SUPREME COURT OF THE UNITED STATES

No. 91–7873

WILLIAM FEX, PETITIONER *v.* MICHIGAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[February 23, 1993]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

I am not persuaded that the language of Article III is ambiguous. The majority suggests that a search for the literal meaning of the contested phrase comes down to an unresolvable contest between a reading that emphasizes the word "caused" and one that emphasizes the word "delivered." But Article III contains another word that is at least as significant. That word favors petitioner's interpretation. The word is "he." The 180–day clock begins after *he* — the prisoner — "shall have caused" the request to be delivered. The focus is on the prisoner's act, and that act is complete when he transmits his request to the warden. That is the last time at which the inmate can be said to have done anything to "have caused to be delivered" the request. Any other reading renders the words "he shall have caused" superfluous.

Even if the provision's focus on the prisoner's act were not so clear, the statute could not be read as Michigan suggests. The provision's use of the future perfect tense is highly significant. Contrary to the majority's contention that "the future perfect would be an appropriate tense for both interpretations," *ante*, at 4, the logical way to express the idea that receipt must be perfected before the provision applies would be to start the clock 180 days "after he has caused the request *to have been delivered*." But the IAD does not say that, nor does it use the vastly more simple, "after delivery."

That this construction was intentional is supported by the drafting history of the IAD. When the Council of State Governments proposed the agreement governing interstate detainers, it also proposed model legislation governing intrastate detainers. See suggested State Legislation, Program for 1957, pp. 77–78 (1956). Both proposals contained language virtually identical to the language in Article III(a). See *id*., at 77. The Council stated that the intrastate proposal was "based substantially on statutes operative in California and Oregon." *Id*., at 76. Critically, however, neither State's provision referred to a delivery "caused" by the prisoner. The Oregon statute required trial "within 90 days of receipt" by the district attorney of the prisoner's notice, Act of Apr. 29, 1955, ch. 387, §2(1), 1955 Ore. Laws 435, and the California law required trial "within ninety days after [he] shall have delivered" his request to the prosecutor, Act of May 28, 1931, ch. 486, §1, 1931 Cal. Stats. 1060. If, as Michigan insists here, see Tr. of Oral Arg. 23, 26, 37, the Council's use of "caused to be delivered" was somehow meant to convey "actual receipt," then the drafters' failure to follow the clear and uncomplicated model offered by the Oregon provision is puzzling in the extreme. When asked at oral argument about this failure, counsel for *amicus* the United States replied that "the problem with using the verb receive rather than the verb deliver in Article III is that . . . . [t]hat would shift the focus away from the prisoner, and the prisoner has a vital role under Article III . . . because he initiates the process." *Id.*, at 41. I submit that the focus on the prisoner is precisely the point, and that the reason the drafters used the language they did is because the 180–day provision is triggered by the action of the inmate.

Nevertheless, the majority finds the disputed language to be ambiguous, *ante*, at 4, and it exhibits no interest in the history of the IAD. Instead, the

majority asserts that the answer to the problem is to be found in "the sense of the matter." *Ibid*. But petitioner's reading prevails in the arena of "sense," as well.

I turn first to the majority's assumption that the 180–day provision is not triggered if the request is never delivered. Because "the IAD unquestionably requires *delivery*, and only after that has occurred can one entertain the possibility of counting the 180 days from the transmittal to the warden," *ante*, at 6, the majority attacks as illogical a reading under which the negligent or malicious warden — who can prevent entirely the operation of the 180–day rule simply by failing to forward the prisoner's request — could not *delay* the starting of the clock. *Ibid*. That premise is flawed. Obviously, the rule anticipates actual delivery. Art. III(b) requires prison officials to forward a prisoner's request promptly, as well. The fact that the rule for marking the start of the 180–day period is written in a fashion that contemplates actual delivery, however, does not mean that it cannot apply if the request is never delivered. Although the IAD assumes that its signatories will abide by its terms, I find nothing strange in the notion that the 180–day provision might be construed to apply as well to an unanticipated act of bad faith.[1]

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[1]For the prisoner aggrieved by a flagrant violation of the IAD, other remedies also may be available. The Courts of Appeals have split over the question of an IAD violation's cognizability on habeas. Compare, *e.g.*, *Kerr* v. *Finkbeiner*, 757 F. 2d 604 (CA4), cert. denied, 474 U. S. 929 (1985) (denying habeas relief), with *United States* v. *Williams*, 615 F. 2d 585, 590 (CA3 1980) (IAD violation cognizable on habeas). See generally M. Mushlin & F. Merritt, Rights of Prisoners 324 (Supp. 1992); Note, The Effect of Violations of the Interstate Agreement on Detainers on Subject Matter Jurisdiction, 54 Ford. L. Rev. 1209, 1212–1215 (1986);

Even on its own terms, the majority's construction is not faithful to the purposes of the IAD. The IAD's primary purpose is not to protect prosecutors' calendars, or even to protect prosecutions, but to provide a swift and certain means for resolving the uncertainties and alleviating the disabilities created by outstanding detainers. See Art. I; *Carchman* v. *Nash*, 473 U. S. 716, 720 (1985); Note, The Effect of Violations of the Interstate Agreement on Detainers on Subject Matter Jurisdiction, 54 Ford. L. Rev. 1209, 1210, n. 12 (1986). If the 180 days from the prisoner's invocation of the IAD is allowed to stretch into 200 or 250 or 350 days, that purpose is defeated.

In each of this Court's decisions construing the IAD, it properly has relied upon and emphasized the purpose of the IAD. See *Carchman* v. *Nash*, 473 U. S., at 720, 729–734; *Cuyler* v. *Adams*, 449 U. S. 433, 448–450 (1981); *United States* v. *Mauro*, 436 U. S. 340, 361–362 (1978). The majority, however, gives that purpose short shrift, focusing instead on "worst-case scenarios," *ante*, at 5, and on an assessment of the balance of harms under each interpretation. Two assumptions appear to underlie that inquiry. The first — evident in the cursory and conditional nature of the concession that to spend several hundred additional days under detainer "is bad, given the intent of the IAD," *ante*, at 6 — is that the burden of spending extra time under detainer is relatively minor. The failure to take seriously the harm suffered by a

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Note, Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers, 83 Colum. L. Rev. 975 (1983). At argument, the State and the United States, respectively, suggested that a sending State's failures can be addressed through a 42 U. S. C. §1983 suit, Tr. of Oral Arg. 33, or a mandamus action, *id.*, at 44.

prisoner under detainer is further apparent in the majority's offhand and insensitive description of the practical impact of such status. To say that the prisoner under detainer faces "certain disabilities, such as disqualification from certain rehabilitative programs," *ante*, at 5, is to understate the matter profoundly. This Court pointed out in *Carchman* v. *Nash*, *supra*, that the prisoner under detainer bears a very heavy burden:

> "`[T]he inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons (i.e., honor farms or forestry camp work); (4) ineligible for trustee [*sic*] status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle [him] to additional good time credits against [his] sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.'" 473 U. S., at 730, n. 8, quoting *Cooper* v. *Lockhart,* 489 F. 2d 308, 314, n. 10 (CA8 1973).

These harms are substantial and well-recognized. See, *e.g.*, *Smith* v. *Hooey*, 393 U. S. 374, 379 (1969); *United States* v. *Ford*, 550 F. 2d 732, 737–740 (CA2 1977) (citing cases), aff'd sub nom. *United States* v. *Mauro*, 436 U. S. 340 (1978); L. Abramson, Criminal

Detainers 29–34 (1979); Note, 54 Ford. L. Rev., at 1210, n. 12. More important for our purposes, they were the reason for the IAD's creation in the first place. The majority's sanguine reassurance that delays of several hundred days, while "bad," are "no worse than what regularly occurred before the IAD was adopted," *ante*, at 6, is thus perplexing. The fact that the majority's reading leaves prisoners no worse off than if the IAD had never been adopted proves nothing at all, except perhaps that the majority's approach nullifies the ends that the IAD was meant to achieve. Our task, however, is not to negate the IAD but to interpret it. That task is impossible without a proper understanding of the seriousness with which the IAD regards the damage done by unnecessarily long periods spent under detainer.

The majority's misunderstanding of the stakes on the inmate's side of the scale is matched by its miscalculation of the interest of the State. It is widely acknowledged that only a fraction of all detainers ultimately result in conviction or further imprisonment. See J. Gobert & N. Cohen, Rights of Prisoners 284 (1981); Dauber, Reforming the Detainer System: A Case Study, 7 Crim. L. Bull. 669, 689–690 (1971); Note, 54 Ford. L. Rev., at 1210, n. 12. It is not uncommon for a detainer to be withdrawn just prior to the completion of the prisoner's sentence. See *Carchman* v. *Nash*, 473 U. S., at 729–730; Note, 54 Ford. L. Rev., at 1210, n. 12; Comment, Interstate Agreement on Detainers and the Rights It Created, 18 Akron L. Rev. 691, 692 (1985). All too often, detainers are filed groundlessly or even in bad faith, see *United States* v. *Mauro*, 436 U. S., at 358, and n. 25, solely for the purpose of harassment, see *Carchman* v. *Nash*, 473 U. S., at 729, n. 6. For this reason, Article III is intended to provide the prisoner "`with a procedure for bringing about a prompt test of the substantiality of detainers placed against him by other jurisdictions.'" *Id.*, at 730, n. 6 (quoting

House and Senate Reports).

These two observations — that detainers burden prisoners with onerous disabilities and that the paradigmatic detainer does not result in a new conviction — suggest that the majority has not properly assessed the balance of interests that underlies the IAD's design. Particularly in light of Article IX's command that the IAD "shall be liberally construed so as to effectuate its purposes," I find the majority's interpretation, which countenances lengthy and indeterminate delays in the resolution of outstanding detainers, impossible to sustain.

Finally, I must emphasize the somewhat obvious fact that a prisoner has no power of supervision over prison officials. Once he has handed over his request to the prison authorities, he has done all that he can do to set the process in motion. For that reason, this Court held in *Houston* v. *Lack*, 487 U. S. 266 (1988), that a *pro se* prisoner's notice of appeal is "filed" at the moment it is conveyed to prison authorities for forwarding to the district court. Because of the prisoner's powerlessness, the IAD's inmate-initiated 180–day period serves as a useful incentive to prison officials to forward IAD requests speedily. The Solicitor General asserts that the prisoner somehow is in a better position than are officials in the receiving State to ensure that his request is forwarded promptly, because, for example, "the prisoner can insist that he be provided with proof that his request has been mailed to the appropriate officials." Brief for United States as *Amicus Curiae* 16–17. This seems to me to be severely out of touch with reality. A prisoner's demands cannot be expected to generate the same degree of concern as do the inquiries and interests of a sister State. Because of the IAD's reciprocal nature, the signatories, who can press for a speedy turnaround from a position of strength, are far better able to bear the risk of a

failure to meet the 180–day deadline.[2]

The IAD's 180–day clock is intended to give the prisoner a lever with which to move forward a process that will enable him to know his fate and perhaps eliminate burdensome conditions. It makes no sense to interpret the IAD so as to remove from its intended beneficiary the power to start that clock. Accordingly, I dissent.

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[2]Even the Solicitor General acknowledged that "a State that has been negligent in fulfilling its duty may well be subject to political pressure from other States that are parties to the IAD." Tr. of Oral Arg. 44. The fact that nevertheless in some cases the 180–day rule may cause legitimate cases to be dismissed is no small matter, but dismissal is, after all, the result mandated by the IAD. Moreover, where a diligent prosecutor is surprised by the late arrival of a request, I would expect that, under appropriate circumstances, a good-cause continuance would be in order. See Art. III(a). (I acknowledge, however, that, as the majority points out, *ante*, at 6, n. 2, some courts have refused to grant a continuance after the expiration of the 180–day period.) The majority finds this obvious solution "implausible," but to me it is far more plausible than a regime under which the inmate is expected to "insist" that recalcitrant prison authorities move more quickly.