner to habeas corpus relief. See *infra* note 35 and accompanying text.

19. *See* Gibson v. Klevenhagen, 777 F.2d 1056, 1058-59 (5th Cir. 1985); United States v. Williams, 615 F.2d 585, 590 (3d Cir. 1980); *see also* Shack v. Attorney General, 776 F.2d 1170, 1173 (3d Cir. 1985).

20. *See* Gibson v. Klevenhagen, 777 F.2d 1056, 1058-59 (5th Cir. 1985) (discussing applicability of rules of waiver); United States v. Williams, 615 F.2d 585, 589-90 (3d Cir. 1980) (a defendant who raises the IAD violation has an absolute defense).

21. *See* Fasano v. Hall, 615 F.2d 555, 557-58 (1st Cir.), *cert. denied*, 449 U.S. 867 (1980). The *Fasano* court applied the standard of Davis v. United States, 417 U.S. 333 (1974), that claimed non-jurisdictional errors are cognizable in a collateral attack only if the defendant is prejudiced and the error is "a fundamental defect which inherently results in a miscarriage of justice," so that it "present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent," *see Davis*, 417 U.S. at 346 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). *See Fasano*, 615 F.2d at 557-58.

22. *See* Kerr v. Finkbeiner, 757 F.2d 604, 607 (4th Cir.), *cert. denied*, 106 S. Ct. 263 (1985). In Bush v. Muncy, 659 F.2d 402 (4th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982), the court held that a violation of one of the IAD's anti-shuttling provisions is not subject to collateral review at all. *See id.* at 409; *see also* Kerr v. Finkbeiner, 757 F.2d at 606-07.

23. *See* United States *ex rel.* Holleman v. Duckworth, 770 F.2d 690, 692 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 828 (1986). *But see* Neville v. Cavanagh, 611 F.2d 673, 679 & n.7 (7th Cir. 1979) (Cudahy, J., dissenting), *cert. denied*, 446 U.S. 908 (1980).

24. *See* Shigemura v. United States, 726 F.2d 380, 381 (8th Cir. 1984) (per curiam); Huff v. United States, 599 F.2d 860, 863 (8th Cir.), *cert. denied*, 444 U.S. 952 (1979); *see also* Young v. Mabry, 471 F. Supp. 553, 562 (E.D. Ark. 1978), *aff'd per curiam*, 596 F.2d 339 (8th Cir.), *cert. denied*, 444 U.S. 853 (1979).

25. *See* Greathouse v. United States, 655 F.2d 1032, 1034 (10th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 926 (1982); *see also* Gray v. Benson, 458 F. Supp. 1209, 1215 (D. Kan. 1978), *aff'd per curiam*, 608 F.2d 825 (10th Cir. 1979).

26. Under this view, the prisoner would need to demonstrate that he "in fact suffered the particular harm the IAD was designed to prevent," which is discriminatory treatment due to the existence of the detainer. *See* Note, *Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers*, 83 Colum. L. Rev. 975, 1027-28 (1983) [hereinafter cited as *Federal Habeas Corpus Review*]; *see also* Kerr v. Finkbeiner, 757 F.2d 604, 607 (4th Cir.), *cert. denied*, 106 S. Ct. 263 (1985); Huff v. United States, 599 F.2d 860, 863 (8th Cir.) (dictum), *cert. denied*, 444 U.S. 952 (1979); Williams v. Dalsheim, 480 F. Supp. 1049, 1054 (E.D.N.Y. 1979). The Third Circuit has stated that prejudice existed due to counsel's failure to raise the IAD violation at trial, since had he done so the complaint would have been dismissed. United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). This view of "prejudice" merely restates the proposition that IAD violations are an absolute defense. Failure to raise the issue at trial is not "the particular harm the IAD was designed to prevent." *See Federal Habeas Corpus Review*, *supra*, at 1027.

27. *See* Rivera v. Harris, 643 F.2d 86, 90 n.2 (2d Cir.), *rev'd on other grounds*, 454

limitations merit habeas corpus relief because those limitations protect the constitutional right to a speedy trial.[28] The Ninth Circuit reasoned that because the anti-shuttling provisions, which prohibit more than one transfer of the prisoner to the receiving state,[29] do not protect any constitutional right, violations of those provisions do not merit habeas corpus relief.[30] The Sixth Circuit also has produced conflicting intracircuit decisions. One panel's decision implies that IAD violations divest a court of subject matter jurisdiction.[31] Two later panels rejected this analysis.[32] One state supreme court has held that IAD violations deprive courts of subject matter jurisdiction.[33]

This Note argues that under the IAD receiving states agree to exercise their subject matter jurisdiction subject to conditions. Failure of the receiving state to prosecute the prisoner in accordance with the restrictions imposed by the IAD compels the court in the receiving state hearing the matter to divest itself automatically of subject matter jurisdiction over the outstanding charges.[34] This Note concludes that because absence of subject matter jurisdiction always entitles a petitioner to relief under the habeas corpus statutes,[35] habeas corpus relief should be granted whenever a violation of the IAD occurs and the prisoner cannot secure other

U.S. 339 (1981); Edwards v. United States, 564 F.2d 652, 653 (2d Cir. 1977) (per curiam).

28. *See* Carlson v. Hong, 707 F.2d 367, 368 (9th Cir. 1983) (per curiam).

29. See *infra* note 44.

30. *See* Carlson v. Hong, 707 F.2d 367, 368 (9th Cir. 1983) (per curiam).

31. *See* Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979). Although the *Stroble* decision is not explicit in its holding, a later decision of the Sixth Circuit explained that *Stroble* stands for the proposition that "a violation of the IAD is jurisdictional and deprives a trial court of any power to proceed with criminal proceedings on the indictment." *See* Mars v. United States, 615 F.2d 704, 706 n.8 (6th Cir.) (answering the dissent, which argued that *Stroble* was controlling), *cert. denied*, 449 U.S. 849 (1980).

32. *See* Kowalak v. United States, 645 F.2d 534, 536-37 (6th Cir. 1981); Mars v. United States, 615 F.2d 704, 706 & n.8 (6th Cir.), *cert. denied*, 449 U.S. 849 (1980); *see also* United States v. Eaddy, 595 F.2d 341, 346 (6th Cir. 1979) (rejecting the contention that IAD violations are jurisdictional, but not mentioning *Stroble*).

33. *See* Moore v. Whyte, 266 S.E.2d 137, 141 (W. Va. 1980). Two other courts reached this conclusion, but were later overruled. *See* Enright v. United States, 434 F. Supp. 1056, 1058 (S.D.N.Y. 1977), *overruled per curiam*, Edwards v. United States, 564 F.2d 652, 653-54 (2d Cir. 1977) (holding that IAD violations are not cognizable in habeas corpus proceedings, without mentioning *Enright*); People v. Jacobs, 198 Colo. 75, 77, 596 P.2d 1187, 1187-88 (1979) (en banc), *overruled*, People v. Moody, 676 P.2d 691, 694-95 (Colo. 1984) (en banc).

34. The court in the receiving state must first determine that an IAD violation has occurred and then take the required actions because the sending state is powerless to compel such actions merely by enacting the IAD. See *infra* note 88 and accompanying text.

35. McNally v. Hill, 293 U.S. 131, 138 (1934); *see* Sunal v. Large, 332 U.S. 174, 182 (1947); Bowen v. Johnston, 306 U.S. 19, 24 (1939); 28 U.S.C. §§ 2254(d)(4), 2255 (1982); Mills & Herrmann, *Collateral Attacks on Convictions: A Survey of Federal Remedies*, 12 J. Marshall J. Prac. & Proc. 27, 30 (1978); *see also* Hill v. United States, 368 U.S. 424, 428 (1962).

relief.[36] The prisoner should not be required to demonstrate actual prejudice to be accorded such relief; violation of the IAD suffices.

I. OPERATION OF THE IAD

Contrary to the view of various courts and commentators,[37] the IAD is not merely a statute. Rather, it is an interstate compact. This distinction is critical because a compact is not subject to unilateral alteration.[38]

A compact establishes a *contractual* relationship between the signatory states.[39] The terms of the contract created by the IAD govern the prose-

36. Normally, a habeas corpus petitioner must exhaust available state remedies before a federal court can grant the requested relief. Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam); Pitchess v. Davis, 421 U.S. 482, 486 (1975); Picard v. Connor, 404 U.S. 270, 275 (1971); 28 U.S.C. § 2254(b) (1982). In the interests of comity, the state's highest court should have the opportunity to review the claim before the federal court intervenes. *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 515 (1982); *Ex parte* Hawk, 321 U.S. 114, 116-17 (1944) (per curiam); Moore v. Fulcomer, 609 F. Supp. 171, 175 (E.D. Pa. 1985). IAD cases apply the exhaustion doctrine. *See* Kerr v. Finkbeiner, 757 F.2d 604, 605-06 (4th Cir.) (indicating that the prisoner has given the state supreme court the opportunity to review his claim), *cert. denied*, 106 S. Ct. 263 (1985); Neville v. Cavanagh, 611 F.2d 673, 675-76 (7th Cir. 1979) (refusing to entertain prisoner's petition because he had not exhausted his state remedies), *cert. denied*, 446 U.S. 908 (1980).

37. *See* Greathouse v. United States, 655 F.2d 1032, 1034 (10th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 926 (1982); United States v. Eaddy, 595 F.2d 341, 346 (6th Cir. 1979); Camp v. United States, 587 F.2d 397, 400 (8th Cir. 1978); United States v. Palmer, 574 F.2d 164, 167 (3d Cir.), *cert. denied*, 437 U.S. 907 (1978); Grizzell v. Tennessee, 601 F. Supp. 230, 231 (M.D. Tenn.), *appeal dismissed mem.*, 746 F.2d 1476 (6th Cir. 1984); Gray v. Benson, 458 F. Supp. 1209, 1213 (D. Kan. 1978), *aff'd per curiam*, 608 F.2d 825, 827 (10th Cir. 1979); People v. Squitieri, 91 Misc. 2d 290, 294-95, 397 N.Y.S.2d 888, 892 (Sup. Ct. 1977); State v. Brown, 118 Wis. 2d 377, 386, 348 N.W.2d 593, 598 (Ct. App. 1984); *Federal Habeas Corpus Review*, *supra* note 26, at 1005; *Prisoner Transfer*, *supra* note 12, at 525.

38. *See* Carchman v. Nash, 105 S. Ct. 3401, 3418 n.18, 3419 n.19 (1985) (Brennan, J., dissenting); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 12-13 (1823); Bush v. Muncy, 659 F.2d 402, 411 (4th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982); President, Managers, & Co. v. Trenton City Bridge Co., 13 N.J. Eq. 46, 51-52 (Ch. 1860); State v. Hoofman, 9 Md. 28, 30-31 (1856); Zimmermann & Wendell, *supra* note 2, at 32; Comment, *Some Legal and Practical Problems of the Interstate Compact*, 45 Yale L.J. 324, 329 (1935) [hereinafter cited as *Some Legal and Practical Problems*]; *cf.* Texas v. New Mexico, 462 U.S. 554, 564 (1983) ("no court may order relief inconsistent with [a compact's] express terms").

39. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106 (1938) (a compact is "binding upon the citizens of each State" to the agreement); Virginia v. Tennessee, 148 U.S. 503, 520 (1893) ("Compacts . . . cover all stipulations affecting the conduct or claims of the parties."); United States *ex rel.* Esola v. Groomes, 520 F.2d 830, 835 (3d Cir. 1975) (IAD is "binding" on the party states); State *ex rel.* Dyer v. Sims, 134 W. Va. 278, 290, 58 S.E.2d 766, 773 (1950) (a compact "creates what is in legal effect a contract binding on all the parties thereto"), *rev'd on other grounds*, 341 U.S. 22 (1951); *see also* F. Zimmermann & M. Wendell, The Law and Use of Interstate Compacts 7 (1976) ("The substantive law of compacts is principally contract law."); *Some Legal and Practical Problems*, *supra* note 38, at 329 (statutes inconsistent with compacts are invalid because they impair the obligation of contracts). The IAD explicitly states that it is a contract. *See* 18 U.S.C. app. § 2, preamble ("The *contracting* States solemnly agree . . . .") (emphasis added).

The exchange of mutual promises by the states is detrimental, and so suffices as consid-

cution of a prisoner of one state by another state. The sending state promises to cede custody over its prisoner to the receiving state for the limited purpose of disposing of *all*[40] outstanding charges against the prisoner.[41] As consideration for the sending state's promise to deliver the prisoner, the receiving state agrees to limit its subject matter jurisdiction over the prisoner. The IAD automatically imposes conditions on the receiving state's jurisdiction[42] through its time limitations[43] and its anti-

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eration supporting the IAD. *See* Virginia v. Tennessee, 148 U.S. 503, 520 (1893). A valid bilateral contract exists, with benefits accruing to both states involved. The receiving state gains the opportunity to vindicate its laws before time can erode the strength of its case. *See* S. Rep. No. 1356, 91st Cong., 2d Sess. 6 (letter from R. Kleindienst, Deputy Attorney General, to Chairman Celler of the House Comm. on the Judiciary), *reprinted in* 1970 U.S. Code Cong. & Ad. News, 4864, 4868; H.R. Rep. No. 1018, 91st Cong., 2d Sess. 6 (1970) (same). Additionally, the receiving state obtains the prisoner with a minimum of red tape. *See* Council of State Governments—1956, *supra* note 1, at 78. The sending state profits from the IAD by a reduction in the uncertainty of the length of the prisoner's term of incarceration, which assists it to properly plan its program of rehabilitation. *See* Carchman v. Nash, 105 S. Ct. 3401, 3413 n.6 (1985) (Brennan, J., dissenting); 18 U.S.C. app. § 2, art. I (1982); Council of State Governments—1956, *supra* note 1, at 75. See *infra* note 63.

40. *See* 18 U.S.C. app. 2, art. III(d) (1982); *id.* arts. IV(b) and (e) (acting conjunctively to equal the force of *id.* art. III(d)).

41. *See id.* art. V(g). The action taken by the sending state in delivering up the prisoner to the receiving state is voluntary. *See* Ponzi v. Fessenden, 258 U.S. 254, 260 (1922) (a state may choose to waive "its strict right to exclusive custody of [the prisoner] for vindication of its laws in order that the other [state] may also subject him to conviction of crime against it"); *id.* at 261 (no jurisdiction can acquire personal jurisdiction over a prisoner without the consent of the imprisoning jurisdiction); Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 370 (1872) (if the governor of the sending state refuses to extradite the prisoner, "there is no means of compulsion"); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 109 (1860) ("The performance of th[e] duty [to extradite an individual] . . . is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union."); *see also* Note, *Detainers and the Correctional Process*, 1966 Wash. U.L.Q., 417, 424 & n.31. The IAD gives legal force to detainers. *See* Burrus v. Turnbo, 743 F.2d 693, 700 (9th Cir. 1984) (recognizing that under the IAD, each participating state gives up "part of its 'rights' to hold prisoners"), *vacated as moot sub nom.* Hijar v. Burrus, 106 S. Ct. 562 (1985); *cf.* Hincks, *The Need for Comity in Criminal Administration*, 9 Fed. Probation, July-Sept. 1945, at 3, 3 (detainers have no intrinsic power) (pre-IAD statement). The IAD reserves to the governor of the sending state the right to refuse to surrender a prisoner, on his own motion or on the prisoner's motion. *See* 18 U.S.C. app. § 2, art. IV(a) (1982); *see also* United States v. Mauro, 436 U.S. 340, 363 n.28 (1978); O'Connor v. Cole, 17 Pa. D. & C.3d 233, 234 (C.P. Cumberland Co. 1980); Council of State Governments—1956, *supra* note 1, at 78.

42. *See* Burrus v. Turnbo, 743 F.2d 693, 700 (9th Cir. 1984) (a receiving state can obtain prisoners through the IAD only if it "meets certain *conditions*" listed in the compact) (emphasis added), *vacated as moot sub nom.* Hijar v. Burrus, 106 S. Ct. 562 (1985); United States v. Mauro, 544 F.2d 588, 597 (2d Cir. 1976) (Mansfield, J., dissenting) (the IAD empowers states to obtain prisoners, "subject to certain *conditions*") (emphasis added), *rev'd*, 436 U.S. 340 (1978); *see also* United States v. Rauscher, 119 U.S. 407, 420-24 (1886) (extradition agreement limits the subject matter jurisdiction under which the prisoner is to be tried). *Contra* Camp v. United States, 587 F.2d 397, 399 (8th Cir. 1978) (the jurisdiction of the court derives from the offense rather than from the IAD).

43. *See* 18 U.S.C. app. § 2, arts. III(a), IV(c) (1982).

shuttling provisions.[44] The receiving state must accept the sending state's offer subject to these conditions.[45] By enacting the IAD, the state legislature commands its judiciary and prosecutors, when that state acts as a receiving state, to respect the conditions imposed on its exercise of jurisdiction over the prisoner and the offense.[46]

The receiving state promises the sending state, and commands its own judiciary, to forfeit subject matter jurisdiction over the charges underlying the detainer "with prejudice"[47] should any of the participants in the

44. *See id.* arts. III(d), IV(e). The return of the prisoner to the sending state "automatically" extinguishes the detainer. *See* Burrus v. Turnbo, 743 F.2d 693, 702 (9th Cir. 1984), *vacated as moot sub nom.* Hijar v. Burrus, 106 S. Ct. 562 (1985); *see also* Walker v. King, 448 F. Supp. 580, 586 (S.D.N.Y. 1978) (permitting only one transfer advances one purpose of the IAD); People v. Reyes, 98 Cal. App. 3d 524, 530, 159 Cal. Rptr. 572, 575-76 (1979) (18 U.S.C. app. § 2, art. IV(e) allows only one rendition) (citing *Walker*, 448 F. Supp. at 586); Hughes v. District Ct., 197 Colo. 396, 400, 593 P.2d 702, 705 (1979) (en banc) (IAD "Article IV(e) allows the receiving state only one rendition"); Commonwealth v. Diggs, 273 Pa. Super. 121, 122-23, 416 A.2d 1119, 1120 (1979) (per curiam) (receiving state must "finally dispose" of all charges before returning the prisoner to the sending state) (dictum). *Compare* 18 U.S.C. app. § 2, art. III(d) (1982) (instructing the court to dismiss the charges with prejudice if the prisoner is returned to the sending state before trial) *and id.* art. IV(e) (same) *with id.* art. V(c) (instructing the court to dismiss the charges with prejudice *and* to recognize that the detainer is without any further "force or effect" if the receiving state refuses to accept the prisoner or does not bring him to trial within the applicable time limit). For this reason, various courts have referred to these sections as "anti-shuttling" provisions. *See* United States v. Woods, 775 F.2d 1059, 1060 (9th Cir. 1985); Burrus v. Turnbo, 743 F.2d 693, 703 (9th Cir. 1984), *vacated as moot sub nom.* Hijar v. Burrus, 106 S. Ct. 562 (1985); People v. Higinbotham, 712 P.2d 993, 1000 (Colo. 1986) (en banc).

45. "It is fundamental that no act constitutes an acceptance unless it is an acceptance of the offer which has been made." Zimmermann & Wendell, *supra* note 39, at 8; *accord* Iselin v. United States, 271 U.S. 136, 139 (1926); W. Jaeger, 1 Williston on Contracts § 73 (3d ed. 1958 reprint); Restatement of Contracts § 59 (1932); *cf.* Carchman v. Nash, 105 S. Ct. 3401, 3419 n.19 (Brennan, J., dissenting) (amendment of IAD by the Kentucky legislature "expressly notes . . . that it can be 'binding only . . . between those party states which specifically execute the same' amendment") (quoting Ky. Rev. Stat. § 440.455(1) (1985)).

46. "The States with the consent of Congress may enter into compacts with each other and the provisions of such compacts may limit the agreeing States in the exercise of their respective [governmental] powers." United States v. Bekins, 304 U.S. 27, 52 (1938). The state legislature, which defines the jurisdiction of its statutory courts, including its criminal trial courts, has the power to limit the jurisdiction it vests in those courts. *See, e.g.*, Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 763 n.27 (1982); Angel v. Bullington, 330 U.S. 183, 197 (1947) (Reed, J., dissenting); Gardner & Florence Call Cowles Found. v. Empire Inc., 754 F.2d 478, 481 n.4 (2d Cir. 1985); Fantis Foods, Inc. v. Standard Importing Co., 49 N.Y.2d 317, 324, 402 N.E.2d 122, 124, 425 N.Y.S.2d 783, 785 (1980). The IAD is a limitation on the receiving state. The command to dismiss complaints with prejudice is directed at courts in receiving states. *See* State v. West, 79 N.J. Super. 379, 386, 191 A.2d 758, 762 (App. Div. 1963); *accord* Mokone v. Fenton, 710 F.2d 998, 1003 (3d Cir. 1983); United States v. Gallipoli, 599 F.2d 100, 102 (5th Cir. 1979); Dodson v. Cooper, 705 P.2d 500, 504 (Colo. 1985) (en banc), *cert. denied*, 106 S. Ct. 857 (1986); Giardino v. Bourbeau, 193 Conn. 116, 126-27, 475 A.2d 298, 304 (1984); Gayles v. Hedman, 309 Minn. 289, 291, 244 N.W.2d 154, 155-56 (1976) (per curiam).

47. *See* 18 U.S.C. app. § 2, arts. III(d), IV(e), V(c) (1982). The sanction of dismissal with prejudice has been described by Congress as having the effect of "bar[ring] any future prosecution against the defendant for charges arising out of the same conduct."

prosecution in either state fail to comply with the conditions of transfer.[48] This promise is necessary for enforcement purposes because the IAD is interjurisdictional.[49] The sending state lacks power to order the receiving state to abandon its prosecution when IAD violations occur.[50] By making the conditional promise to dismiss its charges, the receiving state allows the prisoner, as a third party beneficiary[51] to the contract between the states, to enforce the IAD by seeking specific performance of the contract.[52]

Many courts, including some reviewing habeas corpus petitions, have

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H.R. Rep. No. 1508, 93d Cong., 2d Sess. 23, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7401, 7416; *see Speedy Trial: Hearing on S. 754 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 93d Cong., 1st Sess. 111 (1973) (statement of Joseph T. Sneed, Deputy Attorney General, Dep't of Justice); 120 Cong. Rec. 41,576 (1974) (remarks of Rep. Latta).

48. The IAD is mandatory as well on officials in the sending state. People v. Lincoln, 42 Colo. App. 512, 516, 601 P.2d 641, 644 (1979). If officials in the sending state violate the IAD, the prisoner will be granted the same relief as if an official of the receiving state had violated the IAD. *See* Pittman v. State, 301 A.2d 509, 513 (Del. 1973); People v. Esposito, 37 Misc. 2d 386, 394, 201 N.Y.S.2d 83, 90 (County Ct. 1960); Nelms v. State, 532 S.W.2d 923, 926-27 (Tenn. 1976). *Contra* Shumate v. State, 449 So. 2d 387, 387 (Fla. 1984) (per curiam); *cf.* Bey v. State, 36 Md. App. 529, 531-34, 373 A.2d 1291, 1293-94 (Ct. Spec. App. 1977) (no relief under the Maryland version of the UMDDA when prison officials err); King v. State, 5 Md. App. 652, 660, 249 A.2d 468, 473-74 (Ct. Spec. App. 1969) (same)

49. See *infra* note 87 and accompanying text.

50. See *infra* note 88 and accompanying text

51. The prisoner is classified either as a donee beneficiary to the contract, because the IAD confers upon him, as a third party beneficiary, "a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary," Restatement of Contracts § 133 (1)(a) (1932); *see also* Marlboro Shirt Co. v. American Dist. Tel. Co., 196 Md. 565, 570, 77 A.2d 776, 778 (1951); A. Corbin, 4 Corbin on Contracts § 774 (1951); 2 Williston on Contracts, *supra* note 45, § 357, at 842-43, or as an intended beneficiary, Restatement (Second) of Contracts, § 302 (1981); *id.* at 382 (introductory note to ch. 6). Regardless, the prisoner is vested with rights under the IAD. *See* Williams v. Maryland, 445 F. Supp. 1216, 1219 (D. Md. 1978). See *infra* note 52.

52. A third party to a contract may enforce that contract when it is made for his benefit. *See, e.g.*, Hendrick v. Lindsay, 93 U.S. 143, 149 (1876); Reliance Life Ins. Co. v. Jaffe, 121 Cal. App. 2d 241, 244, 263 P.2d 82, 84 (1953); Seaver v. Ransom, 224 N.Y. 233, 237, 120 N.E. 639, 640, (1918); Restatement of Contracts § 135(a) (1932); 2 Williston on Contracts, *supra* note 45, § 347, at 792-95. Persons affected by interstate compacts and treaties have been recognized to have the capacity to assert rights under them. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110-11 (1938) (rejecting the assertion that the absence of New Mexico and Colorado, parties to the La Plata River Compact, deprived the Court of jurisdiction to entertain the claim of an affected private litigant); Coffee v. Groover, 123 U.S. 1, 30 (1887) (title dispute affecting a landowner involving the Georgia-Florida boundary under a treaty with Spain); United States v. Rauscher, 119 U.S. 407, 423-25 (1886) (violation of an extradition treaty between Great Britian and the United States asserted by the prisoner conveyed pursuant to it); Chew Heong v. United States, 112 U.S. 536, 543 (1884) (Chinese citizen recognized as beneficiary under a treaty between the United States and China, as modified by a subsequent Act of Congress); Poole v. Fleeger, 36 U.S. (11 Pet.) 185, 207-10 (1837) (dispute over the Tennessee-Kentucky border; compact between the states "has full validity" and is "obligatory upon the citizens of both states"); *Some Legal and Practical Problems,*

held that prisoners waive the IAD dismissal provisions by failing to raise them in timely fashion.[53] These courts act under the mistaken impression that the IAD confers purely "statutory" rights.[54] Actually, as noted above, the terms of the IAD are contractual as well as statutory.[55] The conditions to the exercise of jurisdiction constitute material parts of the bargain between the states. "Waiver" of these conditions thus amounts to a modification of the contract without consideration.[56]

Even assuming that modification of a contract without consideration is

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supra note 38, at 329 (an individual can assert the protection of a compact that concerns private rights).

The IAD obviously affects prisoners, seeking to reduce the uncertainty caused by detainers. This uncertainty obstructs programs of prisoner treatment and rehabilitation. 18 U.S.C. app. § 2, art. I (1982). If the prisoner were unable to enforce the IAD, its benefits would be empty and illusory. *Cf.* Filardo v. Foley Bros., 297 N.Y. 217, 221-22, 78 N.E.2d 480, 482 (1948) (laborers entitled to assert right to overtime pay under the Eight-Hour Law, even though "the statute does not in so many words grant to the employee a cause of action if such compensation is not received"), *rev'd on other grounds*, 336 U.S. 281, 290-91 (1949).

Although stating that "principles of contract, evolving as they do from the commercial world, are 'inapposite to the ends of criminal justice,' " Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 294 (2d Cir. 1976) (quoting United States *ex rel.* Selikoff v. Commissioner of Correction, 524 F.2d 650, 654 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976)), *cert. dismissed*, 431 U.S. 911 (1977), the Second Circuit has noted that "[w]here appropriate, the courts have not hesitated to mandate specific performance of [plea bargaining] agreement[s]." *Id.* at 297; *cf. Selikoff*, 524 F.2d at 652, 654 (refusing to order specific performance of plea bargain where the sentencing judge learned, prior to sentencing, of additional information that altered his opinion of the extent of the defendant's culpability). The IAD, being an agreement reached among states, see *supra* note 2, that itself is designed to advance the ends of criminal justice, see *infra* notes 126-34 and accompanying text, should be specifically performed.

The prisoner who has not engaged in any fraud upon the court needs to have the right to enforce the IAD in his own behalf and on behalf of the sending state, because it is possible that prosecutors in sending states will not act to protect either his rights or those of the sending state, as determined by that state's legislature through its enactment of the IAD. *Cf.* Commonwealth v. Bell, 442 Pa. 566, 573, 276 A.2d 834, 837-38 (1971) (rather than enforcing the prisoner's rights under the UMDDA, the state argued that that statute does not act automatically to divest courts of subject matter jurisdiction despite the statute's express language).

53. *See* Kowalak v. United States, 645 F.2d 534, 537 & n.1 (6th Cir. 1981) (habeas proceeding); Mars v. United States, 615 F.2d 704, 707 (6th Cir.) (alternate holding) (habeas proceeding), *cert. denied*, 449 U.S. 849 (1980); United States v. Eaddy, 595 F.2d 341, 346 (6th Cir. 1979) (direct appeal); United States v. Palmer, 574 F.2d 164, 167 (3d Cir.) (direct appeal), *cert. denied*, 437 U.S. 907 (1978); Edwards v. United States, 564 F.2d 652, 653 (2d Cir. 1977) (per curiam) (alternate holding) (habeas proceeding); Gray v. Benson, 458 F. Supp. 1209, 1212-13 (D. Kan. 1978) (proceeding to vacate sentence under 28 U.S.C. § 2255 (1982)), *aff'd per curiam*, 608 F.2d 825 (10th Cir. 1979); Johnson v. State, 442 So. 2d 193, 196-97 (Fla. 1983) (per curiam) (direct appeal), *cert. denied*, 466 U.S. 963 (1984); People v. White, 33 A.D.2d 217, 221, 305 N.Y.S.2d 875, 878 (1969) (direct appeal).

54. See *supra* cases cited in note 53.

55. See *supra* note 39 and accompanying text.

56. *See* J. Calamari & J. Perillo, The Law of Contracts, § 11-36, at 448 (2d ed. 1977); *cf.* Rose v. Mitsubishi Int'l Corp., 423 F. Supp. 1162, 1167 (E.D. Pa. 1976) (material condition cannot be waived); 3A Corbin on Contracts, *supra* note 51, § 753, at 486 (same); Restatement of Contracts, § 297 & comment c (1932) (waiver of a material condi-

ordinarily enforceable,[57] the sending state has interests that are distinct from those of the prisoner.[58] The prisoner is powerless to affect the sending state's interests by modifying the agreement between the states because he is not authorized by the IAD to act as the state's agent.[59] Furthermore, "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."[60] The prisoner is accorded the right to an "expeditious and orderly" trial under the IAD[61] to further the public interest that "detainers . . . not hamper the administration of correction programs and the effective rehabilitation of criminals."[62] The general public, judges, corrections officials and parole authorities in the sending state, as well as the prisoner, all share this interest.[63] To allow

tion "involves to so great a degree a new undertaking that the requisites for the creation of a new contract must exist").

57. An election to continue performance, manifested by conduct, requires no consideration. *See* Brede v. Rosedale Terrace Co., 216 N.Y. 246, 249, 110 N.E. 430, 431 (1915); Calamari & Perillo, *supra* note 56, § 11-37 at 450-51; Restatement of Contracts § 309 (1932). Additionally, although the Restatement states that modification of a material condition is not enforceable unless the parties create a new contract, *see* Restatement of Contracts § 297 comment c (1932), the position of the Restatement (Second) of Contracts is that such a modification is binding (among other reasons, that are inapplicable to this situation) "to the extent that justice requires enforcement in view of material change of position in reliance on the promise." Restatement (Second) of Contracts § 89(c) (1981).

58. Officials in the sending state can carry out their duties when the uncertainty produced by detainers is eliminated. See *infra* note 63.

59. The only time waiver is mentioned in the IAD is in reference to the fact that, when the prisoner requests disposition of the detainer under art. III, the prisoner agrees to waive extradition to the receiving state. *See* 18 U.S.C. app. § 2, art. III(e) (1982). Otherwise, he is powerless to modify the IAD. *Cf. Ex parte* Coy, 32 F. 911, 917 (W.D. Tex. 1887) (prisoner cannot waive provisions of an extradition treaty because he is a third party to the contract).

60. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704, 706-07 (1945) (no waiver allowed of rights under the Fair Labor Standards Act); *see also* Tony & Susan Alamo Found. v. Secretary of Labor, 105 S. Ct. 1953, 1962 (1985) (same; purposes of the FLSA "require that it be applied even to those who would decline its protections"); McDonald v. West Branch, 466 U.S. 284, 292 n.12 (1984) (no waiver of right to judicial action under § 1983 of the Civil Rights Act); Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (refusing to allow individual to waive cause of action conferred by Title VII of the Civil Rights Act because to do so "would defeat the paramount congressional purpose behind Title VII"); Wilko v. Swan, 346 U.S. 427, 434-38 (1953) (refusing to allow investor to waive "judicial trial and review" of claim under the Securities Act of 1933 against a securities brokerage firm); McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1505 (D.N.J. 1985) (rights granted by § 510 of ERISA are unwaivable; even assuming identity of the individual employees with the union, waiver is "neither statutorily permissible nor logically possible").

61. *See* 18 U.S.C. app. § 2, art. I (1982).

62. *See* Council of State Governments—1956, *supra* note 1, at 75. As it existed before the IAD, the detainer system actually increased the costs, economic and otherwise, of incarceration. *See id.* at 74.

63. Uncertainty produced by the imposition of detainers affects all of the participants in the correctional process. The prisoner subject to a detainer is likely to be unmotivated to rehabilitate himself because of the possibility that he faces another prison term. *See* United States v. Mauro, 436 U.S. 340, 359 (1978) (quoting Council of State Governments—1956, *supra* note 1, at 74); Smith v. Hooey, 393 U.S. 374, 379 (1969) (quoting

prisoners to waive or release deficient prosecutions would thwart the legislative policy that the IAD was designed to effectuate.[64]

Bennett II, *supra* note 12, at 21); United States *ex rel.* Esola v. Groomes, 520 F.2d 830, 837 (3d Cir. 1975) ("the psychological strain resulting from uncertainty about any future sentence decreases an inmate's desire to take advantage of institutional opportunites"); 116 Cong. Rec. 14,000 (1970) (remarks of Rep. Poff) ("This . . . consideration is especially important in view of the fact that the basic purpose of the entire penal system is to prepare its inmates to reenter society as law-abiding citizens."). Judges may be unsure of the appropriate length of sentence they should impose when the individuals before them may face further prosecution. *See* Council of State Governments—1956, *supra* note 1, at 74; Perry, *Effect of Detainers on Sentencing Policies*, 9 Fed. Probation, July-Sept. 1945, at 11, 11-12. Prison officials may be uncertain how to plan and structure the prisoner's rehabilitation program. *See* Council of State Governments—1956, *supra* note 1, at 74; *see also* Bennett I, *supra* note 12, at 9 ("because of the indefinite character of many detainers the institutional staff is in no better position to know what the future holds for these men than are the men themselves") (pre-IAD statement). Parole boards are also affected by the uncertainty created by the filing of a detainer. *See* Bennett I, *supra* note 12, at 9-10 (noting the "well-established policy" of the Federal Board of Parole, held in common with many state boards of parole, to refuse parole to prisoners subject to detainers) (pre-IAD statement); *id.* at 10 (detainers serve to undermine parole, "one of the most important aspects of the modern correctional program"). See *supra* note 12.

A stated goal of the IAD is "to permit the prisoner to secure a greater degree of knowledge of his own future and to make it possible for the prison authorities to provide better plans and programs for his treatment." Council of State Governments—1956, *supra* note 1, at 76-77; *see* Carchman v. Nash, 105 S. Ct. 3401, 3413 n.6 (1985) (Brennan, J., dissenting) ("The [IAD] obviously does not eliminate detainers, but merely provides the means for definitive resolution and imposition of a certain, final sentence."); *Mauro*, 436 U.S. at 360 (IAD is intended to alleviate the harmful effects of detainers by encouraging quicker resolution of the outstanding charges); S. Rep. No. 1356, 91st Cong., 2d Sess. 2 (paraphrasing the language used by the Council of State Governments), *reprinted in* 1970 U.S. Code Cong. & Ad. News 4864, 4865 (1970); H.R. Rep. No. 1018, 91st Cong., 2d Sess. 2 (1970) (same). Thus, the IAD creates rights in all of the participants in the rehabilitative process. *See* United States *ex rel.* Esola v. Groomes, 520 F.2d 830, 835 (3d Cir. 1975) (the sending state's right "not to have its . . . rehabilitative programs unduly hampered" was violated by the same actions that violated the prisoner's rights to a speedy trial and effective rehabilitative treatment).

The protection provided by the IAD often has been confused with the right to speedy trial. See *infra* note 103. The right to speedy trial is personal to a defendant, and is waivable. *See* American Bar Ass'n Project on Minimum Standards For Criminal Justice, Standards Relating to Speedy Trial, § 4.1, at 41 commentary (Approved Draft, 1968) (right to speedy trial "is a *personal* right of the defendant, and thus the right is deemed waived if not properly asserted") (emphasis added). The protection offered to the prisoner is not personal to him because the IAD creates rights in people beside the prisoner. *See Groomes*, 520 F.2d at 835. Courts, however, have misconstrued the IAD, stating that the rights granted by it are personal to the prisoner. *See* United States v. Eaddy, 595 F.2d 341, 344 (6th Cir. 1979); United States v. Dixon, 592 F.2d 329, 336 n.9 (6th Cir.), *cert. denied*, 441 U.S. 951 (1979); United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977), *aff'd on other grounds sub nom.* United States v. Mauro, 436 U.S. 340 (1978). These courts fail to recognize that the IAD reflects different policies than the Speedy Trial Act. See *infra* note 103.

64. *Cf.* McDonald v. West Branch, 466 U.S. 284, 292 n.12 (1984) (Court refuses to allow waiver "because preclusion of a judicial action would gravely undermine the effectiveness of [42 U.S.C.] § 1983"); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704 (1945) (Fair Labor Standards Act).

The public interest represented by the IAD, see *supra* notes 62-63, and *infra* notes 126-33, overrides any desire of the prisoner to act contrarily to its provisions. *Cf.* Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77-78 (1982) (refusing to enforce contract violating both

The position that IAD violations are not subject to waiver comports with the position of this Note that IAD violations divest courts of subject matter jurisdiction.[65] The parties to the litigation may not waive the defi-

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the Sherman Act and the Taft-Hartley Act "only on account of the public interest") (quoting McMullen v. Hoffman, 174 U.S. 639, 669 (1899)).

65. Because the IAD is a compact, see *supra* note 2 and accompanying text, the party states are free to establish jurisdictional limits. These limits need not be absolute. Thus, the time limitations of the IAD may be extended without triggering the duty to impose its sanctions. "[F]or good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." 18 U.S.C. app. § 2, arts. III(a), IV(c) (1982). Courts have disagreed on the meaning of "continuance". *Compare* State v. Lippolis, 55 N.J. 354, 354, 262 A.2d 203, 203 (1970) (per curiam) (unanimously reversing the Appellate Division, which held that a continuance must be obtained "no later than the expiration of the [applicable time limitation]", State v. Lippolis, 107 N.J. Super. 137, 143, 257 A.2d 705, 709 (App. Div. 1969)), *with* Commonwealth v. Fisher, 451 Pa. 102, 106-07, 301 A.2d 605, 606-07 (1973) (rejecting the New Jersey Supreme Court's decision in *State v. Lippolis* explicitly).

The New Jersey Supreme Court's decision in *Lippolis* rests on untenable rationale. First, the IAD itself is self-executing. See *supra* note 17. Second, Judge Kolovsky, whose dissent in the Appellate Division was unanimously adopted by the New Jersey Supreme Court, *see Lippolis*, 55 N.J. at 354, 262 A.2d at 203, stated that the time in which the receiving state can obtain a continuance must extend beyond the last day of the IAD's time limitation because the IAD is not self-executing. *Lippolis*, 107 N.J. Super. at 147, 257 A.2d at 711 (Kolovsky, J., dissenting). Yet the UMDDA, which was drafted concurrently by the same body that drafted the IAD, the Council of State Governments, *see* Council of State Governments—1956, *supra* note 1, at 77-85, contains the *same* language as the IAD regarding the granting of "any necessary or reasonable continuance." *See id.* at 77 (UMDDA § 1(a)); *id.* at 81 (IAD art. III(a)); *id.* at 83 (IAD art. IV(c)). These similar provisions, drafted by the same legislative group at the same time, *see* Council of State Governments—1956, *supra* note 1, at 76-85, should be construed to operate similarly. This is a guideline of statutory construction that has been applied to the UMDDA and the IAD. *See* People v. Bean, 44 Colo. App. 373, 374-75, 619 P.2d 72, 73-74 (1980), *rev'd on other grounds*, 650 P.2d 565 (Colo. 1982) (en banc); Barnes v. State, 20 Md. App. 262, 268, 315 A.2d 117, 121 (Ct. Spec. App.), *aff'd*, 273 Md. 195, 328 A.2d 737 (1974); State *ex rel.* Kemp v. Hodge, 629 S.W.2d 353, 359 (Mo. 1982) (en banc). Whether the IAD provision is self-executing is irrelevant. Just as it is impossible to obtain a continuance after the expiration of the time period in the UMDDA, *see* Commonwealth v. Klimeck, 416 Pa. 434, 436-37, 206 A.2d 381, 382 (1965), it should also be impossible to obtain a continuance after the expiration of the IAD time period.

Courts have disagreed on what constitutes "reasonable" grounds for a continuance. *Compare* United States v. Ford, 550 F.2d 732, 742-43 (2d Cir. 1977) (if judge cannot hold trial within the time limit, "it is [his] responsibility . . . to reassign" the case), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978) *with* Foran v. Metz, 463 F. Supp. 1088, 1097-98 (S.D.N.Y.) (continuance granted so prosecutor could take a three-week vacation), *aff'd mem.*, 603 F.2d 212 (2d Cir.), *cert. denied*, 444 U.S. 830 (1979) *and* State v. Carpenter, 24 Wash. App. 41, 47, 599 P.2d 1, 4 (1979) (any delay that occurs after the defendant requests a continuance is attributable to him).

A benefit of a strict interpretation of the IAD's time limitations is a greater reluctance on the part of courts to countenance delay. *E.g.*, Commonwealth v. Fisher, 451 Pa. 102, 105-07, 301 A.2d 605, 606-08 (1973) (charges dismissed when state dilatorily moved for a continuance one day after expiration of the time limit). This advances the goal of the IAD to dispose of detainers in an "expeditious and orderly" manner, *see* 18 U.S.C. app. § 2, art. I (1982), and gives the sending state the greatest degree of control over its prisoner. See *infra* note 93 and accompanying text. In light of the policies that the IAD reflects, it is unlikely that a prosecutor's vacation is a reasonable ground for delay in prosecution.

ciency of lack of subject matter jurisdiction.[66]

II. LANGUAGE AND LEGISLATIVE HISTORY

Analysis of the IAD's language[67] and legislative history reveals the intent that violations of its provisions mandatorily and automatically[68] divest receiving states of subject matter jurisdiction. The receiving state promises the sending state that it "shall" dispose of its detainer(s) in the agreed fashion,[69] and, if it violates the compact's procedures, the appropriate court of the receiving state "shall enter an order dismissing" the indictment, information or complaint "with prejudice."[70] The Council of State Governments, which formulated the IAD, appears to have chosen the word "shall" intentionally.[71] "Shall" is usually a word of mandate rather than of discretion.[72] Mandatory compliance with the

66. *See* Brenner v. Manson, 383 U.S. 519, 523 (1966); United States v. Griffin, 303 U.S. 226, 229 (1938); Mitchell v. Maurer, 293 U.S. 237, 244 (1934); Smith v. Spina, 477 F.2d 1140, 1145 (3d Cir. 1973).

67. The IAD was drafted with reference to and was intended to be analyzed in light of the entire body of legal principles applicable to the interpretation of statutes. *Cf.* Zimmermann & Wendell, *supra* note 39, at 1 (stating that all compacts are drafted with these principles in mind).

68. There is a distinction between "mandatory" and "automatic". If a defendant may waive the violation, any required consequences are mandatory only after he asserts the violation. Thus, the consequences are not automatically imposed. See text accompanying *infra* notes 110-12.

69. *See* 18 U.S.C. app. § 2, arts. III(a), IV(c) (1982).

70. *See id.* arts. III(d), IV(e), V(c) (1982). In addition, if the prisoner is in the receiving state after that state violates the applicable time limit, the receiving state promises that its "detainer based [on the charges underlying the detainer] shall cease to be of any force or effect." IAD art. V(c). See *supra* note 44.

71. The Council of State Governments initially proposed the IAD in 1956. See *supra* note 1. The Council intended that the IAD be analyzed according to the principles of statutory construction. See *supra* note 67. The word "shall" is normally used to indicate that the delineated action is mandatory. See *infra* note 72 and accompanying text. The Council itself later described the provisions of the IAD as "mandatory." See *infra* notes 74, 95 and accompanying text. Finally, when the Council drafted its own speedy trial legislation, it used the word "may," indicating that that statute, in contrast to the IAD, grants discretionary power to courts. See *infra* note 96 and accompanying text.

72. *See, e.g.*, Anderson v. Yungkau, 329 U.S. 482, 485 (1947); Escoe v. Zerbst, 295 U.S. 490, 493 (1935); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1860); City of Edmonds v. United States Dep't of Labor, 749 F.2d 1419, 1421 (9th Cir. 1984).

Some cases have refused to hold that statutes directing administrative action within a statutory time period and using the word "shall" are in fact mandatory unless the statute "*both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision." St. Regis Mohawk Tribe v. Brock, 769 F.2d 37, 41 (2d Cir. 1985) (emphasis in original) (quoting Fort Worth Nat'l Corp. v. Federal Sav. & Loan Ins. Corp., 469 F.2d 47, 58 (5th Cir. 1972)), *petition for cert. filed*, 54 U.S.L.W. 3412 (U.S. Dec. 2, 1985) (No. 85-949); *see* Thomas v. Barry, 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984); Ward v. Fremont Unified School Dist., 276 Cal. Ap. 2d 313, 322, 80 Cal. Rptr. 815, 821 (1969); State *ex rel.* Taylor v. Wade, 360 Mo. 895, 899, 231 S.W.2d 179, 181 (1950) (en banc). The IAD does include consequences for a failure to comply with its provisions. See *supra* note 15.

Of course, construction of a statute must ultimately rest on legislative intent. *See Escoe*, 295 U.S. at 493-94; United Hosp. Center, Inc. v. Richardson, 757 F.2d 1445, 1453

provisions of the IAD advances the intent of its drafters that receiving states dispose of detainers in an "expeditious and orderly" fashion.[73] The Council itself later described the procedure as "mandatory."[74]

The drafters' inclusion of penalties for noncompliance supplies further evidence that the provisions of the IAD are mandatory.[75] The IAD does include penalties—dismissal of the outstanding charges with prejudice and, when the prisoner remains in the receiving state after the occurrence of the violation, nullification of the "force and effect" of the detainer.[76] These sanctions apply if the receiving state fails to comply with the IAD's time limits and its anti-shuttling provisions.[77]

Moreover, the procedures enacted in the IAD embody the substance of the receiving state's duty to dispose of its detainers in an "expeditious and orderly" fashion. The procedures under which the prisoner is to be prosecuted form the subject matter of the IAD; they are matters of substance. They represent a determination of what constitutes an "expeditious and orderly" disposition by the receiving state.[78] Thus, application of another guideline of statutory construction, that provisions relating to the subject matter of the statute are mandatory,[79] further demonstrates that the IAD's provisions are mandatory and automatic.

(4th Cir. 1985); Katunich v. Donovan, 594 F. Supp. 744, 749 (Ct. Int'l Trade 1984). Construction of the IAD as containing mandatory provisions advances the legislative intent of its drafters. See *infra* notes 82-93 and accompanying text.

73. *See* 18 U.S.C. app. § 2, art. I (1982) (statement of purpose).

74. Council of State Governments, Suggested State Legislation Program for 1958, at 17 (1957) [hereinafter cited as Council of State Governments—1957].

75. See *supra* note 72.

76. See *supra* note 15.

77. See *supra* note 15.

78. Many courts have dismissed the IAD as nothing more than a set of "procedural rules." *E.g.*, United States v. Eaddy, 595 F.2d 341, 346 (6th Cir. 1979); Camp v. United States, 587 F.2d 397, 400 (8th Cir. 1978); United States v. Palmer, 574 F.2d 164, 167 (3d Cir.), *cert. denied*, 437 U.S. 907 (1978); Derring v. State, 273 Ark. 347, 351, 619 S.W.2d 644, 646 (1981); *see* Gray v. Benson, 458 F. Supp. 1209, 1213 (D. Kan. 1978) (specifically referring to IAD art. IV(e)), *aff'd per curiam*, 608 F.2d 825 (10th Cir. 1979); *cf.* State v. Ternaku, 156 N.J. Super. 30, 34-35, 383 A.2d 437, 438-39 (App. Div.) (referring to defendants' ground of appeal, violation of IAD art. III(a), as merely a procedural defect in the prosecution), *certification denied*, 77 N.J. 479, 391 A.2d 494 (1978). This attitude conforms with a characterization of the IAD's provisions as conferring purely "statutory" rights. See *supra* note 37 and accompanying text. *But see* Silver v. Mohasco Corp., 602 F.2d 1083, 1095 (2d Cir. 1979) (Meskill, J., dissenting in part) ("where, as here, a procedural requirement *does* further a substantive purpose, it is judicial disregard of the statutory design that is inappropriate") (emphasis in original), *rev'd*, 447 U.S. 807 (1980). However, the right of a state to prosecute a prisoner protected by the IAD is conditional. Failure to comply with these rules is fatal to the prosecution. See *infra* note 80 and accompanying text. *See* 6 N. Ky. L. Rev. 393, 401 (1979) ("[p]rocedural violations [of the IAD] are not mere technical defects").

79. *See* Katunich v. Donovan, 594 F. Supp. 744, 749 (Ct. Int'l Trade 1984) (dictum); Joanna W. Mills Co. v. United States, 311 F. Supp. 1328, 1335 (U.S. Cust. Ct. 1970); Bowen v. Minneapolis, 47 Minn. 115, 117, 49 N.W. 683, 683 (1891); Crawford, Construction of Statutes § 72, at 104 (1940); *cf.* People *ex rel.* Agnew v. Graham, 267 Ill. 426, 438, 108 N.E. 699, 704 (1915) (a statute will be considered mandatory if it creates duties that "affect the real merits" of the subject of the legislation).

Another guideline of statutory construction states that the placement of conditions on a statutory right within the statute itself acts to destroy that right when the conditions have not been met.[80] The IAD creates a right in the receiving state—the right to extend its personal jurisdiction extraterritorially and to obtain a prisoner from another state so that it may prosecute him.[81] The IAD restricts the exercise of this right as it creates it, imposing time limits and a prohibition of multiple transfers on the receiving state. This adds support to the contention that failure to comply with the provisions of the IAD acts to divest courts in receiving states of the right to prosecute the prisoner.

Finally, the conclusion that the provisions of the IAD are mandatory and automatic comports completely with the intent of its drafters. Of necessity,[82] the Council simultaneously proposed two acts to deal with the problem of detainers. One, the Uniform Mandatory Disposition of Detainers Act (UMDDA), concerned itself with the disposition of *intrastate* detainers.[83] The other, the IAD, governed *interstate* detainers.[84] The UMDDA expressly divested courts of subject matter jurisdiction over the outstanding charges when the enacting state failed to bring the prisoner to trial within the time limits provided in the act.[85] The IAD did not expressly compel the same result, but its drafters stated that "[t]he [Interstate] Agreement on Detainers applies the same principles embodied in the intrastate act to the interstate field."[86]

The reason that the IAD does not expressly compel divestiture of sub-

80. *See, e.g.*, Engel v. Davenport, 271 U.S. 33, 38 (1926); Willaim Danzer & Co. v. Gulf & Ship Island R.R., 268 U.S. 633, 636-37 (1925); The Harrisburg, 119 U.S. 199, 214 (1886). The Supreme Court has stated that the lapsing of a statute of limitations contained in a statute, a condition on the statutory right created, is jurisdictional, limiting the power of the adjudicatory body. *See* United States *ex rel.* Louisville Cement Co. v. ICC, 246 U.S. 638, 642 (1918); *see also* Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356, 363-65 (1943) (citing *Louisville Cement Co.* with approval); *cf.* Mohasco Corp. v. Silver, 447 U.S. 807, 811-13, 826 (1980) (reinstating the decision of the district court that an employee's failure to comply with a filing deadline deprived it of subject matter jurisdiction).

81. The use of a compact to extend jurisdiction extraterritorially was first demonstrated in the New York-New Jersey Compact ("Treaty") of 1834, "which extended the criminal jurisdiction of each party state over particular water areas beyond the actual boundary line." Zimmermann & Wendell, *supra* note 39, at 41; *see* 1 The Port of New York Authority, The Port of New York Authority Treaties and Statutes 4-6 (1948); *cf.* N.Y. Civ. Prac. Law § 1006 Interpleader Compact (McKinney 1976) (extending personal jurisdiction extraterritorially).

82. See *infra* text at notes 87-91.

83. Council of State Governments—1956, *supra* note 1, at 76.

84. *Id.* at 78.

85. In the event that the action is not brought to trial within the period of time as herein provided, no court of this state shall any longer have jurisdiction thereof, nor shall the untried [indictment, information or complaint] be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Id. (brackets in original).

86. Council of State Governments—1956, *supra* note 1, at 78.

ject matter jurisdiction is that it is "interjurisdictional."[87] The drafters were limited by the principle that a state cannot constitutionally enact legislation that compels another state to act.[88] The Council of State Governments nevertheless desired that the IAD operate as the "interjurisdictional counterpart" of the UMDDA.[89] Since the Council desired to apply the same principles embodied in the UMDDA to the IAD,[90] it follows that it intended to impose the same harsh penalty found in the UMDDA—withdrawal of subject matter jurisdiction—though the drafters were limited by the interjurisdictional nature of the compact.[91]

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87. *See id.*

88. Sandberg v. McDonald, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."); American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (normally a statute will be construed "as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power"); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 97 (1823) (opinion on rehearing) (it would be absurd to believe one state could enact a law obligatory upon another state); *see* United States v. Bryant, 612 F.2d 806, 809 (4th Cir. 1979) ("as originally drafted for application only among the several states of the Union, the [IAD] must have contemplated 'separate geographic and distinct jurisdictional units' when it used the term 'State' "), *cert. denied*, 446 U.S. 920 (1980); United States v. Umbower, 602 F.2d 754, 757 (5th Cir. 1979) ("Being designed for adoption by state legislatures, the [IAD] contemplates independent and geographically distinct sovereign state units."), *cert. denied*, 444 U.S. 1021 (1980); *cf.* Heath v. Alabama, 106 S. Ct. 433, 438 (1985) ("[t]he States are equal to each other 'in power, dignity and authority' ") (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911)); Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (Illinois anti-takeover statute struck down because of its "extraterritorial effect").

This limitation of power affects various aspects of the detainer system. Detainers, by themselves, lack legal force. Hincks, *supra* note 41, at 3; *see* Yackle, *Taking Stock of Detainer Statutes*, 8 Loy. L.A.L. Rev. 88, 96-97 (1975) ("one state has no power to compel another state to deliver up a prison inmate for prosecution"); *cf.* State v. Fender, 268 S.E.2d 120, 123 (1980) (although a state may deliver a writ of habeas corpus to another state, "the seeking state cannot compel the jurisdiction having custody to return the accused for trial"). Even under the IAD, the contracting states "cooperat[e]," *see* 18 U.S.C. app. § 2, art. I (1982), so that a court in the sending state may not directly affect the outstanding charges in the receiving state. Narel v. Liburdi, 185 Conn. 562, 570, 441 A.2d 177, 182 (1981) (in action based on the IAD, the "court [of the sending state], lacking extraterritorial jurisdiction, is powerless to dismiss the underlying charge [of the receiving state]"), *cert. denied*, 456 U.S. 928 (1982); *accord* Gayles v. Hedman, 309 Minn. 289, 291, 244 N.W.2d 154, 155-56 (1976); State v. West, 79 N.J. Super. 379, 387, 191 A.2d 758, 762 (App. Div. 1963); People *ex rel.* Albuequrque v. Ward, 116 Misc. 2d 634, 635, 455 N.Y.S.2d 1002, 1003 (Sup. Ct. 1982).

89. *See* Council of State Governments—1956, *supra* note 1, at 78. Although the phrase "interjurisdictional counterpart" refers only to IAD art. III, by which a prisoner can request disposition of the detainer, *see id.*, this is so because there is no counterpart in the UMDDA to IAD art. IV, which is an extradition agreement. Since the penalties imposed for violation of either IAD art. III or IAD art. IV are the same, *see* 18 U.S.C. app. § 2, arts. III(d), IV(e), V(c) (1982), the effect of the entire IAD should be to act as the "interjurisdictional counterpart" of the UMDDA.

90. See *supra* note 86 and accompanying text.

91. See *supra* text at notes 82-89. *But see* Yackle, *supra* note 88, at 101 n.76 (since the language of the IAD does not mirror that of the UMDDA, "apparently the prisoner must move for dismissal"). The analysis in that footnote rests on the flawed analysis of State v. West, 79 N.J. Super. 379, 387, 191 A.2d 758, 763 (App. Div. 1963). The *West* case is discussed *supra* at note 17.

The Council acted under the belief that delay in prosecution of charges underlying detainers harmed the sending state's rehabilitation program.[92] The IAD provides the sending state with the means of minimizing that delay. The sending state retains the greatest amount of control over its prisoner[93] through mandatory and automatic IAD provisions.

One extrinsic aid adds to our understanding of the intent of the Council of State Governments when it formulated the IAD. One year after proposing the IAD, the Council proposed speedy trial legislation.[94] In its prefatory comments to that legislation, the Council referred to the IAD, and its "mandatory" provisions.[95] In contrast to the IAD, the Council's speedy trial legislation grants discretionary power to the court.[96] Further, the speedy trial legislation provides that the defendant must move for dismissal to secure the right.[97] These differences underscore the mandatory nature of the IAD requirements.

III. DETERMINING CONGRESSIONAL UNDERSTANDING OF THE IAD'S PROVISIONS

In 1970, Congress adopted the Interstate Agreement on Detainers on behalf of the United States and the District of Columbia.[98] Congress' understanding of the provisions of the IAD is indicative of the understanding other parties had of its terms. Moreover, the IAD is "a federal law subject to federal construction."[99]

The legislative history of the IAD gives no indication that the severity of the penalties for noncompliance was debated.[100] The bill joining the

92. *See* 18 U.S.C. app. § 2, art. I (1982); *see also* United States v. Mauro, 436 U.S. 340, 359-60 (1978); State *ex rel.* Kemp v. Hodge, 629 S.W.2d 353, 355-56 (Mo. 1982) (en banc).

93. Under the IAD, "[f]or all purposes other than [for the disposition of the receiving state's charges underlying its detainer], the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State . . . ." 18 U.S.C. app. § 2, art. V(g) (1982).

94. *See* Council of State Governments—1957, *supra* note 74, at 17-18.

95. *See id.* at 17.

96. On the defendant's application, the court "may" dismiss the charges. *Id.* at 18. Under principles of statutory construction, "may" ordinarily indicates that discretion exists. *See, e.g.*, United Hosp. Center, Inc. v. Richardson, 757 F.2d 1445, 1453 (4th Cir. 1985) (dictum); Matzke v. Block, 732 F.2d 799, 801 (10th Cir. 1984); City of Newark v. Blumenthal, 457 F. Supp. 30, 32 (D.D.C. 1978).

97. Council of State Governments—1957, *supra* note 74, at 18. Section 2 would allow the court to dismiss the charges *sua sponte*, *see id.*, or on application of the prosecutor, *see id.*, but practically speaking the burden of vigilance would lie with the defendant.

98. See *supra* note 3.

99. Carchman v. Nash, 105 S. Ct. 3401, 3403 (1985); *see also* Cuyler v. Adams, 449 U.S. 433, 438-42 (1981). Therefore, congressional understanding of the IAD is important in and of itself as an indicator of what this federal law demands. The Supreme Court has looked to discern the legislative intent of Congress in each of its decisions construing the IAD. *See Carchman*, 105 S. Ct. at 3408; Cuyler v. Adams, 449 U.S. at 448-49; United States v. Mauro, 436 U.S. 340, 353-56 (1978).

100. *See generally* 116 Cong. Rec. 13,997-14,000 (1970) (proceedings in the House of Representatives); *id.* at 38,840-38,842 (proceedings in the Senate).

United States and the District of Columbia as parties to the IAD passed without opposition.[101] Thus, there is no direct evidence of Congress' understanding of the IAD. However, the Speedy Trial Act of 1974 (STA)[102] provides an extrinsic aid in determining the congressional understanding of the harsh nature of the IAD's sanctions. Like the IAD, the STA is intended to produce quicker resolution of outstanding criminal charges.[103] Furthermore, the STA, like the IAD, contains the sanc-

101. *See* 116 Cong. Rec. 14,000 (1970) (House of Representatives); *id.* at 38,840-41 (Senate).

102. Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified as amended at 18 U.S.C. §§ 3161-3174 (1982)).

103. Both the IAD and the STA contain time limits within which the defendant must be brought to trial. *Compare* 18 U.S.C. app. § 2, art. III(a) (1982) (prisoner must be brought to trial within 180 days of delivery of his request for disposition of the detainer to the appropriate authorities of the receiving state) *and* 18 U.S.C. app. § 2, art. IV(c) (1982) (prisoner must be brought to trial within 120 days of his arrival in the receiving state) *with* 18 U.S.C. § 3161(b), (c) (1982) (defendant must be brought to trial within 100 days of arrest or service of summons). However, the IAD is *not* speedy trial legislation. Its speedy trial provisions are merely measures designed to effectuate the goal of the Council of State Governments to reduce the anti-rehabilitative effect of long-standing detainers. *See* Council of State Governments—1956, *supra* note 1, at 75 (objective to be achieved is "that detainers will not hamper the administration of correction programs and the effective rehabilitation of criminals"); *see also* Nash v. Jeffes, 739 F.2d 878, 882 (3d Cir. 1984), *rev'd on other grounds sub nom. Carchman v. Nash, 105 S. Ct. 3401 (1985); People v. Esposito, 37 Misc. 2d 386, 392, 201 N.Y.S.2d 83, 88 (County Ct. 1960); Bennett I, supra* note 12, at 10; Meyer, *Effective Utilization of Criminal Detainer Procedures*, 61 Iowa L. Rev. 659, 674 (1976); Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rutgers L. Rev. 828, 855-56 (1964); *Habeas Corpus Ad Prosequendum, supra* note 6, at 298-99 (1979); Note, *Effective Guaranty of a Speedy Trial For Convicts in Other Jurisdictions*, 77 Yale L.J. 767, 775 (1968). The emphasis of the IAD on reducing harm to the sending state's rehabilitation program is hinted at by the roster of participants who reviewed proposals for the disposition of detainers, which included:

> representatives of such groups as the state police, *prison societies and correctional associations*, bar associations, state legislators, members of commissions on interstate cooperation, *state and local parole and probation officials*, district attorneys, *state correctional and prison officials*, states attorneys general, and the United States Department of Justice.

Bennett II, *supra* note 12, at 22 (emphasis added); *see* United States v. Mauro, 436 U.S. 340, 350 & n.17 (1978); Council of State Governments, Suggested State Legislation Program for 1959, at 167 (1958); *Convicts—The Right to a Speedy Trial and the New Detainer Statutes, supra*, at 855 n.225.

In Smith v. Hooey, 393 U.S. 374 (1969), and Dickey v. Florida, 398 U.S. 30 (1970), the Supreme Court held that prisoners are entitled to a speedy trial. *Dickey*, 398 U.S. at 32, 37-38; *Hooey*, 393 U.S. at 375, 383. Congress passed the IAD in response to these decisions. *See* Carchman v. Nash, 105 S. Ct. 3401, 3409 n.10 (1985); S. Rep. No. 1356, 91st Cong., 2d Sess. 1, *reprinted in* 1970 U.S. Code Cong. & Ad. News, 4864, 4864; H.R. Rep. No. 1018, 91st Cong., 2d Sess. 1 (1970); *see also* 116 Cong. Rec. 14,000 (1970) (remarks of Rep. Poff) (noting *Hooey*); *id.* at 38,840 (remarks of Sen. Hruska) (same). Although "the real impetus for enactment of the [IAD]" may have been "the possibility of dismissal of state cases" after *Hooey* and *Dickey*, Fried, *The Interstate Agreement on Detainers and the Federal Government*, 6 Hofstra L. Rev. 493, 501 (1978), Congress did not have the power to convert the IAD into speedy trial legislation unilaterally. *See Carchman*, 105 S. Ct. at 3418-19 n.18 (Brennan, J., dissenting). See *supra* text accompanying note 38. Congress intended to preserve prisoners' rights to a speedy trial by passing the IAD;

tion of dismissal of prosecutions for violations of its requirements.[104] The legislative history of the STA reveals Congress' understanding of

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nonetheless, the legislators realized that with passage they were also incorporating the IAD's primary goal, the reduction of uncertainty to prisoners' terms of incarceration. *See* 116 Cong. Rec. 38,842 (1970); *id.* at 13,999.

One of the reasons courts have not policed IAD time limitation violations strictly is that they perceive the prisoners to be raising "speedy trial-type arguments." *See* United States *ex rel.* Holleman v. Duckworth, 770 F.2d 690, 692 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 828 (1986); Foran v. Metz, 463 F. Supp. 1088, 1096 (S.D.N.Y.), *aff'd mem.*, 603 F.2d 212 (2d Cir.), *cert. denied*, 444 U.S. 830 (1979); Johnson v. State, 442 So. 2d 193, 196-97 (Fla. 1983) (per curiam), *cert. denied*, 466 U.S. 963 (1984); Hunter v. Franza, 405 So. 2d 1035, 1037 (Fla. Dist. Ct. App. 1981) (per curiam); Commonwealth v. Thompson, 262 Pa. Super. 211, 217, 396 A.2d 720, 723 (1978). The association of the IAD with the STA leads courts to accept the argument that the prisoner has waived his rights, since speedy trial rights are subject to waiver. *See Duckworth*, 770 F.2d at 692; *Johnson*, 442 So. 2d at 196; *Franza*, 405 So. 2d at 1036-37; *Thompson*, 262 Pa. Super. at 217, 396 A.2d at 723.

Congress contributed to the confusion of the statutes by incorporating § 3161(j) into the STA. *See* 18 U.S.C. § 3161(j) (1982). This section is intended to extend "the right to a speedy trial to prisoners." *See* H.R. Rep. No. 1508, 93d Cong., 2d Sess. 34, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7401, 7427. In *Mauro*, the Supreme Court added to the confusion when it stated that if the different time limitations contained in the STA and the IAD are both applicable to a particular prosecution, "the more stringent limitation may simply be applied." *See Mauro*, 436 U.S. at 357 n.24 (dictum). This language is problematic. If it refers to the shorter time period of the two, then a prisoner and his sending state will be denied the benefit of dismissal with prejudice contained in the IAD, because the STA grants the court discretion to order dismissal without prejudice. See *infra* text at note 115.

The potential problem is resolved by applying the guideline of statutory construction that "a precisely drawn, detailed statute pre-empts more general remedies." Block v. North Dakota, 461 U.S. 273, 285 (1983); *see also* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 375-77 (1979); Brown v. General Servs. Admin., 425 U.S. 820, 834 (1976). The IAD applies only to prisoners, while the STA applies to all criminal defendants.

In a case where a prisoner asserted rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982) in conjunction with a petition seeking habeas corpus relief, the Court stated that only the "more specific act," habeas corpus, should apply, for "strong policy" reasons. *See* Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973). Similarly, there are strong policy reasons why the IAD should be applied rather than the STA when both are available. First, the two statutes protect different rights. The STA is intended to enforce the constitutional right to speedy trial, *see* H.R. Rep. No. 1508, 93d Cong., 2d Sess. 8-9, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7401, 7402, while the IAD has the goal of advancing prisoner rehabilitation. *See* 18 U.S.C. app. § 2, art. I (1982). Second, the STA has the objective of assisting "in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial," *see* H.R. Rep. No. 1508, 93d Cong., 2d Sess. 8, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7401, 7401, while the IAD's objective is to remove detainers as a hindrance to "the administration of correction programs and the effective rehabilitation of criminals." *See* Council of State Governments—1956, *supra* note 1, at 75. Third, the concern of Congress that dismissals with prejudice under the STA would return some malefactors to society unrehabilitated, see *infra* note 123 and accompanying text, is not applicable to prisoners being prosecuted in receiving states under the IAD because they will be returned to their original correctional facility in the sending state if the prosecution is dismissed. See *infra* text accompanying note 122; *see also* 18 U.S.C. app. § 2, arts. III(d), IV(e), V(g) (1982).

104. *See* 18 U.S.C. § 3162(a) (1982).

both the IAD'S manner of operation and the severity of its sanctions through the legislators' debates over the dismissal provisions contained in the STA.

The STA was originally introduced in the Senate on June 9, 1970,[105] and in the House of Representatives on September 9, 1970.[106] The IAD was enacted on November 25, 1970.[107] Thus, Congress became aware of the STA prior to passing the IAD. The original version of the STA provided the same sanction for STA violations as the IAD provided—dismissal of the charges with prejudice.[108] There were, however, two important limitations on the use of the sanction: 1) the STA expressly required the defendant to move for dismissal, and 2) failure by the defendant to move for dismissal before trial constituted waiver of the right to dismissal.[109]

Section 3162(a)(2) of the STA states that under certain conditions "the information or indictment *shall* be dismissed on motion of the defendant."[110] There is no doubt that dismissal is *mandatory* in these situations.[111] However, dismissal is not "*automatic*, since the defendant is expressly required under section 3162(a)(2) to move for dismissal if not brought to trial within the prescribed time."[112] During hearings on the STA, Senator Percy argued against conditioning dismissal on a motion by the defendant:

> If, after [the applicable time period within the bill] has expired, the accused has not been brought to trial, despite the readiness of the defense and the court, and no good cause has been shown for the delay, the charges should be automatically dropped. The defendant should not have to move the court to have the charges dismissed; it should be the automatic result of the denial of a basic right.[113]

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105. *See* S. 3936, 91st Cong., 2d Sess., 116 Cong. Rec. 18,844 (1970).

106. *See* H.R. 19,067, 91st Cong., 2d Sess., 116 Cong. Rec. 30,927 (1970).

107. On that date the Senate passed the IAD. *See* 116 Cong. Rec. 38,840-42 (1970).

108. *See* 116 Cong. Rec. 18,846 (1970) (S. 3936). This sanction was retained when the STA was reintroduced by Sen. Ervin the following year. *See Speedy Trial: Hearings on S. 895 Before the Senate Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 92d Cong., 1st Sess. 232 [hereinafter cited as *Hearings on S. 895*]; 117 Cong. Rec. 3408 (1971). Introducing S. 895, Sen. Ervin remarked that it was almost exactly the same bill as its predecessor. "The only real difference in [S. 895] and S. 3936 which was introduced last year is that the new bill does not provide for specific additional penalties for crimes committed while a defendant was released awaiting trial." 117 Cong. Rec. 3407 (1971).

109. *See* 117 Cong. Rec. 3408 (1971).

110. *See* 18 U.S.C. § 3162(a)(2) (1982) (emphasis added). This language mirrors the language in S. 895. *See Hearings on S. 895*, *supra* note 108, at 232; 117 Cong. Rec. 3408 (1971).

111. H.R. Rep. No. 1508, 93d Cong., 2d Sess. 38, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7401, 7431; *see also* United States v. Ford, 532 F. Supp. 352, 353 (D.D.C. 1981) (quoting H.R. Rep. No. 1508).

112. H.R. Rep. No. 1508, 93d Cong., 2d Sess. 38, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7401, 7431 (emphasis in original).

113. *Hearings on S. 895*, *supra* note 108, at 67 (statement of Sen. Percy).

Since the IAD and the STA employ similar language, it is reasonable to conclude that Congress understood the IAD penalty to be mandatory. Furthermore, since the IAD, unlike the STA, contains no requirement that the defendant move for dismissal, Congress must have understood the IAD sanction to be automatic. Consistent with this distinction, the IAD does not contain language permitting waiver of the right to mandatory dismissal, indicating that none is possible.[114]

Congress clearly understood that dismissal with prejudice is a very harsh sanction. The STA had to be amended to vest the trial court with discretion to order dismissal with or without prejudice before the bill could be passed.[115] Senator Ervin, principal sponsor of the bill, stated: "[O]n the Senate side opposition to this dismissal with prejudice provision was so intense that passage would have been impossible [unless it were changed]."[116]

The Justice Department, as an interested party, commented to Congress on both the IAD and the STA.[117] The Department's position regarding dismissal is enlightening. Testifying before the Senate Judiciary Committee's Subcommittee on Constitutional Rights about the original sanction of dismissal with prejudice contained in the early versions of the STA, then Assistant Attorney General William H. Rehnquist stated:

> [I]t may well be, Mr. Chairman, that the whole system of Federal

114. See *supra* note 59.

115. 120 Cong. Rec. 41,794-96 (1974); *see id.* at 41,578 (remarks of Rep. Conyers) (noting that the House Subcommittee on Crime was ready to "yield" to the "pressures" for the amendment); *id.* at 41,778 (remarks of Rep. Wiggins) ("I understand that an amendment will be offered by the committee to remove the mandatory dismissal with prejudice and immunity language, and providing for a dismissal with or without prejudice as the court finds to be appropriate. This amendment must be adopted if the bill is to pass."); *id.* at 41,576 (remarks of Rep. Latta) (opining that unless the dismissal sanction were modified, the STA "should be referred to as the 'Let the Criminal Go Act of 1974' "); *id.* at 41,577 (remarks of Rep. Anderson) (voicing support for the proposed amendment of the dismissal sanction to be offered by Rep. Cohen); *id.* at 41,578 (remarks of Rep. Wiggins) (if the amendment allowing dismissal without prejudice were adopted, "90 percent of the legitimate objection to the bill will have been resolved"); *id.* at 41,794 (remarks of Rep. Conyers) (explaining, after the offer of the amendment, that because of time pressure to recess, "it would be far more prudent for all of us, regardless of our feelings about this amendment, to accede to it in the interests of enacting speedy trial legislation").

116. *Speedy Trial Act of 1974: Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773 and H.R. 4807 Before the House of Representatives Subcomm. on Crime of the Comm. on the Judiciary*, 93d Cong., 2d Sess. 161 (1974) (statement of Sen. Ervin) [hereinafter cited as *Hearings, Speedy Trial Act of 1974*]; *see also* 120 Cong. Rec. 35,871 (1974).

117. *See Hearings on S. 895, supra* note 108, at 94-121 (statement of W.H. Rehnquist, Assistant Attorney General, U.S. Dep't of Justice) (comments on the STA); *Speedy Trial: Hearing on S. 754 Before the Senate Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 93d Cong., 1st Sess. 109-31 (1973) (statement of J.T. Sneed, Deputy Attorney General, U.S. Dep't of Justice) (same); S. Rep. No. 1356, 91st Cong., 2d Sess. 5-6, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4864, 4868-69 (letter from R. Kleindienst, Deputy Attorney General, regarding the need for federal adoption of the IAD); H.R. Rep. No. 1018, 91st Cong., 2d Sess. 5-6 (1970) (same).

> criminal justice needs to be shaken by the scruff of its neck, and brought up short with a relatively *peremptory* instruction to prosecutors, defense counsel, and judges alike that criminal cases *must* be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill.[118]

The Department initially supported the sanction of dismissal with prejudice, but its support was contingent on enactment by Congress of new restrictions on the use of the writ of habeas corpus.[119] Failing to convince Congress to reform the habeas corpus laws, the Department requested that Congress modify the sanction provided in the STA, out of "fear [of] wholesale dismissals in jurisdictions with overloaded criminal calendars."[120] In contrast, the Justice Department urged passage of the IAD, expressing no reservations as to its sanctions.[121] Because IAD defendants are already incarcerated, dismissals under the IAD would not release alleged criminals to society.[122] The possibility that such releases would occur was a real fear of Congress when it considered the STA.[123] Thus, it appears that Congress passed the IAD with the knowledge that

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118. *Hearings on S. 895*, *supra* note 108, at 96 (emphasis added); *see also* 120 Cong. Rec. 41,780 (1974) (remarks of Rep. Drinan) (quoting the testimony of Assistant Attorney General Rehnquist).

119. *See Hearings on S. 895*, *supra* note 108, at 97-106, 108-14 (statement of W.H. Rehnquist, Assistant Attorney General, U.S. Dep't of Justice).

120. *See* 120 Cong. Rec. 35,965 (1974) (remarks of Rep. Conyers); *see also Hearings, Speedy Trial Act of 1974*, *supra* note 116, at 387 (statement of Rep. Rodino, Chairman of the House Judiciary Comm.) (the effect of the sanction was "lessened" "[a]t the insistence of the Department of Justice"); 120 Cong. Rec. at 35,873 (same); *Speedy Trial: Hearing on S. 754 Before the Senate Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 93d Cong., 1st Sess. 111-12 (1973) (statement of J. T. Sneed, Deputy Attorney General, U.S. Dep't of Justice) (expressing the fear that the sanction of dismissal with prejudice imposes too great a cost on society).

121. *See* S. Rep. No. 1356, 91st Cong., 2d Sess. 5-6 (letter from R. Kleindienst, Deputy Attorney General, U.S. Dep't of Justice, to Rep. Celler, Chairman of the House of Representatives Comm. on the Judiciary), *reprinted in* 1970 U.S. Code Cong. & Ad. News 4864, 4868-69; H.R. Rep. No. 1018, 91st Cong., 2d Sess. 5-6 (1970) (same). The letter specifically discusses the conditions of transfer, *see* S. Rep. No. 1356, *supra*, at 5, *reprinted in* 1970 U. S. Code Cong. & Ad. News, 4864, 4868; H.R. Rep. No. 1018, *supra*, at 5, indicating that the Justice Dep't was aware that the IAD includes the sanction of dismissal with prejudice, since that sanction is included in the relevant sections of the IAD. See *supra* note 15.

122. See Hoss v. State, 266 Md. 136, 148, 292 A.2d 48, 54 (1972) (while dismissing kidnapping charges, court notes that its decision "is not likely to expedite" the prisoner's release by the sending state).

123. *See Speedy Trial: Hearing on S. 754 Before the Senate Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 93d Cong., 1st Sess. 112 (1973) (statement of J. T. Sneed, Deputy Attorney General, U.S. Dep't of Justice) (under the sanction of dismissal with prejudice, "[s]ociety suffers . . . because . . . guilty defendants would not be convicted and would thus, unrehabilitated, continue to be a threat to the community"); *see also* H.R. Rep. No. 1508, 93d Cong., 2d Sess. 81 (minority views of Reps. Hutchinson, McClory, et al.) ("The danger of a dismissal *with prejudice* sanction is that defendants who may have committed serious crimes would be released into society.") (emphasis in original), *reprinted in* 1974 U. S. Code Cong. & Ad. News 7401, 7457; 120 Cong. Rec. 41,576 (remarks of Rep. Latta) ("[The American people] do not want these criminals out in society to redo their crimes."); *id.* at 41,778 (remarks of Rep. Anderson) (expressing

any violation of its conditions causes mandatory and automatic divestiture of jurisdiction.

IV. POLICY CONCERNS

The position advanced by this Note would invalidate some convictions for reasons having nothing to do with guilt or innocence.[124] Further, it would prevent the continuation of other prosecutions for the same "technical" reasons.[125] However, the Council of State Governments determined that if detainers remained outstanding against a prisoner, the benefits accruing from conviction in the receiving state would be outweighed by the harm to the prisoner's present rehabilitation.[126] They concluded that "society is the real loser in collecting its debt from the offender [when detainers remain unresolved for long periods]. Much money is spent in extra periods of imprisonment, and embittered offenders become recidivists, pyramiding the expense of law enforcement."[127] The Council focused on the problems detainers created for the penal system in the sending state.[128] Detainers were found to have "plagued penal administrators, courts and institutional personnel," . . . . "cling[ing] leechlike to penal progress."[129] The Council found that the detainer system affected four distinct groups within the state where the prisoner is presently incarcerated: judges, correctional officials, parole authorities

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his belief that "the fear might have been left in the minds of some people that this was . . . the kind of bill that would turn criminals loose").

124. *See Prisoner Transfer, supra* note 12, at 517; *cf. Hearings on S. 895, supra* note 108, at 120 (statement of W.H. Rehnquist, Assistant Attorney General, U.S. Dep't of Justice) (inclusion of the sanction of dismissal with prejudice for violations of the STA's time limits "encourages the overall interest of society by occasionally letting a guilty defendant free").

125. *See* Camp v. United States, 587 F.2d 397, 399 n.4 (8th Cir. 1978) (contending that although the government was "technically precluded from proceeding further" in its prosecution, the court retained jurisdiction and could proceed to judgment); *see also* United States v. Schrum, 504 F. Supp. 23, 28 (D. Kan. 1980) (reluctantly granting relief), *aff'd per curiam*, 638 F.2d 214 (10th Cir. 1981); People v. Cella, 114 Cal. App. 3d 905, 921, 170 Cal. Rptr. 915, 923-24 (1981) (refusing to grant relief). The courts' irritation with IAD claims manifests the belief that the provisions of the IAD are merely "procedural rules". See *supra* note 78.

126. *See* Council of State Governments—1956, *supra* note 1, at 74.

127. *Id.*; *see* Baker v. Schubin, 72 Misc. 2d 413, 416, 339 N.Y.S.2d 360, 366 (Sup. Ct. 1972); Dauber, *Reforming the Detainer System: A Case Study*, 7 Crim. L. Bull. 669, 697-99 (1971).

128. *See* United States v. Mauro, 436 U.S. 340, 360 (1978) ("[t]he adverse effects of detainers . . . are . . . for the most part the consequence of the lengthy duration of detainers" while a prisoner is incarcerated); United States *ex rel.* Esola v. Groomes, 520 F.2d 830, 836-37 (3d Cir. 1975) (purpose of the IAD is to "minimize the adverse impact of a foreign prosecution on rehabilitative programs of the confining jurisdiction"); People v. Esposito, 37 Misc. 2d 386, 392, 201 N.Y.S.2d 83, 88 (Sup. Ct. 1960) (Those who participated in the formulation of the IAD "were . . . primarily concerned with the planning and carrying out of programs for prisoner rehabilitation." Delay in disposition of outstanding charges was objectionable because it impeded their functions.).

129. *This Issue in Brief*, 9 Fed. Probation, July-Sept. 1945, at 1.

and individual prisoners themselves.[130] The Council proposed that states adopt the IAD for the purpose of maximizing rehabilitative opportunities for prisoners by minimizing the uncertainty caused by extended detainers. Clearly defined procedures for prosecution of the charges underlying detainers benefit judges, corrections officials and parole authorities in the sending state as well as prisoners.[131] It allows those officials to make informed decisions regarding the prisoner's status earlier in the prisoner's term.[132]

The purpose of both the UMDDA and the IAD is to provide a system in which "detainers will not hamper the administration of correction programs and the effective rehabilitation of criminals."[133] These Acts place the objective of current rehabilitation above that of the determination of guilt or innocence. In fact, one of the reasons that the Council desired to foster prompt settlement of detainers was so that the receiving state and the sending state could "cooperate in planning effective rehabilitation programs for the prisoner."[134]

The position that violations of the IAD mandatorily and automatically divest courts in receiving states of subject matter jurisdiction provides the best means of achieving the Council's stated aim that "[e]very effort should be made to accomplish the disposition of detainers as promptly as possible."[135] Imposition of the harshest possible penalties against a receiving state that fails to comply with the provisions of the IAD fosters the greatest degree of compliance with the IAD's terms.[136] The IAD places reasonable limitations on prosecution by receiving states. The

130. Council of State Governments—1956, *supra* note 1, at 74.

131. See *supra* note 63.

132. See *supra* note 63.

133. Council of State Governments—1956, *supra* note 1, at 75; *see also* Commonwealth v. Fisher, 451 Pa. 102, 106, 301 A.2d 605, 607 (1973).

134. Council of State Governments—1956, *supra* note 1, at 75.

135. *Id.* (emphasis deleted).

136. *See* Camp v. United States, 587 F.2d 397, 399 n.4 (8th Cir. 1978) ("The sanction of dismissal with prejudice . . . is a relatively severe sanction designed to compel prosecutorial compliance with the procedures set forth in the IAD."); State v. Lippolis, 107 N.J. Super. 137, 145, 257 A.2d 705, 710 (Super. Ct. App. Div. 1969) ("The sanction [of dismissal with prejudice] is a prophylactic measure to induce compliance in the generality of cases."), *rev'd on other grounds per curiam*, 55 N.J. 354, 262 A.2d 203 (1970); Commonwealth v. Fisher, 451 Pa. 102, 106-07, 301 A.2d 605, 607-08 (1973) (refusing to grant a continuance requested one day late) (quoting *State v. Lippolis*, 107 N.J. Super. at 145, 257 A.2d at 710, with approval); Note, *The Interstate Agreement on Detainers: Defining the Federal Role*, *supra* note 12, at 1033 (1978) (the penalty "is intentionally harsh to prevent abuse of the detainer and to encourage prompt and speedy disposition of pending charges"); *cf.* H.R. Rep. No. 1508, 93d Cong., 2d Sess. 37 (adopting the position of the American Bar Ass'n "that the only effective remedy for denial of speedy trial is absolute and complete discharge") (quoting American Bar Ass'n Project on Minimum Standards For Criminal Justice, Standards Relating to Speedy Trial § 4.1 at 40 commentary (Approved Draft 1968)) *reprinted in* 1974 U.S. Code Cong. & Ad. News 7401, 7430; Steinberg, *Dismissal With or Without Prejudice Under the Speedy Trial Act: A Proposed Interpretation*, 68 J. Crim. L. & Criminology 1, 14 (1977) ("only by a vigorous judicial application of the remedy of dismissal with prejudice will the prosecution be deterred from noncompliance with the [STA's] time limits").

states have agreed to these limitations[137] for the greater benefit of society.[138] When the IAD's limits are violated, deficient prosecutions should end and the rehabilitative process should resume.

V. THE *MAURO* DECISION

Some courts and commentators have suggested that the Supreme Court implicitly held in *United States v. Mauro*[139] that IAD violations do not divest courts in receiving states of subject matter jurisdiction.[140] In *Mauro*, the Court noted that the cases under review[141] concerned the scope of the United States' obligations under the IAD. The cases posed the particular question "whether a writ of habeas corpus *ad prosequendum*,[142] used by the United States to secure the presence in federal court of state prisoners, may be considered either a 'detainer' or a 'request' within the meaning of the [IAD]."[143] The Court stated that it "granted certiorari . . . to consider whether the [IAD] governs the use of writs of habeas corpus *ad prosequendum* by the United States to obtain state prisoners."[144] The Court held that the writ "is not a detainer within the meaning of the [IAD],"[145] but also held that "the United States is bound by the [IAD] when it activates its provisions by filing a detainer against a state prisoner and then obtains his custody by means of a writ of habeas corpus *ad prosequendum*."[146]

Having decided that question, the Court stated that it agreed with the Second Circuit "that respondent Ford's[147] failure to invoke the [IAD] in specific terms in his speedy trial motions before the District Court did not result in a waiver of his claim that the Government violated Art.

137. Besides the fact that the IAD is a contract, see *supra* notes 39-52 and accompanying text, it is also a statute which must be enacted by each party-state.

138. See *supra* text at note 127.

139. 436 U.S. 340 (1978).

140. See *infra* notes 149-50 and accompanying text. That the question is still open is indicated by Justice White's dissent from the denial of certiorari in Kerr v. Finkbeiner, 106 S. Ct. 263 (1985). *See id.* at 264 (White, J., dissenting from denial of certiorari).

141. United States v. Ford, 550 F.2d 732 (2d Cir. 1977), was consolidated with *Mauro*. *See Mauro*, 436 U.S. at 340.

142. "[A] federal writ of habeas corpus ad prosequendum is a federal court order commanding the immediate production of a prisoner at a federal trial. . . . Upon being served with a writ of habeas corpus ad prosequendum, the state authority . . . turns the prisoner over at once to the federal custodian." United States v. Mauro, 544 F.2d 588, 595 (2d Cir. 1976) (Mansfield, J., dissenting), *rev'd*, 436 U.S. 340 (1978); *see Prisoner Transfer*, *supra* note 12, at 492. 28 U.S.C. § 2241 grants federal courts the authority to issue such writs. *See* 28 U.S.C. § 2241(a), (c)(5) (1982); *see also* United States v. Mauro, 436 U.S. 340, 357 (1978); Carbo v. United States, 364 U.S. 611, 613 n.4, 618-19 (1961). When the United States acquires a prisoner by this writ, it need not comply with the provisions of the IAD. *Mauro*, 436 U.S. at 349; *see* L. Abramson, Criminal Detainers 97 (1979).

143. *Mauro*, 436 U.S. at 344 (1978).

144. *Id.* at 349 (footnote omitted).

145. *Id.*

146. *Id.*

147. See *supra* note 141 and accompanying text.

IV(c)."[148] From this, courts and commentators have concluded that because the Court did discuss the issue of waiver, violations of the IAD are waivable,[149] and therefore, they cannot affect the subject matter jurisdiction of a court.[150]

This conclusion, however, is erroneous. The Justice Department raised the issue of waiver in its petition for certiorari in *United States v. Ford*.[151] The Department presented as a question whether Ford, "by failing to raise the issue in the district court, waived the claim that his indictment should have been dismissed for violation of the [IAD]."[152] The government contended that IAD violations are subject to waiver.[153] Ford's attorneys argued that Ford did not in fact waive his claim under the IAD.[154] The Court held that the defendant had repeatedly asserted his rights under the IAD,[155] thus rendering moot the question whether waiver was, in fact, possible.[156] Thus, the Court did not take the opportunity to discuss the question whether IAD violations are waivable.

CONCLUSION

The IAD should be recognized as curtailing, when necessary, subject

148. *Mauro*, 436 U.S. at 364. Defendant Ford did not specifically invoke the IAD before the trial court. Rather, he asserted his general right to a speedy trial. *See* United States v. Ford, 550 F.2d 732, 735-36 (2d Cir. 1977), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978). The Second Circuit decided his appeal exclusively on the issue of the IAD violation. *See id.* at 736 & n.4. The Supreme Court affirmed this determination. *See Mauro*, 436 U.S. at 364-65.

149. *See* Kowalak v. United States, 645 F.2d 534, 537 n.1 (6th Cir. 1981) (the Court's "factual analysis" regarding waiver by defendant Ford "would have been pointless if the Court were of the opinion that IAD rights could not be waived"); United States v. Eaddy, 595 F.2d 341, 345-46 (6th Cir. 1979) (quoting language from *Mauro* to make the point that IAD rights are waivable); *Federal Habeas Corpus Review*, *supra* note 26, at 986 n.71 ("implicit in th[e Court's] analysis is the assumption that . . . waiver is possible").

150. Kowalak v. United States, 645 F.2d 534, 536-37 & n.1 (6th Cir. 1981); United States v. Eaddy, 595 F.2d 341, 346 (6th Cir. 1979); *Federal Habeas Corpus Review*, *supra* note 26, at 986 n.71.

151. *See* Petition For a Writ of Certiorari at 2, 19-22, United States v. Ford, *decided sub nom.* United States v. Mauro, 436 U.S. 340 (1978).

152. *Id.* at 2.

153. *Id.* at 19-22. The Government pursued this argument in its memoranda of law. *See* Petitioner's Brief at 53-59, United States v. Ford, *decided sub nom.* United States v. Mauro, 436 U.S. 340 (1978); Petitioner's Reply Brief at 11-14, United States v. Ford, *decided sub nom.* United States v. Mauro, 436 U.S. 340 (1978).

154. *See* Brief in Opposition to the Petition For Writ of Certiorari at 16-17, United States v. Ford, *decided sub nom.* United States v. Mauro, 436 U.S. 340 (1978); Brief For Respondent at 42-45, United States v. Ford, *decided sub nom.* United States v. Mauro, 436 U.S. 340 (1978).

155. *Mauro*, 436 U.S. 340, 364-65 (1978) ("[F]rom the time he was arrested Ford persistently requested that he be given a speedy trial.").

156. In their brief in opposition to the petition for a writ of certiorari, Ford's attorneys, after contending that their client did not in fact waive the protection of the IAD, argued: "[I]n any event, the application of waiver principles to a particular claim under the [IAD] does not at this point present an important question of federal law meriting Supreme Court review." Brief in Opposition to the Petition for Writ of Certiorari at 16, United States v. Ford, *decided sub nom.* United States v. Mauro, 436 U.S. 340 (1978).

matter jurisdiction. The language of the IAD and the intent of its drafters indicate that any violation of the IAD's provisions is intended to divest courts of jurisdiction mandatorily and automatically. Congress and the Justice Department also appear to have understood the IAD's provisions to have this effect. Therefore, because violations of the IAD divest courts of subject matter jurisdiction, relief should be granted without requiring a prisoner to demonstrate actual prejudice stemming from the violation. Acceptance of this interpretation may preclude or nullify some prosecutions. The drafters of the IAD decided that these results were preferable to extended, disorderly prosecutions associated with detainers.[157] They accorded the prisoner's rehabilitation program precedence over the receiving state's interest in prosecution. Although the result may seem objectionable in individual cases, the severe penalties of the IAD were included because of a legislative determination that the benefit to society from strict enforcement of the IAD would outweigh occasional losses of prosecutorial power over individual prisoners.

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157. See *supra* notes 124-38 and accompanying text. *See* State v. Lippolis, 107 N.J. Super. 137, 142, 257 A.2d 705, 708 (App. Div. 1969) (murder indictment dismissed because of failure to comply with the IAD's provisions), *rev'd on other grounds per curiam*, 55 N.J. 354, 262 A.2d 203 (1970). The *Lippolis* rationale is commented on *supra* note 65.