Legal Feasibility Series Number 3.0

LEGAL FEASIBILITY ANALYSES 3.1 THROUGH 3.5

ANALYSIS OF LEGAL AUTHORITY FOR COOPERATIVE INTERSTATE PRISONER TRANSPORTS

COMPUTER
ASSISTED
PRISONER
TRANSPORTATION
INDEX
SERVICE

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LEGAL FEASIBILITY ANALYSES 3.1 THROUGH 3.5

ANALYSIS OF LEGAL AUTHORITY FOR COOPERATIVE INTERSTATE PRISONER TRANSPORTS

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Legal Feasibility Series

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PREFACE

The Legal Feasibility Series has been prepared to answer legal questions pertaining to the implementation of the CAPTIS pilot system. Each Legal Feasibility Analysis probes a single essential issue from the standpoint of: "Can we do it?" The objective is to discover and demonstrate a satisfactory legal foundation for the use of out-of-state officers to accomplish cooperative interstate prisoner transports on a cost reimbursement or exchange basis.

As now scheduled, the Legal Feasibility Series is to consist of five Legal Feasibility Analyses with others to be issued should the need arise. The Five Legal Feasibility Analyses immediately forthcoming are:

Legal Feasibility Analysis Number 3.1:
Do the existing federal and state statutory mandates for interstate prisoner transportation permit the officials of a demanding, requesting, or sending state to appoint the officer of another state to act as their agent to accomplish the transport of a prisoner?

Legal Feasibility Analysis Number 3.2:
Do state and local governments and their

criminal justice agencies now have the authority to contract with other units of governments in other states for the transport of prisoners?

Legal Feasibility Analysis Number 3.3:

Do present state and local laws governing public offices and employments allow the officials of the demanding, requesting, or sending state to tender an appointment to an officer from another state to act as their escort officer and may this officer accept and serve such an appointment?

Legal Feasibility Analysis Number 3.4:

May an officer transport a prisoner of another state without being specially deputized by that state?

Legal Feasibility Analysis Number 3.5:

Does the exchange of essential elements of information about the status and availability for transport of prisoners envisaged by CAPTIS fall outside of or comply with federal and state privacy and security requirements safeguarding the collection, storage, and dissemination of

criminal history information?

Readers desiring further information about the legal aspects of the CAPTIS pilot system are requested to write or telephone:

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Legal Feasibility Analysis Number 3.1:

DO THE EXISTING FEDERAL AND STATE STATUTORY MANDATES FOR INTERSTATE PRISONER TRANSPORTATION PERMIT THE OFFICIALS OF A DEMANDING, REQUESTING, OR SENDING STATE TO APPOINT THE OFFICER OF ANOTHER STATE TO ACT AS THEIR AGENT TO ACCOMPLISH THE TRANSPORT OF A PRISONER?

A. DIFFERENCES BETWEEN UNIFORM LAWS AND INTERSTATE COMPACTS

Before attempting to answer the subject questions it may be helpful to note quickly a few of the important distinctions between uniform laws and interstate compacts.(1) These distinctions, which are manifest in statutory structure and scope, have significant impacts upon the differing legal and historical methodologies that must be used in investigating the feasibility of CAPTIS. Briefly, uniform laws, even when clearly reciprocal, have no tenable formal legal effect beyond the jurisdiction of the enacting states. They are ordinary statutes, "the unilateral act of a single state." Interstate compacts are statutes also, but additionally, they are binding contracts among their party states and therefore have very powerful extrajurisdictional ramifications.

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(1) This discussion is drawn generally from F. Zimmermann & M. Wendell, THE LAW AND USE OF INTERSTATE COMPACTS (1976).

Because of their more limited focus, the functional elements of uniform laws tend to be insular and specifically drawn according to orthodox drafting techniques. They deal narrowly with the subject matter at hand, and when gauging the authority given to undertake activities that are thought to be subsumed within or believed to be complementary or auxiliary to the explicit operation of these laws, it frequently becomes necessary to look toward other statutes of the enacting states.

Not so interstate compacts. Drafted as far-reaching contracts to which all must adhere, they must provide a common and comprehensive statutory foundation to make possible compliance and cooperation. Every effort must be made to avoid the need to consult the disparate and often conflicting provisions of internal law which, for compact purposes, are the unwanted baggage of the party states. Interstate compacts are superior in force to both prior and subsequent statutory law, but this, absent breadth of coverage, is not enough. For this reason, interstate compacts tend to be broadly drawn. They are replete with policy sections and include many provisions governing administration that are utterly lacking in uniform laws. Interstate compacts are often described as "umbrella" to enable the doing of any of a number of things to accomplish a particular object.

Of course, these are only general observations but, as will soon become clear, they do happen to pertain to the interstate crime control legislation governing the transport of prisoners across state lines. From the standpoint of demonstrating a satisfactory legal foundation

for CAPTIS, where uniform laws are at issue, a long arm is necessary to gather the authority together. Where an interstate compact is concerned, it is seldom necessary to reach much beyond textual analysis to arrive at a correct conclusion.

B. APPOINTMENTS UNDER THE UNIFORM LAWS

Though all of the uniform laws governing interstate prisoner transports must be examined carefully, the Uniform Criminal Extradition Act (hereinafter Extradition Act) will be most thoroughly investigated. It is by far the most often used, heavily litigated, and closely scrutinized of any of the legislation for interstate crime control. The influence of the Extradition Act is pervasive: Not only is it the "big stick" of the softly speaking civil provisions of the Uniform Reciprocal Enforcement of Support Act, but the Extradition Act also illuminates many decisive considerations of law and policy supporting the use of out-of-state officers to transport prisoners pursuant to the provisions of the Uniform Act to Secure the Attendance of Witnesses from Without A State in Criminal Proceedings, the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act, and the Uniform Act for the Extradition of Persons of Unsound Mind. As a first proposition, if it can be shown that CAPTIS agency appointments are legally possible within the Extradition Act, then it becomes likely that similar appointments are permissable in other less rigorous and constrained statutory contexts.

This is not to say, however, that it can be readily determined whether the Extradition Act permits the chief executive of a demanding state to appoint the officer of another state to act as his agent to accomplish the return of a fugitive. Quite the contrary, a conclusive answer to this question is not easily available. A search of doctrine and precedent in Anglo-American legal history reveals that the agent is truly the unperson of extradition. His presence, if acknowledged at all, usually is noted briefly among the interstices and dicta of decisions directed toward larger matters. Even the few cases that focus upon the extradition agent are chiefly concerned with issues having only limited relevance to the use of out-of-state agents. And what law there is, is old. Still the extradition agent has not been ignored altogether, and the evidence that has beeen collected and evaluated, though sparse, does suggest that CAPTIS is a legally feasible solution to problems now posed by the accelerating expenses and loss of available manpower incurred by criminal justice agencies responsible for this category of interstate prisoner transport.

1. The Extradition Act

a) The Meaning of the Federal Requirement

As it is only when there is compliance with the United States Constitution and the laws of Congress (aided by ancillary state

statutes not in conflict with the federal mandate) that one becomes an "agent" for the purpose of returning a fugitive,(2) a number of significant considerations derived from the history, public policy, and text of the extradition clause of the Constitution and its implementing legislation must be grasped and applied to determine if officers from other states may be designated as "extradition agents" of the demanding state.

> (1) The influence and incorporation of early practices.
>
> The connection between the colonial arrangements and the [extradition] provision of the Constitution has been more than once judicially referred to, and the intimacy of the colonial relations in this respect pointed out, and applied to fortify the conclusion that it was intended to provide a perfect means for continuing and consolidating those relations in the corresponding clause of the Constitution.
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> Hoague, Extradition Between The States, 13 Am. L. Rev. 181, 191(1879)[hereinafter cited as Extradition].

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(2) Boston v. Causey, 206 Okl. 251, 242 P.2d 712 (1952).

The "very lucid and forcible decision" in the 1846 case of State v. Buzine,(3) contains a "remark by the way" by Mr. Chief Justice Booth of Delaware suggesting that:

> [W]here separate States or Territories are parts of the same empire, under one common sovereign or government; a person who commits a crime in one part, and seeks shelter in another, may be arrested in the latter, and sent for trial where the offense was committed; or may be detained for a reasonable time, to allow an application to be made, to deliver him up to the proper authority for the same purpose. This is a principle of the common law, founded in the common welfare and safety of society.

Though of no force as controlling precedent in case law, it would seem that Justice Booth's dictum, because made by a jurist of high authority in an acclaimed opinion construing the common law development of extradition, is entitled to more than a little weight as purely historical evidence of the existence and judicial acceptance of the practice of employing officers from one state -- or at least officers from an asylum state(4) -- to return the fugitives of another. Unfortunately, a close scrutiny of the few early English decisions

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(3) 4 Del. (4 Harr.) 572, 574 (1848). The issue in Buzine relative to this quote is whether the asylum state may arrest or detain a person accused of a crime in another state before a demand is made by the chief executive of the demanding state.

(4) Whether officers from third party states were ever used to return fugitives must remain a problematic historical question. If they were used, it could only have been very rarely -- not because legal disabilities necessarily attended their employment but rather because of the difficulties in coordination engendered by primitive and uncertain communications systems. As noted earlier, these difficulties have been surmounted only very recently.

cited by Justice Booth in support of his confident but superfluous declaration reveals that each of them deals only with the question of the duty to surrender, no issue is either presented or decided in these cases with respect to who may transport the fugitive. But these decisions are of some value as artifacts of legal history docementing the use of extraterritorial agents to transport prisoners and thus ought to be offered and briefly examined for what they are worth.

The pertinent cases were well summarized in 1823 by Mr. Chief Justice Tilqhman of Pennsylvania in Commonwealth v. Deacon(5):

> I will now take notice of what may be called adjudged cases, and they are but few. Col. Lundy's case in the 1st year of William and Mary, is in 2 Vent. 314. Col. Lundy committed a capital offence in Ireland, and fled to Scotland, where he was arrested and sent to England; the judges were consulted, and all agreed, that he might be sent to Ireland for trial. The King v. Kimberley is reported in 2 Str. 848, 1 Barnard, K. B. 225, and Fitzg. 111. Kimberley committed a capital felony in Ireland, and having fled to England, was arrested on a warrant of a justice of the peace, and on a habaes corpus, the Court of King's Bench refused to bail him; he was sent to Ireland, by virtue of a warrant from the secretary of state. In the case of the East India Company v. Campbell, 6 Ves. 246, it was said by the Court of Exchequer, that one may be sent from England to Calcutta, to

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(5) 10 Serg. & Rawl. 125. Deacon addressed the question of whether New York was under a duty to surrender a fugitive charged with a crime in Ireland to the United Kingdom, and was itself cited in Buzine.

> be tried for an offense committed there. The principle of these cases is plain, and undeniable; the territories where the crime was committed, and to which the criminal fled, were parts of the same empire, and under one common sovereign .... The common good of the whole forbids an asylum, in one part, for the crime committed in another (6)

One possible difficulty in reading these cases as "confirmation of ancient practice" lies in their use of "sent" without a trace of elaboration or further explanation. As defined by the Oxford English Dictionary, one of the primary meanings of this active verb is "To direct to be conveyed as a prisoner or slave; to commit or consign officially to prison, the gallows, death, etc." A moment's careful reflection tells us that this meaning, as applied within the context of extradition, does not necessarily distinguish clearly between either a conveyance, that is, a transportation by an officer of the asylum jurisdiction, or a consignment, that is, a surrender or release of the prisoner to officers of the demanding jurisdiction. It may include both modes of extradition, or one to the exclusion of the other.

Happily, Chief Justice Tilghman tarried in the course of his opinion to observe that "prior to the American Revolution, a criminal who fled from one colony, found no protection in another; he was

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(6) Id., 128.

arrested wherever found, and sent for trial to the place where the offence was committed."(7) In this way Deacon points towards far more definitive authorities.

The extradition clause of the Constitution "involved no new principle. It merely prescribed the method of doing what up to and even after the adoption of the Articles of Confederation was usually accomplished through the courts .... The evidences of this fact are abundant and conclusive."(8) Indeed, "this clause of the Constitution does not contain a grant of power. It confers no right. It is the regulation of a previously existing right."(9)

In Article Eight of the First New England Compact of 1643, the governments of Massachusetts, New Plymouth, Connecticut, and New Haven provided that not only should a fugitive be delivered up "into the hands of the officer or other person who pursueth him" but that also, "if there be help required for the safe returning of any such offender, then it shall be granted unto him that craves the same, he paying the charges thereof."(10)

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(7) Id., 129.

(8) J. Moore, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION Sec. 517 (1891) [hereinafter cited as TREATISE].

(9) In re Fetter, 23 N.J.L. 311, 315 (1852).

(10) Reprinted in Kentucky v. Dennison, 65 U.S. (24 How.), 66, 101 (1860).

This "fugitive article" was apparently the forerunner of the corresponding extradition clauses in the Articles of Confederation and in the Constitution.(11) It placed an affirmative duty upon the asylum colony to provide officers to assist in the "safe returning" of fugitives to the demanding jurisdiction. "Like the provisions in the later instruments" its language "is absolute and unqualified," and the arrangements for intercolonial extradition established by the fugitive article were renewed with only slight modification in the Second New England Compact of 1670 (to reduce the amount of proof required to authorize the surrender,(12) and thereafter remained in full force and effect until replaced by Article IV, Section 2 of the Articles of Confederation and Perpetual Union in 1778.(13)

The use of officers from asylum colonies was not confined to New England alone. In colonial Virginia the governor wrote to the neighboring governments, asking for the arrest and return of fugitives.(14) Additional evidence of the use of out-of-state officers

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(11) Id.

(12) Hoague, Extradition, 181, 188.

(13) J. Scott, THE LAW OF INTERSTATE RENDITION Sec. 121 (1917) [hereinafter cited as RENDITION].

(14) A. Scott, CRIMINAL LAW IN COLONIAL VIRGINIA 54 - 55 (1930).

to transport fugitives and, further, that the new extradition clause of the Articles of Confederation sanctioned the continuing employment of officers in this way, is provided by a 1784 Pennsylvania demand upon Maryland in which the Maryland authorities were requested to transport one Henry Carberry from Maryland and across Delaware to the jail in Philadelphia. In support of its demand, Pennsylvania proclaimed that this request was "founded on the second clause of the fourth article of Confederation, and has been the constant usage between this State and the neighboring States."(15)

Governor Paca of Maryland initially objected to Pennsylvania's demand on two supposed bases: Firstly, "that the demand must come from the Executive Department of Pennsylvania" (the state supreme court had levied the demand); and secondly, "that the prisoner could not be taken by the authorities of Maryland beyond the limits of that state. The permission of Delaware would be necessary to go across her territory and the officers of Pennsylvania must receive him at the State line." But once the Governor of Pennsylvania made a formal demand, Governor Paca "replied to this demand, signifying his readiness

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(15) Hoague, Extradition, 181, 189.

to make the surrender at once."(16) Obviously, Governor Paca's willing acquiesence upon being honored as he desired by a demand from a fellow chief executive suggests strongly that his expressed reluctance to transport Carberry to Pennsylvania was but a sham, a mere makeweight, and that Pennsylvania had been correct from the beginning in asserting as customary the use of officers from the asylum state to transport fugitives to the demanding state.

The framers of the Constitution "were acquainted with the provision made in the Compact of 1643 between the Colonies of New England,"(17) and they had before them the Articles of Confederation, itself derived from the New England Compacts. As the extradition clause of the Constitution "was largely borrowed from"(18) and follows "in almost verbatim language" the earlier provision in the Articles of Confederation,(19) and as the extradition clause was proposed and accepted with almost no debate at the Federal Convention of 1787,(20)

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(16) Id. 189 - 90.

(17) S. Spear, THE LAW OF EXTRADITION: INTERNATIONAL AND INTERSTATE 286 (1885) [hereinafter cited as LAW OF EXTRADITION].

(18) Id., 287.

(19) Article IV, Section 2 of the Articles of Confederation reads: "If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State, shall flee from justice and be found in any of the United States, he shall, upon the demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense."

(20) See 2 M. Ferrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 443 (1911).

the force of both history and logic can be marshalled to support the conclusion that a long standing and widespread custom of using officers from an asylum colony or state to return fugitives to the demanding jurisdiction was approved and thereby incorporated within the substance of Article IV, Section 2, Clause 2 of the Constitution by the founding fathers as a cumulative reaffirmation of the existing law.

(2) Construing the command of the Constitution

> The language was not used to express the law of extradition as usually prevailing among independent nations, but to provide a summary executive proceeding by the use of which the closely associated states of the Union could promptly aid one another ... by preventing their finding in one state an asylum against the processes of another .... Its design was and is, in effect, to eliminate for this purpose, the boundaries of states, so that each may reach out and bring to speedy trial offenders against its law from any part of the land.
>
> Biddinger v. Commissioner of Police, 245 U.S. 128, 132 (1917).

An extradition is simply one stop in securing the arrest and detention of a defendant.(21) The extradition clause is a "procedural provision" that "does not impinge upon any substantive right of any

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(21) In re Strauss, 197 U.S. 324 (1905).

individual and does not affect any provisions of the Constitution or its amendments protecting such rights."(22) In light of its important public policy objectives the extradition clause is to be given a "liberal construction to accomplish the return of the fugitive summarily."(23)

The earliest and most telling expression of the reach of the extradition clause was set forth in the comprehensive opinion of Edmond Randolph, first attorney general of the United States, delivered to President Washington on July 20, 1791. The attorney general urged in the strongest possible language that "[t]o deliver up is an acknowledged federal duty; and the law couples with it the right of using all incidental means in order to discharge it."(24)

These words are of great importance as a contemporaneous construction of the extradition clause by an eminent legal authority, who was prominent and influential in the framing of the Constitution, and who, as attorney general of Virginia was also called upon to interpret the preceding extradition clause of the Articles of Confederation.(25) Subsequently, President Washington laid Mr. Randolph's opinion before Congress which then, after an earnest appeal

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(22) Johnson v. Matthews, 182 F.2d 677, 682 (1950), 86 U.S. D.C. App. 376 (1950), Cert. denied 340 U.S. 823 (1950).

(23) Millet v. Babb, 1 Ill.2d 191, 195, 115 N.E.2d 241 (1953).

(24) Reprinted in 2 Moore, TREATISE Sec. 532.

(25) Id.

in person by the President, adopted Mr. Randolph's views as the basis of the federal statute first enacted in 1793.(26)

From this it may follow that though the New England Compacts and colonial customs be discounted or ignored altogether, a rational and sensible construction of the true meaning of the extradition clause and the federal statute must encompass, indeed encourage, demanding states to appoint officers from other states -- asylum or third party -- to return fugitives to the jurisdiction of their courts in the interest of a more perfect administration of justice. Further, upon fully considering that the procedure of extradition is merely ministerial and not judicial,(27) and that since the purpose of extradition is not to determine guilt or innocence but only to return an accused to the place of an alleged offense, none of his constitutional rights, other than at most the "present right to personal liberty," are involved or relevant in any way, (28) the cogency of this hypothesis gains considerable strength.

The function of the agent -- who but accomplishes the transportation of a prisoner lawfully committed to his hands, and whose commission is but "a mere appointment of the person nominated as agent, with an authorization for him to receive and return the named

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(26) Scott, RENDITION Sec. 20, 23.

(27) State v. Bost, 2 Ariz. App. 431, 409 P.2d 590 (1966).

(28) Hackler v. Lohman, 17 Ill.2d 78, 160 N.E.2d 792 (1959), Cert. denied 361 U.S. 963 (1960).

fugitive"(29) -- is the most limited of all participants in any extradition proceeding, and the fugitive would seem to have little or no protected interest in who this agent might be, from where he comes, or how the states concerned arrange his transport. Such at least is the import of the decisions regarding the extradition agent, which, though few in number,(30) have again and again emphasized the narrow scope of the agent's duties and the inappropriateness of challenges to his commission and authority.

It has been held that the agent is a "silent spectator" who has "nothing to do" with effecting the arrest of the fugitive, with receiving a requisition from the governor of the demanding state, with having it honored by the governor of the asylum state, or with habeas corpus proceedings commenced by the fugitive -- to which "he is not even remotely a party thereto."(31) Indeed, the agent "has but a single

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(29) Office of the District Attorney, County of Los Angeles, California, The Fundamentals of Extradition 8 (n.d.) [hereinafter cited as L. A. County, Extradition].

(30) One commentator, writing in 1885, remarked: "The courts have seldom had any occasion to construe the law in respect to the agents appointed to receive and transport fugitive criminals. Cases calling for the expression of an opinion in regard to the powers, duties, and liabilities of these agents, have rarely come before the courts." Spear, LAW OF EXTRADITION 448. He was able to cite only five cases. Only a handful of other decisions have been handed down since that time, all of which are discussed here.

(31) Douthett v. Lawrence, 4 Pa. Dist. 608 (1895).

duty to perform after he has accepted the appointment and that is to transport the fugitive."(32)

The agent's authority to hold the fugitive is proved prima facie by a precept from the chief executive of the demanding state.(33) That the fugitive will be returned by the deputy of a sheriff appointed by the chief executive of the demanding state does not affect the validity of the extradition or entitle the fugitive to a discharge.(34) If the

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(32) Id.

(33) Commonwealth v. Hall, 75 Mass. (9 Gray) 262 (1857).

(34) Ex parte Wells, 108 Tex. Crim. 57, 298 S.W. 904 (1927); but cf. Poucher v. State, 46 Ala. App. 272, 240 So.2d 694 (1970). There is no doubt that Poucher was wrongly decided, plainly so. The court determined that if "agent" as used in the governor's rendition warrant calling for delivery of an accused to named sheriff and/or agent referred to any agent the sheriff might choose, the maxim that delegated power cannot be delegated would intervene; the Poucher court purported to save the delivery and to act in harmony with Ex parte Wells by deciding the designation of the named sheriff includes -- but is limited to -- his duly commissioned deputy, this according to the ancient and esoteric doctrine that a deputy is not strictly the agent of the sheriff but is his alter ego. (The opinion in Ex parte Wells contained no such mumbo jumbo.) Actually, delegatus non potest delegare does not apply to purely ministerial acts such as the return of the accused by the governor's agent. W. Seavey, HANDBOOK OF THE LAW OF AGENCY, Sec. 21K (1964) [hereinafter cited as AGENCY]. But assuming arguendo that it does, the court in Poucher is still wrong. The maxim is authoritatively stated to mean that: "[T]he person to whom an office or duty is delegated cannot lawfully devolve the duty on another, `unless he be expressly authorized to do so' (emphasis added)." BLACK'S LAW DICTIONARY 513 (rev. 4th ed. 1968); see also RESTATEMENT (SECOND) OF AGENCY Sec. 18 (1958) [hereinafter cited as RESTATEMENT]: "Unless the principal manifests otherwise ...." From the facts of the case it is clear that the rendition warrant in calling for the delivery to the named sheriff and/or agent was "faithful to the demand" levied. Therefore it can be concluded that the governor of the demanding state had expressly empowered the sheriff to accomplish the return or to designate another to do so.

requisition is valid, the fugitive is not to be discharged even though it is shown that the agent is improperly commissioned.(35) It "matters not" that the agent's feelings towards the fugitive are malicious,(36) and even though the agent suggests to his prisoner that the criminal prosecution underlying the extradition proceedings could be averted by a settlement of the prisoner's indebtedness, "[t]he opinion of the agent cannot overcome the presumption of regularity which attaches to the proceedings and he cannot be permitted to decide upon matters submitted by law to the executive."(37)

A manual delivery of the requisition to the governor of the asylum state by the attorney for the prosecuting witness instead of by the agent of the chief executive of the demanding state "presents no question of merit."(38) It is decided that when returning the fugitive, the agent acts purely in obedience to the mandate of legal authority and without regard to the exercise of his own judgement regarding the propriety of the act being done.(39) Should he decline to demand the fugitive or withdraw the requisition, his acts will be presumed to be

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(35) Ex parte Pinkus, 114 Tex. Crim. 326, 25 S.W.2d 334 (1930).

(36) In re Titus, (D.C.N.Y.) 8 Ben. 411, 23 F. Cas. No. 14062 (1876).

(37) In re Burke, 4 Fed. Cas. No. 2158 (1879).

(38) Worth v. Wheatley, 183 Ind. 598, 108 N.E. 958 (1915).

(39) Titus, 8 Ben. 411.

at the direction of his principle.(40) Though the agent must use caution to prevent the escape of his prisoner after delivery and may follow an escapee in hot pursuit, he has no lawful power to gather an armed force and arrest a fugitive by violence.(41) The agent's only obligation is to return the fugitive and, provided he does this within the scope of his authority and without unreasonable delay, he is not liable to an action for false imprisonment.(42)

Finally, the demanding and asylum states are "alone interested in the transaction," and should the judiciary of any state through which the fugitive is being transported attempt to intervene: The utmost limit to which they may lawfully extend their power is to ascertain whether the agent is clothed with the requisite authority, without any inquiry into the antecedent proceedings; and this fact, if appearing, must at once be the end of the matter.(43)

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(40) In re Troutman, 24 N.J.L., 634 (1854).

(41) Ex parte Hobbs, 32 Tex. Crim. 312, 22 S.W. 1035 (1893).

(42) Pettus v. State, 42 Ga. 358 (1871), Reagan v. Jessup, 34 Tex. Crim. Civ. App. 74, 77 S.W. 972 (1903). In In re Bull, 4 Fed. Cas. No. 2119 (1877), Bull and Turtle, the agents of the governor of Illinois, received delivery of one Blair from the governor of Nebraska. Supposedly, they were to convey the fugitive to Cook County, but "[i]nstead of taking Blair to Chicago by the nearest route, Bull and Turtle took him to St. Louis, and from thence one of them took him to New York and thence to England, where he was arrested as soon as the ship on which he was sailing had landed." The court was "not satisfied that the relators kept within the scope of their duty under the requisition, or acted in pursuance of it."

(43) Burke, 4 Fed. Cas. No. 2158.

Clearly then, though there is no case directly on point, the reasoning of such authority as there is does imply most convincingly that the appointment of officers from asylum or other states could well be one of the "incidental means" that rightly may be used to extradite fugitives in accordance with the command of the Constitution.

(3) The intrinsic meaning of agent

> In performing the delicate and important duty of construing clauses in the Constitution of our country ... it is proper to take a view of the literal meaning of the words to be expounded.
>
> Chief Justice John Marshall
> in Brown v. Maryland, 25 U.S.
> (12 Wheat) 419, 437 (1827)

The meaning of "agent" or the requirements of agency have never, either in common or legal usage, been defined with reference to the boundaries of territory or jurisdiction, and there is no rule of agency law which mandates territorial restrictions on the activities of an agent. Any such restrictions, if they are to exist at all, must have their basis either in the consensual relationship between the principal and the agent or in some other body of law other than agency law.

The Oxford English Dictionary defines agent as "[O]ne who does the actual work of anything, as distinguished from the instigator or

employer; hence, one who acts for another, a deputy, steward, factor, substitute, or emissary." The technical meaning attached to agent in legal discourse follows very closely that of its use in the vernacular: "Agent is a word used to describe a person authorized by another on his account and under his control."(44) This intimate connection between the popular etymology and technical meaning of agent is hardly surprising, for though "[t]wo hundred years ago, the term Agency was hardly known,"(45) the principles underlying the plenary legal concept of agency have been part of the common law since at least the sixteenth century,(46) having grown out of the relation of authority established in everyday life between master and servant.(47)

In law the existence of agency "depends upon the existence of required factual elements," and these are -- no less but no more than -- "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking."(48) It is not a condition precedent either in ordinary

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(44) RESTATEMENT Sec. 1, Comment d.

(45) Seavey, AGENCY Sec. 2.

(46) RESTATEMENT Title B: Torts of Servants, Introductory Note.

(47) Seavey, AGENCY Sec. 2.

(48) RESTATEMENT Sec. 1, Comment b.

speech or at law that one be from or going to anywhere before one becomes an agent. The black letter rule is this: "A person can properly authorize another to do any act with the same legal effect as if done by himself, except an act which for public policy or his own agreement requires his personal performance."(49) To hold otherwise -- to arbitrarily impose a territorial limitation upon the appointments of agents -- perverts the accepted understanding of agency in every sense.

Dicta in early cases suggests that it has been decided for some time in this country that though "the general business of the state, within the state, executive, legislative and judicial, must be performed by citizens or denizens of the state, and the officers charged with it must be resident in the state," the states also "may have extraterritorial officers, for extraterritorial functions." The test applied in these opinions to determine what is or is not an extraterritorial function is, it seems, refreshingly simple: Is the duty to be performed within or without the physical territory and jurisdiction of the state?(50)

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(49) Seavey, AGENCY Sec. 13.

(50) In re Mosness, 39 Wis. 509, 511, 20 Am. R. 55 (1876), Atty. Gen. v. Scott, 182 N.C. 865, 109 S.E. 789 (1921).

Early English legal history provides one of the most striking examples of the use of extraterritorial agents:

> In 1174 Henry II of England entered into a treaty with William, King of Scotland, wherein they agreed that if persons guilty of felony shall have fled from England to Scotland, they shall immediately be seized and either be tried for the offense in Scotland, or be surrendered to England, and vice versa (emphasis added).(51)

In fact, the extradition clause has been construed in a manner suggestive of this ancient English treaty:

> It was, in effect, a pledge from every state to each of the others, incorporated into the organic law of the nation, that it would become to a certain extent, an agency in the administration of the laws of every other state against treason, felony or other crime, as to all such criminals as should come within its borders.(52)

Today, legal officers of asylum states routinely presume to represent the interests of demanding states at habeas corpus hearings testing the validity of an extradition,(53) and it seems going little

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(51) Kopelman, Extradition and Rendition: History - Law - Recommendations, 14 B.U.L. Rev. 591, 593 (1934).

(52) J. Hawley, INTERSTATE EXTRADITION 90 (1890).

(53) L.A. County, Extradition 11.

further to say that, if agent, as used in the federal statute, is read simply to mean what it means, there can be little doubt that insofar as the Constituition and laws of Congress are concerned, the governor of a demanding state may appoint officers of the asylum or any other state to act as his agents in the return of fugitives after these proceedings have been concluded.

b. The Significance of the Extradition Act

Before assessing the bearing of the Extradition Act upon the use of officers from one state to return fugitives to another, a short outline of what this act can and cannot do within the shadow of the federal requirements is warranted. It is familiar law that the power of the states is limited. The states may not restrict the summary exercise of authority granted to the governors by the extradition clause and federal statute, and any state legislation in conflict with the intent and meaning or the full operation of the requirements of the Constitution and the laws of Congress is void.(54)

But the states may enact legislation facilitating extradition proceedings or to supplement federal law where federal law is unclear or silent, and their legislatures also may permit extradition to be

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(54) Lohman, 17 Ill.2d 78.

accomplished on terms less exacting than those imposed by federal law.(55)

(1) The silence of the commissioners

The Extradition Act does not anywhere define agent, and its published legislative history is similarly reticent. An investigation of the "powerful dicta" in the proceedings of the National Conference of Commissioners on Uniform State Laws (hereinafter NCCUSL) in the 1920s and 30s, when the present Act was formulated, shows that the conference never considered matters relating to the extradition agent to be subjects necessary of discussion. There were only minor alterations in statutory language pertaining to the agent,(56) and no mention of the extradition agent was made either in the committee on

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(55) Application of Morgan, 53 Cal. Rptr. 642, 244 A.2d 903 (1966).

(56) The language of Section 22 as it appeared in the first draft of the uniform act used "messenger" in place of "agent," and Section 25-A when first proposed merely indicates that a person waiving extradition would leave the asylum state "in custody" rather than in the hands of "the duly accredited agent or agents of the demanding state." Both were subsequently changed to their present form without exciting comment. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS [hereinafter all publications in this series are cited according to short title and numbered meeting or conference]: NCCUSL HANDBOOK: THIRTY-SECOND MEETING 371 (1922) and NCCUSL HANDBOOK: FORTIETH CONFERENCE 139 (1930).

the whole or in the reports prepared by the commissioners selected to draft the Extradition Act.(57)

(2) The codification of statutory and common law

Despite the lack of articulate and specific legislative history regarding the extradition agent, the genesis and fundamental sources of the Extradition Act do show that the appointment of out-of-state officers to return fugitives to the demanding state is likely to be within the scope of its provisions. The Extradition Act was derived from the artifacts of the common and statutory law. Like the extradition clause of the Constitution, the uniform act was not intended as a radical, innovative departure from prior arrangements for interstate extradition.

The drafters of the Extradition Act chose the extradition provisions of the Alabama Criminal Code as "the simplest basis for our work." Not only had these provisions remained unchanged since 1852, but further, "as many of the laws of Alabama adopted in 1852 were taken

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(57) NCCUSL HANDBOOK: THIRTY-SECOND MEETING 362 - 72 (1922); NCCUSL HANDBOOK: THIRTY-FIFTH MEETING 248 - 63, 899 - 910 (1925); NCCUSL HANDBOOK: THIRTY-SIXTH MEETING 131, 173, 180 - 81, 585 - 600 (1926); NCCUSL HANDBOOK: FORTIETH CONFERENCE 133 - 41 (1930); NCCUSL HANDBOOK: FORTY-FIRST MEETING 123 - 25, 152 - 54, 403 - 08 (1931); NCCUSL HANDBOOK: FORTY-SECOND MEETING 40, 71 - 95, 132 - 33, 394 - 417 (1932); NCCUSL HANDBOOK: FORTY-SIXTH MEETING 55, 60 - 61, 79 - 89, 91 - 106, 114, 154 - 55, 320 - 34 (1936).

from earlier laws of New York, and as some of the present New York Law on the subject of extradition is the same as Alabama, it is probable that the Alabama Law on Extradition was taken bodily from the early laws of New York."(58) Thus the Extradition Act was founded largely on historical precedents reaching far back into the nineteenth century.

The drafters also drew upon the statutes of Connecticut, Arkansas, Indiana, Illinois, and Oklahoma; the federal extradition statute decisions of the Supreme Court and the state courts, and the "very thorough study of the whole subject" presented by the highly pragmatic James A. Scott in his book, THE LAW OF INTERSTATE RENDITION , from which the drafters took their "general view."(59)

Enough has been said in the prior discussions of the meaning of the federal requirements to demonstrate that the use of agents from other than the demanding state to return fugitives has been countenanced in this country from the earliest colonial times. A survey of all state statutes for interstate extradition in force at the turn of this century underlines this fact. With but one exception, these statutes do not require the holding of a public office or employment as a law enforcement officer of the demanding state to be an exclusive prerequisite to appointment as an extradition agent, or for

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(58) NCCUSL HANDBOOK: THIRTY-SECOND MEETING 365.

(59) NCCUSL HANDBOOK: THIRTY-SECOND MEETING 365 - 72; FORTY-SIXTH CONFERENCE 320 - 32.

that matter, that the agent must necessarily have any other kind of connection -- official or territorial -- with the demanding state at all. Rather agent is variously described in these statutes as "any agent or officer or other person appointed by or representing the authorities of any other state," "some person authorized by the warrant of the governor," "public officer of this state, or other person," "persons named in said order," "any person authorized," "any suitable person to take such a requisition," "persons named in said order," "such agent as shall therein be named," "person who makes the demand," and so forth.(60)

"Agent" or an equivalent term simply did not appear in the statutes of Alabama, Florida, Montana, Nevada, and New Mexico; nor did these states attempt to describe or define his role in any way. Only Minnesota sought to restrict the appointment of extradition agents to its own law enforcement officers: "The governor of this state may ... appoint agents who shall be sheriffs of the counties respectively from which application for extradition shall come in all cases where the sheriff of such county can serve."(61)

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(60) Statutes collected in H. Whitlock, WHITLOCK'S GUIDE FOR SHERIFFS AND OTHER OFFICERS 11 - 105 (1904) [hereinafter cited as WHITLOCK'S GUIDE].

(61) Id., Note, however that even this statute limited appointments to county sheriffs only when they could serve. If they could not serve, presumably the governor could exercise his power of appointment at his discretion.

A textual analysis of the provisions of the Extradition Act concerning the agent demonstrates conclusively that its language incorporates the pragmatism of the state statutes from which it was drawn. Again, no attempt is made to limit the appointment of extradition agents to only law enforcement officers or other persons having ties of public office or employment, citizenship, residence, or whatever in the demanding state. Rather it stipulates that when making his demand the governor of the demanding state shall issue a warrant under seal "to some agent";(62) that the governor of the asylum state shall issue a warrant of arrest authorizing the apprehension and delivery of the fugitive "to the duly authorized agent of the demanding state";(63) that the fugitive is guaranteed a hearing before he is "delivered over to the agent whom the Executive Authority demanding him shall have appointed to receive him";(64) that should the fugitive be delivered over "to the agent for extradition of the demanding state" before such a hearing, the officer responsible shall be guilty of a misdemeanor;(65) that the fugitive who waives extradition will be remanded to "the duly accredited agent or agents of the demanding

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(62) Sec. 22.

(63) Sec. 8.

(64) Sec. 10.

(65) Sec. 11.

state;"(66) and that "the agent of the demanding state" to whom the fugitive has been delivered may confine his prisoner in jails along his travel route;(67) and that the jailer must receive and confine the prisoner until "the officer or agent having charge of him" is ready to proceed.(68)

Lastly, the statutes of many states directly supported the tradition of interstate cooperation in the return of fugitives. Connecticut, Iowa, Massachusetts, Minnesota, and New Hampshire specifically required that local officers "take and transport the person so demanded to the line of the state ... to deliver over such person, at the line of the state to the agent of the state or territory making such demand." The statutes of Maine, Maryland, Nebraska, Oregon, Tennessee, Washington, and Wisconsin contained a helping hand provision similar to that of the fugitive article of the New England Compacts directing that officers of the asylum state "afford all

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(66) Sec. 25-A.

(67) Sec. 12.

(68) This juxtaposition of "officer or agent" is especially revealing of the lack of necessity that the agent hold an office or employment within the demanding state.

needful assistance" to extradition agents returning fugitives to the demanding state.(69)

Though the Extradition Act does not positively mandate such interstate cooperation, if the NCCUSL had intended to prohibit the use of out-of-state officers to return fugitives to the demanding state, it seems clear they would have -- must have -- done so directly in explicit and forceful language in a provision clearly focused upon the agent. They did not do this.(70) The result is that it is difficult to construe the Extradition Act in any other manner than to permit the governor of the demanding state to appoint officers from other states as extradition agents.

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(69) Whitlock, WHITLOCK'S GUIDE 11 - 105 (1904).

(70) In this connection it is perhaps more than of passing interest that the "Rules of Practice" adopted by the Inter-State Extradition Conference of 1887, a gathering of delegates appointed by the governors of nineteen states and the chief justice of the Supreme Court of the District of Columbia required only "That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive." Reprinted in 2 Moore, TREATISE 1190.

2. The Witnesses Acts

a. The Uniform Act to Secure The Attendance of Witnesses from Without a State in Criminal Proceedings

> Not infrequently material witnesses have been known to leave the state and to remain away while a prosecution is pending.
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> Medalie, Inter-state Exchange of Witnesses in Criminal Cases, 33 L. Notes 166, 167 (1929).

The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (hereinafter Attendance of Witnesses Act) stipulates that the requesting state "may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state" (emphasis added)(71) and that if the court of the asylum state chooses to honor this recommendation, it may order that "said witness be forthwith taken into custody and delivered to an officer of the requesting state." (emphasis added).(72) "Officer" at best is a term "of vague and varient import," the meaning of which necessarily varies with the connection in which it is used.(73) It is possible

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(71) Sec. 3.

(72) Sec. 2.

(73) Sachtjen v. Festge, 25 Wis.2d 128, 130 N.W.2d 457 (1964).

that this language could be construed to restrict delivery to only the sheriffs, police, or corrections officers of the requesting state. It must be admitted that there is no use of "some person authorized," "persons named," "any suitable person," or equivalent terminology in the Attendance of Witnesses Act. The deliberations of the Commissioners again are silent.(74) And though the early use of out-of-state officers to return fugitives is suggestive and possibly controlling, a sifting of the materials of legal history in this instance reveals no explicit precedent for employing officers

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(74) See NCCUSL HANDBOOK: THIRTY-THIRD MEETING 56, 86, 90, 178 - 80 (1923); NCCUSL HANDBOOK: THIRTY-FOURTH MEETING 58, 329, 344 (1924); NCCUSL HANDBOOK: THIRTY-FIFTH MEETING 175 - 76 (1925); NCCUSL HANDBOOK: THIRTY-SIXTH MEETING 669 (1926); NCCUSL HANDBOOK: THIRTY-SEVENTH MEETING 395, 915 - 18 (1917); NCCUSL HANDBOOK: THIRTY-EIGHTH MEETING 22, 49 - 50, 430 - 33 (1928); NCCUSL HANDBOOK: THIRTY-NINTH CONFERENCE 75, 109, 119 - 30, 356 - 59 (1929); NCCUSL HANDBOOK: FORTIETH CONFERENCE 12, 110 - 13, 75 - 77 (1930); NCCUSL HANDBOOK: FORTY-FIRST CONFERENCE 10, 41 - 69, 120 - 22, 417 - 23 (1931); NCCUSL HANDBOOK: FORTY-SECOND CONFERENCE 4, 41, 446 - 50 (1932); NCCUSL HANDBOOK: FORTY-SIXTH CONFERENCE 60, 79 - 106, 114, 155 - 58, 333 - 38 (1936); NCCUSL HANDBOOK: SIXTY-SIXTH CONFERENCE 89, 108 - 09, 131 - 36, 211 - 15 (1957); NCCUSL HANDBOOK: SIXTY-FIFTH CONFERENCE 14, 123 (1956).

from other than requesting states to transport witnesses.(75)

(1) A proper construction of this language

> Generally those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute, are not commonly considered mandatory. Likewise, if the act is performed but not in the time or in the precise manner directed by the statute, the provision will not be considered mandatory if

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(75) The first legislative efforts to prevent material witnesses for a prosecution in one state from placing himself beyond process by simply entering or remaining in another can be traced back to New England. In 1792 New Hampshire passed an act under which a person within its borders, certified as a witness in a criminal proceeding, could be summoned to attend a trial in a court of another state. Subsequently, similar acts were adopted in the other New England States. These statutes made no provision for the arrest and delivery of recalcitrant witnesses to secure their attendance. If the putative witness, after having been summoned and tendered expense monies should refuse to go, enforcement could be had only through fine or forfeiture. A statute adopted in New York in 1902 was the first to give the court the power to imprison a witness who refused to appear and testify in the requesting state. Still no provision was made for the arrest and delivery of the witness by anyone. A Wisconsin statute attempted to solve this problem "the other way around" by empowering the prosecution to take the accused to confront the witness in the asylum state so that a deposition for the prosecution taken there could be used in trial. Obviously, none of these laws can provide precedent for the use of out-of-state officers to transport witnesses in criminal proceedings. See Note, Criminal Law - Statutes Compelling the Attendance of Out-of-State Witnesses, 37 N.C.L.Rev. 77 (1958) and Compelling the Attendance of Witnesses From Without the State in Criminal Trials, 85 U.Pa.L.Rev. 717 (1937) for the best short discussion of the devlopment of legislation in this area.

> the purpose of the statute has been substantially complied with and no substantial rights have been jeopardized.
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> 1A J. Sutherland, STATUTES AND STATUTORY CONSTRUCTION Sec. 25.03 (4th ed. 1973) [hereinafter cited as STATUTES].

If construed according to its subject matter and the purpose for which the Attendance of Witnesses Act was enacted, as should properly be done,(76) it is found that the Act permits officers from asylum or other states to be employed to transport witnesses to requesting states. Assuming for the moment that the bare surface of the statute is to be read literally, the words "officer of a requesting state" relate only to the manner (and then only in a most inconsequential way) in which the jurisdiction conferred upon the court by the Attendance of Witnesses Act is to be exercised -- certainly they do not relate to the substance or limits of that jurisdiction.

Restricting delivery to just the officers of the requesting state is not essential to the intent of this Uniform Law, which is to provide "a speedy and effective procedure, through use of certificate issued under seal of court, to summon witnesses living in another state."(77)

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(76) 1A Sutherland, STATUTES Sec. 25.03.

(77) Drew v. Myers, 327 F.2d 174, 182 (1964) cert. denied 379 U.S. 847 (1964).

The argument goes the other way: Timeliness and efficiency in securing the attendance of witnesses would be advanced if delivery could be made to properly authorized officers of other states as well.

The due process guarantees of the Attendance of Witnesses Act which are "generous"(78) -- in many respects better than those given to witnesses summoned in intrastate proceedings(79) -- are not undercut even an inch by the use of an out-of-state officer to effect the transport. In plain fact, the origin of the escort officer is entirely irrelevant to the central concerns of due process involved in the deprivation of the witness's liberty as the result of the judicial direction and discretion mandated by the Act. Though his protection is important, the Attendance of Witnesses Act was not intended for the benefit of the witness, and provided that the due process guarantees of the Act are followed, it would seem that the witness has no right or interest in the exact details of the manner of his transport to attend

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(78) New York v. O'Neill, 359 U.S. 1, 9 (1958).

(79) Massachusetts v. Klaus, 145 App. Div. 798, 130 N.Y. Supp. 713 (1911). This decision construed the New York statute after which the Attendance of Witnesses Act was largely patterned.

criminal proceedings in another state.(80)

For these many reasons it is fitting to construe the language of the Act as less than mandatory, rather, as only directory in its character.(81)

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(80) This suggestion is drawn from holdings and authoritative commentary regarding the return of fugitives: "The government of the state or country to which he flees may insist that he shall not be extradited from there unless by its consent, and under such conditions as it shall assent to. But the fugitive cannot assert these rights of the foreign state or government in our courts." Hawley, INTERSTATE EXTRADITION 98 (1890); the transport of detainees: "[T]he right to insist on action by the governor is a right of the state and not of the prisoner." Consequently, it is provided that the prisoner shall not be able to plead gubernatorial inactivity in resisting delivery to the other state. CSG, SUGGESTED STATE LEGISLATION: PROGRAM FOR 1958 at 82; and the retaking of parole or probation violators: "[T]he parolee ... has the right to complain, by means of habeas corpus, if that law is not complied with by the authorities. But no right exists on the part of the parolee ... to claim that he may only be removed by the method of his choosing." Ex parte Tenner, 20 Cal.2d 670, 678, 128 P.2d 388 (1942), cert. denied, 314 U.S. 585, 317 U.S. 597 (1942). Though the reach of these statements can be said to stretch too far in circumstances where truly substantive issues of due process are inextricably intertwined with statutory administration, the proposition for which they stand surely extends to include a mere matter of logistics such as the use of out-of-state officers to effect a transport. Further evidence that this is so is provided by the recent opinions of two state attorneys general concerning whether a prisoner may be transported by commercial aircraft with or without his consent. These opinions concluded that a prisoner who is legally detained has no constitutional right to choose or object to the mode of his transportation from one state to another pursuant to lawful authority. Letter from Raymond Momboisse, Deputy Attorney General of California, to Orvie Clyde, Sheriff, King's County (April 14, 1967); Opinion of the Attorney General of Florida, No. 075-155 (June 3, 1975).

(81) 1A Sutherland, STATUTES Sec. 25.03.

(2) Bringing other considerations to bear

The Courts are given the responsibility for the superintendance and administration of the Attendance of Witnesses Act, and they also have been provided with considerable leeway for the exercise of judicial judgement in the larger matters necessary to the satisfactory operation of the Act. They do not discharge a mere ministerial function. The Attendance of Witnesses Act does not provide for the delivery of witnesses as a matter of course.(82) The good faith of the demanding state in applying for a certificate is always at issue in either its courts or the courts of the asylum state.(83) The grant or denial of a motion to compel the attendance of out-of-state witnesses is largely discretionary with the court of the requesting state,(84) and though the certificate is "prima facie evidence of all the facts stated therein,"(85) the asylum state court, nonetheless, exercies the power of final determination.

Historically, the courts have had a vital interest in assuring material testimony, and they have been equipped with strong powers to secure the attendance of witnesses in cases tried before them. It is

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(82) Wright v. State, Okla. Crim., 500 P.2d 582 (1972).

(83) Id.

(84) People v. Newville, 33 Cal. Rptr. 816, 220 Cal. App.2d, 267 (1963).

(85) In re Cooper, 127 N.J.L. 312, 22 A.2d 532 (1941).

well settled that as "a general rule of law and necessity of public justice that every person is compellable to bear testimony in the administration of the laws by the duly constituted courts of the country,"(86) and that "for several centuries it has been recognized as a fundamental maxim that it is the general duty of every man to give what testimony he is capable of giving. Any exemptions from that positive general rule are distinctly exceptional."(87) These general principles have been extended by statute or decree to invest the courts with the power to require the recognizance of material witnesses and to incarcerate them in prison upon their failure or refusal to comply.(88) The Attendance of Witnesses Act since has extended the scope of customary judicial authority to include the imposition of naked physical custody upon the witness who is flatly unwilling to testify in the criminal proceeding of requesting states.

Finally, as agencies of the state, "the courts may have extra-territorial officers, for extraterritorial functions, as commissioners to take depositions, etc."(89)

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(86) Haugland v. Smythe, 25 Wash.2d 161, 167, 169 P.2d 706, Annot., 165 A.L.R. 1295, 1300 (1946).

(87) Id., 168.

(88) E. Fisher, LAWS OF ARREST 88 - 89 (1967).

(89) Mosness, 39 Wis. 509, 511.

Given the paramount role of the courts in the performance of the Attendance of Witnesses Act, their long standing right and duty to oversee the provision of essential testimony , and their ability to employ out-of-state officers, it seems unlikely that the Attendance of Witnesses Act could or would be ready to forbid the use of officers from other than the requesting state to receive and transport witnesses in what, after all, are not criminal but civil proceedings(90) conducted in the ultimate interest of "the orderly and effectual administration of justice and prosecution of criminal conduct."(91)

a. The Uniform Rendition of Prisoners As Witnesses In Criminal Proceedings Act

There is no difficulty in delivery to out-of-state officers under the Uniform Rendition of Prisoners in Criminal Proceedings Act (hereinafter Prisoners as Witnesses Act). In modifying the procedures set out in the Attendance of Witnesses Act to fit the circumstances of a material witness confined in penal institutions, the Commissioners did not hesitate to provide that if the judge in the incarcerating state determines to honor the certificate of the requesting state, he "shall issue an order... (a)directing the witness to attend and

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(90) Application of People of State of New York, 100 So.2d 149 (Fla. 1958), reversed on other grounds, 359 U.S. 1 (1959).

(91) In re Saperstein, 30 N.J. Super. 373, 380 140 A.2d 842 (1954), cert. denied 348 U.S. 874 (1954).

testify, (b)directing the person having custody of the witness to produce him, in the court where the criminal action is pending, or where the grand jury investigation is pending, at a time and place specified in the order, and (c)prescribing such conditions as the judge shall determine."(92)

The Prisoners as Witnesses Act is utterly bereft of the unfortunate "officer of this state," "officer of the requesting state" terminology found in the Attendance of Witnesses Act, and it seems clear that such language as "directing the person having custody of the witness to produce him" and "prescribing such conditions as the judge shall determine," gives ample leeway and opportunity for judicial approval of the use of out-of-state officers in cooperative transports arranged with the criminal justice agencies of other states.

b. The Uniform Act for the Extradition of Persons of Unsound Mind

> The State alone, as parens patriae, is charged with the duty of caring for the insane within its borders, and may adopt whatever method of procedure it may desire for the inquisition into their condition and the necessity for their confinement, provided, the same is not in contravention of the Constitution or laws of the United States.
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> C. Alexander, THE LAW OF ARREST IN CRIMINAL AND OTHER PROCEEDINGS Sec. 836 (1949) [hereinafter cited as ARREST].

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(92) Sec. 3.

The Uniform Act for the Extradition of Persons Of Unsound Mind (hereinafter Persons of Unsound Mind Act) provides a simple, relatively informal procedure for the return of mentally ill or incompetents who have fled to other states. The general language of the Act is broad and it may be used either to aid a state in exercising its protective civil jurisdiction over the mentally ill or incompetent or to return such a person wanted in connection with the commission of a crime. In either instance, the return seeks to protect both society and the fugitive. Ample precedent exists for the use of out-of-state officers in extradition generally, and no special reason appears why the power of the demanding state to return fugitives by appointing such officers to perform the transport should be restricted simply because of the mental condition of the person to be brought back. Indeed, Section 4 of this Act requires that the asylum state be paid for "transmitting" the fugitive to the demanding state. There can be no doubt but that this language contemplates that officers of the asylum state may be employed to accomplish the return.

C. APPOINTMENTS UNDER THE INTERSTATE COMPACTS

As joint undertakings, the compacts for interstate crime control give each party state the statutory authority to employ as its agents the criminal justice agencies and officers of other party states. This authority is conferred in the same way in every one of these compacts: It is provided that each party state shall be the agent of another.

For example, the Council of State Governments (hereinafter CSG) has explained the oldest of the compacts as follows: "The Interstate Compact for the Supervision of Parolees and Probationers is a legally binding agreement under which the fifty states, Puerto Rico and the Virgin Islands serve as each other's agents in the supervision of certain parolees and probationers."(93)

The only possible question then is whether the interstate transportation of prisoners is properly within the ambit of these agency relationships under the compacts. The answer is not difficult. Some compacts specifically enumerate prisoner transports as one of the specific tasks that may be performed by the officers of an agent state acting at the direction of a principle state. In other compacts, the use of agent state officers to transport the prisoners of the principle state is not singled out explicitly; rather it is approved indirectly as something necessary to or included within larger activities that may

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(93) CSG, CRIME CONTROL 3.

be accomplished through the use of officers from agent states. In either event, there is an effective grant of the power of "interstate agency."

1. The Interstate Compact For The Supervision Of Parolees And Probationers

The rules and regulations ratified by the party states for the operation of the Interstate Compact for the Supervision of Parolees and Probationers (hereinafter the Parole and Probation Compact) require that as to parole violators: "In returning said parolee the receiving state will cooperate with the sending state in the retaking of the parolee";(94) and that as to probationers: "Whenever and if a probationer is to be returned to his or her original jurisdiction, the receiving state or appropriate judicial or administrative authority thereof shall cooperate with the sending state or appropriate judicial or administrative authority thereof in retaking the probationer."(95) And under the Parole and Probation Compact, a sending state, upon being notified of a violation, may direct the receiving or supervising state

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(94) CSG, Part I. Parole Rules and Regulations, CRIME CONTROL Sec. 5 at 10.

(95) CSG, Part II. Probation Rules and Regulations, CRIME CONTROL Sec. 5 at 12.

to pick-up and hold the delinquent parolee or probationer until further action to effect a return can be taken.(96)

This apprehension and confinement is an exercise of the "power to incarcerate," jurisdiction for which is carefully retained by the sending state in order to assure that the out-of-state supervision of parolees and probationers can be backed by punitive sanctions when necessary.(97) As a practical matter, the pick-up and holding of the parolee or probationer -- as well as all ancillary proceedings that may be initiated by decree of the sending state prior to the arrival of its retake officers -- requires one or more transportations of the violator within the receiving state (to jail, to hearings, and so forth) by criminal justice personnel of that state acting as agents of the sending state. The transport of prisoners -- already being accomplished on an intrastate basis by the officers of other states -- is an integral component, an essential means in our physical world of time and space of the power to incarcerate exercised pursuant to the Parole and Probation Compact. From the standpoint of both theory and practice it seems eminently reasonable to go but one small step further and conclude that it is permissible for sending states, should they desire to do so, to arrange cooperative interstate transports using the

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(96) For a discussion of how this is done see CSG, PAROLE AND PROBATION COMPACT ADMINISTRATORS MANUAL Secs. 408 - 501 (1972).

(97) CSG, Interstate Corrections Compact 3, reprinted from 31 1972 SUGGESTED STATE LEGISLATION.

officers of receiving and other party states as their agents.(98)

2. The Agreement On Detainers

In discussing the Agreement on Detainer's the CSG points out that "[w]hat any party state wants is the availability of the prisoner and any method which accomplishes this purpose meets the practical purposes of the agreement," and that as "in most instances it is not contemplated that states will find it convenient to make the prisoner available in their own custody," they will fulfill their obligation

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(98) Compact language tends to speak almost exclusively of principal and agent relationships between sending and receiving states. This wording reflects the realities of most of the cooperative arrangements generally established under the compacts, but it does not mean that a sending state is confined to using the officers of only its receiving state as agents, nor does it mean that only the receiving states may act as the agent of its sending state. This has been settled quite clearly in important cases arising under the Parole and Probation Compact, and the principle involved is fully applicable to other compacts as well. In Rider v. McLeod, 323 P.2d 74 (Okla. Crim. 1958), a Kansas parolee was paroled under the compact in Missouri. He left Missouri and was convicted of a felony in Oklahoma. After he had served his sentence, Kansas attempted to retake him. The Oklahoma Criminal Court of Appeals held that a party state, which is not the receiving state, may hold a prisoner for return to the sending state. In re Casemento, 24 N.J. Misc. R. 345, 49 A.2d 437 (1945) Casemento, a Pennsylvania parolee was allowed to go to New York for supervision under the compact. He absconded to New Jersey and was arrested there on a new charge. When Pennsylvania attempted to retake him, Casemento argued that the compact procedure was not applicable to him since New Jersey, where he was held, was not the "receiving state" or "sending state" mentioned in his waiver of extradition. The court held against Casemento, and absconding supervisees have been retaken under the Parole and Probation Compact from other party states that were not the receiving states in several cases. These cases are collected in CSG, CRIME CONTROL, note at 26.

under the compact by "giving the prisoner into the temporary custody of the official of the jurisdiction where the trial is to be had."(99)

Within this framework the receiving state, which "shall be responsible for the prisoner"(100) acts as the agent of the sending state while holding the detainee.(101) Thus, "[f]or all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state,"(102) and "[d]uring the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run."(103)

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(99) CSG, SUGGESTED STATE LEGISLATION: PROGRAM FOR 1958, 82.

(100) Art. V (h).

(101) In Braden v. Thirtieth Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973), the Supreme Court found the warden of the Alabama prison holding the detainee to be the agent of Kentucky, the detainer filing state. Braden illustrates the usual fact situation in which the agency status is conferred upon the actual custodian. But its logic applies to the instant situation in which the roles are reversed temporarily through the operation of the Agreements on Detainers, that is, the receiving state is momentarily the actual custodian of the detainee and as such becomes the agent of the sending state to which he must be returned.

(102) Art. V (g).

(103) Art. V (f).

3. The Corrections Compacts

The Corrections Compacts are replete with the legal trappings of agency. As previously pointed out in Research Study Number 2.1: Mandates for Interstate Prisoner Transports, the major provisions of the New England and the Interstate Corrections Compacts were taken almost verbatim from the Western Interstate Corrections Compact, (hereinafter Western Corrections Compact) and the provisions of the Interstate Compact on the Mentally Disordered Offender in many important respects broadly resemble those of the Western Corrections Compact. Therefore only it need be discussed here. In devising this compact the CSG recognized that "the important thing jurisdictionally is to make it clear that the receiving state acts solely as agent of and by virtue of authority derived from the sending state";(104) and that "[w]hen confinement is involved, care must also be taken to provide specifically for this agency relationship with respect to the other aspects of institutionalization."(105)

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(104) CSG, Western Regional Office Explanatory Memorandum: Western Interstate Corrections Compact, 2 (n.d.).

(105) Id.

It is elementary that the "delivery and retaking of inmates" is not just one of "the other aspects of institutionalization," but that it is a condition precedent to any institutionalization in the first instance and that interstate prisoner transports are absolutely necessary to adhere to the purposes of the Compact. "A number of the Compact's provisions deal with these matters,"(106) and even the most casual reading of the provisions and commentary of the Western Corrections Compact leaves no doubt that it, and the succeeding compacts modeled upon it, authorizes the use of out-of-state officers to conduct interstate transports as agents of the sending state.

4. The Interstate Furlough Compact

Extended discussion is not necessary here. The text of the Interstate Furlough Compact reads as follows:

> The authorized person of the sending State or the receiving State acting as agent for the sending State will be permitted to transport inmates being taken through any or all States party to this compact without interference.(107)

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(106) Id.

(107) Sec. 6 (c).

5. The Interstate Compact On Juveniles

As briefly discussed in Research Study Number 2.1: Mandates for Interstate Prisoner Transports, the provisions of the Interstate Compact on Juveniles (hereinafter the Juvenile Compact) were adopted from other legislation for interstate crime control. In many instances this has resulted in a transfer to the Juvenile Compact of agency authority sufficiently comprehensive to support cooperative prisoner transports. For example, just as in the Corrections Compacts, party states to the Juvenile Compact may provide for the cooperative care, treatment, and rehabilitation of delinquents through agreements which "provide that the state receiving such a delinquent juvenile in one of its institutions shall act solely as agent for the state sending such delinquent juvenile."(108)

Procedures for the return of juveniles from asylum states were taken from the Extradition Act. Thus runaways are to be delivered up "to the officer whom the court demanding him shall have appointed to receive him"(109) and escapees and absconders are to be delivered up "to the officer to whom the appropriate person or authority demanding

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(108) Art. X.

(109) Art. IV (a).

him shall have appointed to receive him."(110) Not only does this language permit the demanding state to designate out-of-state officers as agents, but the Juvenile Compact contemplates that officers from sister states will be used, for it continues on to fix the responsibility for payment of expenses incurred, saying that the demanding state "shall be responsible for the payment of the transportation cost of such return."(111)

6. The Interstate Compact On Mental Health

One of the primary purposes of the Interstate Compact on Mental Health (hereinafter Mental Health Compact) is to permit the transfer of persons in need of institutionalization by reason of mental illness or deficiency to institutions in other states.(112)

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(110) Art. V (a).

(111) Art. IV (b) and V (a).

(112) CSG, Interstate Compact on Mental Health 72 (1969), revised and reprinted from SUGGESTED STATE LEGISLATION: PROGRAM FOR 1958.

Insofar as agency is concerned, the structure and operation of this compact is fundamentally similar to that of the Corrections Compacts. This resemblance is not surprising for the Mental Health Compact, like the Corrections Compacts, is directed toward assuring interstate cooperation in the treatment of persons who must be confined. As a result, there is a fully adequate basis for the appointment of out-of-state officers by sending states to transport mentally ill or deficient patients to or from institutions located in receiving states pursuant to the provisions of the Mental Health Compact.

D. CAPTIS AND APPOINTMENTS UNDER THE MANDATES

Though the clarity and force of the evidence varies, a patient sifting through the history, language, logic, and public policy of the existing federal and state statutory mandates for interstate prisoner transportation reveals but one conclusion: The officials of a demanding, requesting, or sending state may appoint the officer of another state to act as their agent to accomplish the transport of a prisoner. Agency appointments of out-of-state officers must, of course, be possible under the relevant uniform laws and compacts if CAPTIS is to be implemented. They are, and thus it appears that the proposed pilot system is fully, legally feasible from this standpoint.

Legal Feasibility Analysis Number 3.2

DO STATE AND LOCAL GOVERNMENTS AND THEIR CRIMINAL JUSTICE AGENCIES NOW HAVE THE AUTHORITY TO CONTRACT WITH OTHER UNITS OF GOVERNMENT IN OTHER STATES FOR THE TRANSPORT OF PRISONERS?

Generally, units of state and local governments are limited to such intergovernmental contracts as are plainly authorized in express terms by legislative or constitutional provisions or as may be necessarily implied from such express authorization.(1) In the past this rule of strict construction greatly hindered cooperation among units of government. Additionally, when the legal feasibility of interstate cooperation was concerned, the existence of this authorization in state and local government law, though necessary, was not thought sufficient. Article I, Section 10, Clause 3 of the Constitution provides that "[n]o State shall, without the consent of Congress ... enter into agreement or compact with another state," and this language seemed to pose an obstacle to the development of contracts spanning state political boundaries.(2)

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(1) Advisory Commission on Intergovernmental Relations (ACIR), A HANDBOOK FOR INTERLOCAL AGREEMENTS AND CONTRACTS 3 (1967) [hereinafter cited as INTERLOCAL AGREEMENTS].

(2) National Sheriffs' Association (NSA), MUTUAL AID PLANNING: A MANUAL DESIGNED TO ASSIST IN THE DEVELOPMENT OF LAW ENFORCEMENT MUTUAL AID SYSTEMS 1 (1973) [hereinafter cited as MUTUAL AID PLANNING].

However, state governments usually can authorize intergovernmental contracts by statute. They have increasingly done so, and most observers would agree that the modern trend has been towards ever broader and more varied grants of authority.(3) Also, two events occurred which have removed the supposed constitutional obstacle to contracts between units of governments in different states. The first was the U.S. Supreme Court ruling in Virginia v. Tennessee which states that only those agreements which affected the political balance of the federal system or a power delegated to the national government must be approved by Congress.(4) The second occurred in 1934 when Congress, aware of the interstate nature of crime and the growing complexity of law enforcement, enacted the Crime Control Act. This Act, as amended, provided Congressional consent to interstate agreements designed to control criminal activity spanning state boundaries, even though no such agreements existed at that time. Broadly construed since 1934, this Act has become the juridical basis that permits states to enter into intergovernmental contracts for interstate crime control.(5)

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(3) Institute of Urban Studies, University of Texas at Arlington, HANDBOOK FOR INTERLOCAL CONTRACTING IN TEXAS 13 (1972).

(4) 148 U.S. 503 (1893).

(5) Crime Control Act of 1934, 48 Stat. 909.

A. INTERSTATE CONTRACTS UNDER THE UNIFORM LAWS

Only two uniform acts for interstate crime control, contain legislative grants of authority arguably empowering state and local governments and their criminal justice agencies to enter into agreements with other units of government in other states for the transport of prisoners.(6) But this authority need not always be provided by specific functional authorization within the four corners

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(6) Section 4 (Terms and Conditions) of the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act requires that:

> The order of the witness and to the person having custody of the witness shall provide for the return of the witness at the conclusion of his testimony, proper safeguards on his custody, and proper financial reimbursement or prepayment by the requesting jurisdiction for all expenses incurred in the production and return of the witness, and may prescribe such other conditions as the judge thinks proper or necessary. The order shall not become effective until the judge of the state requesting the witness enters an order directing compliance with the conditions prescribed.

Section 4 of the Uniform Act for Extradition of Persons of Unsound Mind provides that "All costs and expenses incurred in the apprehending, securing, maintaining, and transmitting such fugitive to the state making such demand, shall be paid by such state." Though additional language would be helpful, it seems reasonable to suppose that if this grants the asylum state the right to demand payment, it must also grant to the demanding state the right to make payment and to both states the authority to conclude other arrangements inherent to the transaction. Otherwise that statute would be largely a nullity.

of particular statutes. State legislatures also can provide for the assistance across state lines envisioned by CAPTIS through general authorization not narrowly confined to any particular governmental structure or activity. The Interlocal Contracting and Joint Enterprises Model Act prepared by the Advisory Commission on Intergovernmental Relations (hereinafter ACIR Model Act) provides an excellent example of such a general authorization:(7)

> The term "public agency" shall mean any political subdivision ... of this state; any agency of the state government or of the United States; and any political subdivision of another state.
>
> Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed ... jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment.
>
> Any two or more public agencies may enter into agreements with one another for joint or cooperative action pursuant to the provisions of this act.

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(7) ACIR, INTERLOCAL AGREEMENTS: Appendix B 26, Secs. 3(1) and 4(a)-(b).

The ACIR Model Act has proven to be very influential. At least thirty-four states have passed enabling legislation permitting a wide range of intergovernmental agreements on an interstate basis and of these almost all have adopted the Interlocal Contracting and Joint Enterprises Model Act in whole or in part, see EXHIBIT I, Statutory Authorization For Contracts With Other States. Much of this legislation was enacted in recent years, and it seems likely that the remaining states will permit contracts with units of government of other states in the near future.

On the darker side, in nine of the thirty-four states with enabling legislation, units of state and local government and their criminal justice agencies have been allowed to contract only with adjoining states, and in one of these ten states this authority is limited still further to contracts with contiguous political subdivisions of adjoining states. Undoubtedly, the legislators in these states prefer to keep a far tighter and more constant rein on the activities of their governmental units than what would be permitted by an unqualified enactment of the ACIR Model Act or similar legislation. Still, even here a real, though imperfect, authorization for intergovernmental contracts pursuant to participation in CAPTIS exists.

B. INTERSTATE CONTRACTS UNDER THE COMPACTS

Only the Interstate Compact for the Supervision of Parolees and Probationers, the earliest of all the compacts for interstate crime

EXHIBIT I

STATUTORY AUTHORIZATION FOR
CONTRACTS WITH OTHER STATES

A) The following states authorize contracts with any other state:

Arkansas	Ark. Stat. Ann. sec. 14-901 to 14-908
Connecticut	Conn. Gen. Stat. Ann. sec. 7-339a to 7-339l
Florida	Fla. Stat. Ann. sec. 163.01 (West)
Hawaii	Const. Art. XIV sec. 6
Idaho	Idaho Code sec. 67-2326 to 67-2333
Illinois	Ill. Ann. Stat. ch. 127 sec. 741 to 748 (Smith-Hurd)
Indiana	Ind. Code Ann. sec. 18-5-1-4 to 18-5-1-7 (Burns)
Iowa	Iowa Code Ann. sec. 28E.1 to 28E.14 (West)
Kansas	Kan. Stat. sec. 12-2901 to 12-2907
Kentucky	Ky. Rev. Stat. Ann. sec. 65.210 to 65.300
Maryland	Md. Ann. Code art. 27 sec. 602B
Michigan	Mich. Comp. Laws Ann. sec. 124.501 to 124.512
Missouri	Mo. Ann. Stat. sec. 70.210 to 70.320 (Vernon)
Nebraska	Neb. Rev. sec. 23-2201 to 23-2207
Nevada	Nev. Rev. Stat. sec. 277.080 to 277.180
North Carolina	N.C. Gen. Stat. sec. 160A-460 to 160A-465
Oklahoma	Okla. Stat. sec. 1001 to 1008
Oregon	Or. Rev. Stat. sec. 190.410 to 190.440
Pennsylvania	Pa. Stat. Ann. tit. 53 sec. 481 to 485 (Purdon)
Tennessee	Tenn. Code Ann. sec. 12-801 to 12-809
Utah	Utah Code Ann. sec. 11-13-1 to 11-13-27
Virginia	Va. Code sec. 15.1-21
Washington	Wash. Rev. Code Ann. sec. 39.34.010 to 39.34.920
Wisconsin	Wis. Stat. Ann. sec. 66.30 (West)
Wyoming	Wyo. Stat. sec. 9-18.13 to 9-18.20

B) The following states authorize contracts with an adjacent state:

Arizona	Ariz. Rev. Stat. sec. 11-951 to 11-954
California	Cal. Gov. Code sec. 6500 to 6514 (West)
Colorado	Colo. Rev. Stat. sec. 29-1-201 to 29-1-204
Minnesota	Minn. Stat. Ann. sec. 471.59
New Hampshire	N.H. Rev. Stat. Ann. sec. 53-A:1 to 53-4:4
New Mexico	N. M. Stat. Ann. sec. 4-22-1 to 4-22-7
North Dakota*	N. D. Cent. Code sec. 54-40-01 to 54-40-09
South Dakota	S. D. Compiled Laws Ann. sec. 1-24-1 to 1-24-10
Texas	Tex. Rev. Civ. Stat. Ann. art. 4413(32c)

*Grant of authority limited to contracts with contiguous political subdivisions of adjoining states.

control, fails to provide specifically for contracts among units of government in different states for the transport of prisoners. Nonetheless, providing a broad legal basis for cooperative efforts spanning state lines is the essence of this compact, and the Council of State Governments (CSG) maintains that any party state can enter into "cooperative return agreements" and that "[s]uch agreements do not require an amendment to the compact."(8)

The nearly identical Western, New England, and Interstate Corrections Compacts specifically stipulate that "[e]ach party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated in receiving states,"(9) and that "[a]ny such

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(8) CSG, THE HANDBOOK OF INTERSTATE CRIME CONTROL 8-9 (rev. ed. 1966) [hereinafter cited as CRIME CONTROL]. For example as of December 31, 1965, Michigan (parolees only), Minnesota, New York, Ohio, Oregon, Pennsylvania, Tennessee, Utah, and Wyoming had signed contracts for cooperative returns pursuant to an abortive "clearinghouse system" proposed by the CSG in the early 1950s. CRIME CONTROL 174 n.3.

(9) Art. III(a).

contract shall provide for ...[d]elivery and retaking of inmates"(10) and "[s]uch other matters as may be necessary and appropriate to fix the responsibilities and rights of the sending and receiving states."(11) The Interstate Compact on the Mentally Disordered Offender(12) and the Interstate Furlough Compact contain similar language.(13)

The Interstate Compact on Juveniles provides that compact administrators "may enter into supplementary agreements with any other state or states party hereto ... whenever they shall find that such agreements will improve the facilities or programs available for ... care, treatment and rehabilitation."(14) Administrators of the Interstate Compact on Mental Health "may enter into supplementary agreements for the provision of any service,"(15) and the Agreement on

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(10) Art. III(a)(4).

(11) Art. III(a)(5).

(12) Art. III(a)(5)-(6).

(13) Sec. 5(5)-(6).

(14) Art. X.

(15) Art. XI.

Detainers contemplates that the demanding state shall pay for the transport, care, keeping, and return of the prisoner "unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves."(16)

C. CAPTIS AND INTERSTATE CONTRACTING AUTHORITY

Adequate statutory authorization to permit state and local governments and their criminal justice agencies to contract across state lines for the cooperative transport of prisoners exists in most states. Two uniform laws appear to contain the grants of authority necessary for such transports and all but one of the compacts for interstate crime control do so in quite specific language. The single exception, the Parole and Probation Compact, is said to authorize interstate contracts for cooperative transports upon a "sense of the statute" rationale. Some variant of the ACIR Model Act usually provides a general authorization for interstate contracts that is sufficient to support cooperative transports arranged through CAPTIS. Clearly then, questions regarding contracting authority can be resolved in favor of the CAPTIS pilot system.

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(16) Art. V(h).

Legal Feasibility Analysis Number 3.3

DO PRESENT STATE AND LOCAL LAWS GOVERNING PUBLIC OFFICES AND EMPLOYMENTS ALLOW THE OFFICIALS OF THE DEMANDING, REQUESTING OR SENDING STATE TO TENDER AN APPOINTMENT TO AN OFFICER FROM ANOTHER STATE TO ACT AS THEIR ESCORT OFFICER AND MAY THIS OFFICER ACCEPT AND SERVE SUCH AN APPOINTMENT?

Though the existing federal and state mandates for interstate prisoner transportation permit the official of a demanding, requesting, or sending state to appoint the officer of another state to act as their agent to accomplish the transport of a prisoner; nonetheless, these appointments cannot violate applicable constitutional and statutory requirements regarding the selection, obligations, and activities of public officers and employees.(1) Frequently, states attempt to safeguard the administration of their internal affairs through complex civil service laws providing for examinations, ratings and certification, eligibility lists, and appointments of candidates to all public offices and employments saving a limited number of positions exempted from the classified service and governed by their own rules and regulations. The tenure, scope, and permanency of duties also are often stipulated in some detail, and prohibitions against holding other offices and employment abound.

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(1) Board of Trustees of Indian Soldiers' and Sailors' Home v. Wright, 211 Ind. 264, 6 N.E.2d 697 (1936).

A. PUBLIC OFFICES AND EMPLOYMENTS AND THE INTERSTATE COMPACTS

Laws governing the filling of public offices and employments have never presented problems to the administration of the compacts for interstate crime control. None of these compacts envisage the creation of special overarching interstate governmental agencies to oversee and carry out new and unique functions and to be specially staffed only with personnel recruited and assigned for just that exclusive purpose. Rather they are to be implemented and maintained by designated officials(2) using the personnel of existing criminal justice agencies

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(2) The compacts contemplate the appointment of a "compact administrator" who may act individually or in concert with his counterparts in other party states, see e.g., Section (5) of the Interstate Compact for the Supervision of Parolees and Probationers: "That the governor of each state may designate an officer who, acting jointly with the officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact", and Section 3 of the model enabling statute of the Interstate Corrections Compact: "The [insert title of head of state correctional agency] is hereby authorized and directed to do all things necessary or incidental to the carrying out of the Compact in every particular and he may in his discretion delegate this authority to the [insert title of assistant commissioner or other appropriate official]."

As indicated by the enacting clause of the Interstate Corrections Compact, "compact administrators always have been existing state officers with responsibilities in the subject matter field with which the compact is concerned." F. Zimmermann & M. Wendell, THE LAW AND USE OF INTERSTATE COMPACTS 29 (1976).

who will perform eventually the same functions under the compacts -- for example, the supervision of parolees and probationers, the confinement of inmates, and so forth -- as they already perform in the ordinary course of their duties.

Most applicable constitutional and statutory provisions provide considerable leeway for the imposition of new powers and additional functions and duties upon existing public offices and employments,(3) and, of course, when a state ratifies a compact through its legislative process, compact business ipso jure becomes public business. The compact related activities undertaken by the officers and employees of these agencies are simply additional work requirements necessarily and lawfully imposed upon the internal machinery of state and local government by legislative and executive processes.

B. PUBLIC OFFICES AND EMPLOYMENTS AND THE UNIFORM LAWS

At the outset the situation is not so clear with regard to appointments of out-of-state officers involving cooperative transports arranged pursuant to the uniform laws for interstate crime control and enabling legislation permitting intergovernmental contracts across

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(3) Tayloe v. Davis, 212 Ala. 282, 102 So. 433 (1924); Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947).

state lines. Neither the uniform laws nor the statutory grants of contracting authority, nor both of them together, ipso jure remove the tender and acceptance of such appointments from the requirements affecting public offices and employments. Reflecting peculiar considerations of local policy, these requirements "were not designed to be a rule of thumb(4) but are to be liberally applied(5) and stringently enforced,(6) and their operation poses potentially insuperable barriers to the full implementation of CAPTIS which presupposes on the one hand, a liberal and unfettered exercise of the appointment powers vested in the officials of the demanding, requesting, or sending state, and on the other hand, an unconstrained ability of officers from other states to accept and serve such appointments.

1. How These Laws Should Be Construed

Laws governing the filling of public offices and employments "ought, if possible, to be so contrued as to make them effectual pieces

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(4) Felder v. Fullen, 27 N.Y.S.2d 699 (1941), affirmed 263 App. Div. 986, 34 N.Y.S.2d 396 (1942), affirmed 280 N.Y. 658, 45 N.E.2d 167 (1942).

(5) Martini v. Civil Service Commission, 129 N.J.L. 599, 30 A.2d 569 (1943).

(6) Kos v. Adamson, 226 Minn. 177, 32 N.W.2d 281 (1948).

of legislation in harmony with common sense and sound reason."(7) Applying this rule of construction and given that reform of the personnel administration of government historically has meant the substitution of principles and methods tested in private industry and commerce for the spoils system of boss politics -- especially in the matter of appointments,(8) and further, that the object of civil service is not alone to protect public servants from the spoils system but also to protect the public so that citizens receive service of the kind and quality for which they pay,(9) it seems most likely that constitutional and statutory provisions establishing civil service systems should or could be applied to binder or interrupt the implementation of CAPTIS.

These laws are prophylactics designed to eliminate personal or political considerations from decisions concerning the selection of public servants. It is patent that the CAPTIS pilot system, by its very structure and mode of operation assures that the tender and acceptance of appointments can only be governed by stark dollars-and-cents utilitarian considerations providing no opportunity for the intrusion of improper influences or preferences. In this

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(7) Younie v. Doyle, 306 Mass. 567, 572, 29 N.E.2d 137 (1940); Annot., 131 A.L.R. 379 (1941).

(8) Ricks v. Department of State Civil Service, 200 La. 341, 8 So.2d 49 (1942); Ward v. Leche, 189 La. 113, 179 So.52 (1938).

(9) Fox v. Dunham, 326 Ill. App. 562, 63 N.E.2d 138 (1945).

respect, CAPTIS is self-policing and no further protection can be gained or rational purpose served through entanglement with the trappings of civil service.

2. The Independent Contractor Exception

Acknowledging that the rote imposition of civil service requirements would be ill-considered in many circumstances and counter to the public interest, laws affecting public offices and employments frequently provide for exceptions to their operation. For example, civil service systems generally recognize the appropriateness of exempting temporary or provisional appointments,(10) situations of a confidential nature,(11) or positions requiring exceptional qualifications that cannot be practically measured by competitive examinations.(12) From the standpoint of CAPTIS, the most important exception is that for independent contractors. The cases generally sustain the view that civil service provisions are not applicable to employees of one who is in fact an independent contractor under an agreement to perform work or accomplish a task for a unit of government, provided that a) the agreement is not a sham device in

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(10) Getty v. Witter, 107 Colo. 302, 111 P.2d 636 (1941).

(11) Chittenden v. Wurster, 152 N.Y. 345, 46 N.E. 857 (1897).

(12) County of San Diego v. Gibson, 133 Cal. App.2d 519, 284 P.2d 501 (1955); Hale v. Worstall, 185 N.Y. 247, 77 N.E. 1177 (1906).

which an "independent contractor" is engaged in bad faith only to circumvent the requirements of civil service, and b) the relationship between the contracting unit of government and the contractor or his employees is not in reality that of master and servant, for the contractor's own employees, as well as himself, may be subject to civil service provisions.(13)

a) The True Test

When assessing if an agreement is but a pretense to evade the requirements of civil service, labels are of no account, and the "mere fact" that the appointing power enters into a contract in which it chooses to designate the person rendering the services as an "independent contractor" rather than an "employee" does not of itself remove the contract from the operation of civil service.(14) Rather, the "true test" looks toward the circumstances promoting the agreement. If it is alleged and decided that the services contracted for are of such a nature they could not be performed "adequately or competently or satisfactorily" by persons selected under civil service, agreements

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(13) Sottile v. Mensing, 238 Wis. 189, 298 N.W. 620 (1941); Annot., 134 A.L.R. 1149 (1941).

(14) State Compensation Ins. Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985 (1937); Annot., 111 A.L.R. 1509 (1937).

with independent contractors outside the operation of the civil service laws are permissible "to obtain greater, speedier, more satisfactory, and more adequate service."(15) On the other hand, if civil servants can do the job as well, agreements with independent contractors are without legitimate advantage and void as against public policy.(16)

The reasoning and requirements of this true test are fully satisfied by agreements for the cooperative transport of prisoners negotiated pursuant to CAPTIS. The services provided by the out-of-state officers are of such a nature that they could not be performed satisfactorily by public servants selected under the provisions of civil service -- and this is not difficult to demonstrate given that considerable cost and manpower savings become possible only as a result of using officers from other states to accomplish prisoner transports. Once again, it may be emphasized that criminal justice agencies participating in CAPTIS will enter into contractual relationships for cooperative transports only in instances where it is foreseen that conventional single-handed transport using their own personnel would prove less productive and more costly.

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(15) Burum v. State Compensation Ins. Fund, 30 Cal.2d 575, 184 P.2d 505 (1947); (construing the "true test" of Riley).

(16) Id.

b) The Status of the Out-of-State Officer

The solution to the problem of determining the true relationship between the contracting unit of government and the contractor and his employees lies in determining exactly the status of the out-of-state officers designated to effect the transport. From the standpoint of the demanding, requesting, or sending state: "He is in every substantial sense, her agent."(17) But if the appointment is accepted, does this officer become the servant of a "borrowing employer?" Or does he remain exclusively the servant of his criminal justice agency? If the latter pertains, the officer then is nonetheless an agent of the demanding, requesting, or sending state. But, he accomplishes his agency as a nonservant, who in the circumstances of CAPTIS happens to be the employee of an independent contractor, his criminal justice agency, which agreed to and facilitated the appointment.

The distinction is vital: If the out-of-state officer becomes the servant of the appointing state, the independent contractor exception does not apply, and that state's laws could be applied to challenge the appointment on any of a number of possible grounds for

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(17) Robb v. Connolly, 111 U.S. 624, 635 (1883).

disqualification, ranging from lack of residence to failure to demonstrate fitness by competitive civil service examination. However, if the out-of-state officer does not become the servant of the appointing state but rather, discharges his appointment as a nonservant agent, the laws of the appointing state which regulate its public service are not properly applicable because they should not pertain to those who, being nonservants, are neither officers nor employees.(18) The reason for the law ceasing, the law itself also ceases.

Similarly, if the out-of-state officer becomes a servant of the demanding, requesting, or sending state when he accepts an appointment to transport prisoners on behalf of that state, his action could be viewed as holding other office or employment and the laws of his own state construed to void his acceptance either in accordance with the well settled doctrine that in the public service no man may serve two masters where the performance of the duties of one office are deemed to interfere with the performance of the duties of the other(19) and or --

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(18) Oakland v. Williams, 15 Cal.2d 542, 103 P.2d 168 (1940); Annot., 134 A.L.R. 1149 (1941).

(19) Reilly v. Ozzard, 33 N.J. 529, 166 A.2d 360 (1960); Annot., 89 A.L.R.2d 612 (1963). The argument can be made that incompatibility does not result here. There is no incompatibility between officers in which their duties are sometimes similar and the manner of performing substantially the same. Gulbrandson v. Midland, 72 S.D. 461, 36 N.W.2d 655 (1949). Nor are offices inconsistent where the experience gained in one can be used to better perform the duties of the other. Dyche v. Davis, 92 Kan. 971, 142 P.264 (1941). But caution is in order, for regarding prohibitions against the dual holding of incompatible offices, "the outer reaches of the doctrine are not easily delineated." Jones v. MacDonald, 33 N.J. 132, 162 A.2d 817 (1960).

based upon a judgement that the accumulation of public offices or places of trust or profit in a single person is per se contrary to sound government policy(20) -- his appointment could be attacked by sweeping strictures against double office holding without reference to whether they are incompatible or not.(21) But if what is involved is a nonservant agency, things will be much different; for it has been held that the aforementioned prohibitions are without force where one of the positions is an office and the other is merely an employment.(22) A fortiori they should not apply where one of the positions is not even an employment.(23)

Is the out-of-state officer a servant or a nonservant agent? In deciding this question, the following considerations regarding an

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(20) The distinction between "office" and "places of trust or profit" is not clear and they may be considered as approaching each other so closely in all their essential elements of meaning as to be identical. Groves v. Barden, 169 N.C. 8, 84 S.E. 1042 (1915).

(21) Harris v. Watson, 201 N.C. 661, 161 S.E. 215 (1931).

(22) Horne v. Wilkinson, 220 Ala. 38, 124 So. 213 (1929); Wooten v. Smith, 145 N.C. 476, 59 S.E. 649 (1907).

(23) Oakland, 15 Cal.2d 542. Of course the same reasoning avoids as well, less common prohibitions expressed in statutory language explicitly including employments.

out-of-state officer serving as the agent of the demanding, requesting, or sending state are in order:

1) He agrees to accomplish a result and to use care and skill in accomplishing this result, but in transporting the prisoner he continues to be liable to the direction and control of his criminal justice agency as to the details and manner in which he performs the return. The conduct of this officer is regulated by the policies and procedures of his agency with regard to such matters as the trip itinerary and check points, safeguarding of information regarding the particulars of the transport, familiarization with the local laws of jurisdictions through which the officer and his prisoner must pass, searching the prisoner and dressing him in special clothing, selection and application of restraints, caring for the personal items of the prisoner, use of firearms, and special arrangements for transporting females, juveniles, and the mentally ill.

2) The officer's agency determines which of its personnel are qualified and available for appointment.

3) The officer's agency sets the standards of job performance and retains full disciplinary authority for his actions.

4) "The transportation of prisoners is a highly specialized function,"(24) and the officer is a trained expert who accomplishes the return without the supervision of the principal.

5) The work is of short duration, the officer is used only when needed, all of the equipment used in the return is supplied by his department, transport planning and preparation is accomplished at and by the officer's agency, and the time he spends upon the "premises" of the principal is minimal.

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(24) California State Board of Corrections, PRISONER TRANSPORTATION MANUAL, 7 (rev. ed. 1968).

6) Neither the officer's principal nor his agency intend that he becomes an integral part of the governmental "household" of the demanding, requesting, or sending state; he is on the outside, not on the inside, and such undoubtedly would be the common understanding of the law enforcement community and state and local government communities.

When the accepted tests for distinguishing between a servant and a nonservant agent are applied to this fact pattern,(25) it is clear that the officer is a nonservant agent of the officials of the demanding, requesting, or sending states. Therefore, his appointment need not be considered subject to the laws governing public officers and employments of either his state or the appointing state.

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(25) See for example, RESTATEMENT (SECOND) OF AGENCY, Sec. 2, 14N, 219, and Title B: Torts of Servants, Introductory Note.

C. CAPTIS AND PUBLIC OFFICES AND EMPLOYMENTS

Neither the logic nor the law of present state and local legislation governing public offices and employment intervene to stymie the appointments necessary for cooperative prisoner transports arranged through CAPTIS. The officials of demanding, requesting, or sending states may tender an appointment to an officer from another state to act as their escort officer and this officer may accept and serve such appointments. This is quite clear where transports under the compacts for interstate crime control are concerned and, upon closer examination, it can be seen that the same holds true when prisoners are moved across state lines pursuant to the uniform laws. In either instance, the appointment of out-of-state officers is equally feasible, and thus yet another essential legal precondition to the implementation of the CAPTIS pilot system is found to be satisfied.

Legal Feasibility Analysis Number 3.4

MAY AN OFFICER TRANSPORT A PRISONER OF ANOTHER STATE WITHOUT BEING SPECIALLY DEPUTIZED BY THAT STATE?

Because the laws of one sovereign have no extraterritorial force, a violation of the laws of one state does not authorize the arrest of an alleged offender in another state(1) -- except when and as permitted by the laws of the foreign state.(2) A law enforcement officer, acting in his official capacity, can make an arrest only within the state from which his authority is derived;(3) a warrant of arrest issued in one state may not be executed in another state;(4) and a state cannot unilaterally empower its officers to make an arrest beyond its

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(1) Kirkes v. Askew, 32 F. Supp. 802 (E.D. Okl. 1940). In Kirkes the plaintiff was charged with a crime in a Justice of the Peace Court in Oklahoma. A warrant for his arrest was issued and Askew, the county sheriff, telegraphed the sheriff of Yuma County, Arizona, to arrest and hold Kirkes. Upon his arrest, the plaintiff agreed to waive the formalities of extradition, and the defendant sheriff, Askew, proceeded to Arizona where he formally executed the Oklahoma warrant. Instead of immediately returning the plaintiff to Oklahoma, Askew proceeded on a pleasure trip to the World's Fair in California, leaving the plaintiff in jail in Arizona. Held: When he attempted to execute the warrant by arresting the plaintiff in Arizona, the defendant sheriff was acting beyond any authority conferred upon him by the warrant and beyond the scope of any authority conferred upon him as a sheriff under the laws of Oklahoma.

(2) U.S. v. Miles, 413 F. 2d 34 (3rd Cir. 1969).

(3) Kirkes, 32 F. Supp. 802.

(4) Id.

boundaries(5), even when recapturing an escaped prisoner upon immediate pursuit.(6) Thus an out-of-state officer traveling in an asylum or receiving state does not have the power -- absent cooperative statutory arrangements -- to arrest a fugitive, material witness, deserting spouse, person of unsound mind, parole or probation violator, inmate, or juvenile for the purpose of transporting that person to a demanding, requesting, or receiving state.

A. CUSTODY DISTINGUISHED FROM ARREST

The territorial limitations of sovereignty, however, do not have an adverse impact upon the cooperative transports envisioned by CAPTIS. The escort officer is not required to arrest the prisoner but only to receive him and to maintain a custody previously obtained through full process of law. A clear distinction exists between arrest and custody.(7) The word "arrest" is derived from the French "arreter," meaning to stop or stay.(8)

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(5) Id.

(6) Bromley v. Hutchins, 8 Vt. 68 (1836).

(7) 1 C. Alexander THE LAW OF ARREST Sec. 45 (1949) [hereinafter cited as ARREST].

(8) Alter v. Paul, 101 Ohio App. 139, 135 N.E.2d 73 (1955).

An arrest is the "seizing,"(9) the "apprehension,"(10) the "capture,"(11) the "first taking,"(12) the "beginning of imprisonment."(13) It is the initial stage of a criminal prosecution,(14) intended to serve the end of bringing the person arrested within the custody of the law.(15)

"Custody" is the "continued control" of another after the original arrest.(16) It is the "retention of him."(17) Though an arrest does not necessarily terminate the instant a person is taken into custody, for arrest also includes bringing the person taken personally within the custody and control of the law, the arrest does terminate when he is delivered to the jailer and properly confined,(18) and when a prisoner

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(9) E. Fischer, LAWS OF ARREST Sec. 4 (1967) [hereinafter cited as LAWS], citing H. Voorhees, THE LAW OF ARREST IN CIVIL AND CRIMINAL ACTIONS Sec. 65 [hereinafter cited as ACTIONS].

(10) People v. Mirbelle, 276 Ill. App. 533 (1934).

(11) Alexander, ARREST, Sec. 45.

(12) Fisher, LAWS Sec. 4, citing Voorhees, ACTIONS Sec. 65, and BLACK'S LAW DICTIONARY (4th. ed.).

(13) Id.

(14) Terry v. State of Ohio, 392 U.S. 1.

(15) State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

(16) Alexander, ARREST Sec. 45.

(17) Id.

(18) Leak, 11 N.C. App. 344.

is already in custody, no further arrest is necessary.(19) Indeed, one court has reasoned that since an arrest "presumes taking the prisoner into custody, there can be no arrest of a prisoner held in custody."(20)

This distinction between arrest and custody is what makes possible the working principles and practices of interstate prisoner transports as they developed in the past and exist today. For example, the great bulk of the fugitives returned pursuant to the provisions of the federal and state laws governing extradition have waived formal proceedings.(21) When these proceedings are waived, the criminal justice agency that desires to bring the fugitive back usually will dispatch escort officers as soon as possible, and it will -- and may -- do so without the governor having appointed these officers his extradition agents, for the agent's commission is but one of the required incidents of formal extradition proceedings that are rendered of no effect by a properly executed waiver. The legal sufficiency of all this is so well settled as to be beyond dispute and need not

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(19) Hayes v. U.S. 367 F.2d 216; People v. Ragsdale, 177 Cal. App. 2d 676 , 2 Cal. Rptr. 640 (1960).

(20) Hayes, 367 F.2d 216.

(21) Results of the National Sheriffs' Association's County Law Enforcement Survey (CLE) Andrew McKean, Project Director, indicate that 75 percent of all fugitives returned during 1976 waived formal extradition proceedings. These and other results of the CLE survey are now being prepared for publication in the spring of 1978.

concern us further. What is important here is to determine precisely the operative capacity in which these officers presume to proceed - that is, the official or personal condition giving effect to their extraterritorial acts as they accomplish the transport. Do they, then, derive any sort of power from their employment as law enforcement officers? Or are their actions rendered effectual for other reasons?

The answer is that these officers are acting purely in their capacity as private citizens, they have no power as law enforcement officers to carry out the transport. Further, even were formal extradition not waived and all of its required incidents in force, these officers, now forced to obtain the governor's commission, would not proceed as law enforcement officers but as special agents for extradition. There are two cases which illuminate this critical point. In the first of these, Boston v. Causey,(22) a tort action for negligence leading to the death of the fugitive in an automobile collision was brought against two persons who were transporting the fugitive from Arizona to Illinois. Boston who was one of the persons transporting the fugitive was also a sheriff of a county in Illinois. The fugitive had signed a waiver of "all formality" stating that he was "willing to return to Illinois with the said officers, without the Governor's requisition or other papers legally necessary in such cases".(23)

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(22) 206 Okl. 251, 242 P.2d. 712 (1952).

(23) Id., 252.

The defense raised was sovereign immunity. Boston claimed to be an agent for Illinois in the transportation of the fugitive. The court held that he was not acting as an agent of Illinois and the defense of sovereign immunity could not be raised. Before Boston could become an agent under the law relating to extradition it was necessary that the Governor of Illinois make a demand and appoint him agent for the return of the fugitive. In the absence of any such demand and appointment, the defendant Boston was acting as a private citizen even though Boston was a sheriff of a county in Illinois. Though not at issue, the court assumed throughout its opinion that Boston as a private citizen had the power to return the fugitive.

The court in Boston relied on McLean v. State of Mississippi.(24) In McLean, a Mississippi sheriff went to Louisiana, took delivery of a fugitive who was wanted for a crime in Mississippi, and allegedly beat the fugitive during the course of transportation to Mississippi. The fugitive sued the insurance company on the sheriff's surety bond that he would faithfully perform his duties. Held: no liability by the insurance company on the bond.

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(24) 96 F.2d. 741 (5th Cir. 1938), cert. den. 305 U.S. 623 (1938).

In this case, as in Boston, the governor of the demanding state had not issued a requisition or made an appointment of agent. The court stated flatly that the federal extradition statute gives the state sheriffs no duty or function to perform qua sheriffs in extradition. The governors of the demanding and asylum states handle the matter and the prisoner is to be delivered to and returned by a specially appointed agent and not by a sheriff of the demanding state. Furthermore, the court said, even though one who is a sheriff should be such an agent, he acts not as a sheriff under his bond but as a special agent to extradite at least until he has the prisoner in his custody in his own county.

B. BOSTON, MCLEAN AND CAPTIS

Boston and McLean are instructive and their meaning reaches far beyond the context of extradition. The futility of having any authority to arrest -- even within the confines of the demanding state -- is made quite clear by their holdings. Simply put, this authority is utterly irrelevant to the capacity to transport prisoners across state lines, regardless of whether the prisoner is being returned for trial according to the provisions of the Uniform Criminal Extradition Act or is being transported for a different purpose pursuant to the operation of any of the many other uniform laws and compacts for interstate crime control. This is so because in all instances the persons being transported under these statutory mandates have been made

prisoners through lawful process executed before they are "made available". There can be no doubt then, that an officer may transport the prisoner of another state without being specially deputized by that state. This officer need only be employed to do so, as he will be in cooperative transports arranged through CAPTIS.

Legal Feasibility Analysis Number 3.5

DOES THE EXCHANGE OF ESSENTIAL ELEMENTS OF INFORMATION ABOUT THE STATUS AND AVAILABILITY FOR TRANSPORT OF PRISONERS ENVISAGED BY CAPTIS FALL OUTSIDE OF OR COMPLY WITH FEDERAL AND STATE PRIVACY AND SECURITY REQUIREMENTS SAFEGUARDING THE COLLECTION, STORAGE, AND DISSEMINATION OF CRIMINAL HISTORY INFORMATION?

A. FEDERAL LAWS AND REGULATIONS

The Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90 - 351) (hereinafter cited as Act), as amended by the Crime Control Act of 1973 (Public Law 93 - 83) provided for confidentiality, accuracy, and dissemination requirements in the administration of criminal history record information by criminal justice agencies. Section 524(b) of the Act provides:

> All criminal history information collected, stored or disseminated through support under this title shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest is included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Administration shall insure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation of this title, shall upon satisfactory verification of his identity be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

Pursuant to this federal statute, the Law Enforcement Assistance Administration (hereinafter LEAA) promulgated implementing regulations under Title 28 of the United States Code (hereinafter U.S.C.).

Section 20.21 requires security and completeness, but does not place limitations on dissemination of criminal history information to "criminal justice agencies," if such information is to be used for criminal justice activities or employment.(2) Section 20.3(c)(2) defines a "criminal justice agency" as "a government agency ... which performs the administration of criminal justice pursuant to a statute or executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice." "The administration of criminal justice" is expanded in Section 20.3(d) to mean "... performance of any of the following activities: detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice shall include criminal identification activities and the collection, storage and dissemination of criminal history record information.

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(2) Section 20.21 (b)(1).

B. CAPTIS APPLICABILITY

1. Question(s) Presented

Given the requirements of federal law and implementing federal regulations, the essential question is thus presented:

> Does the exchange of the essential elements of information (EEI) about the status and availability for transport of prisoners envisaged by CAPTIS fall outside the scope of the federal legislation?

2. Conclusion

The exchange of EEI for prisoners to be cooperatively transported through utilization of the services of CAPTIS falls outside of the requirements of the federal legislation cited above, and hence the federal regulations, addressing safeguarding the collection, storage, and dissemination of criminal history information, do not apply.

3. Discussion

A party transported through a CAPTIS transport would not be automatically assumed to be currently charged with a crime. The system is designed to assist transports of persons other than fugitives, and

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may include persons of unsound mind, non-supporting spouses, or material witnesses. Simple inclusion in the files as a potential party for cooperative transport does not automatically imply that the individual is a party to a criminal charge, and consequently, the data disseminated does not constitute even the barest of criminal history record information.

Title 28, U.S.C. , Chapter 1, Part 20, Section 20.3(b) identifies "criminal history information system" as "mean[ing] information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges and any disposition arising therefrom, sentencing, correctional supervision, and release. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system."

By virtue of the above definition, the exchange of CAPTIS EEI does not constitute an exchange of criminal history record information. The program is not intended to disseminate any information relating to the criminal history record information, or even current criminal charges pending against the individual to be transported. The information to be disseminated includes only that information essential to the

successful accomplishment of the cooperative transport. The EEI are:

1. Identification, location, and transport coordinator (name and telephone number) of the agency wanting custody of the prisoner.
2. Prisoner (name or agency identifying number), sex, height, weight, danger code (does not refer to any criminal offense, past or current).
3. Date prisoner is available for transport.
4. Latest date transport must be made.
5. Identification, location, and transport coordinator (name and telephone number) of the agency having custody of the prisoner.

From the foregoing, the obvious intent of the EEI is to identify that an individual is available for cooperative transport, and not to detail any pending charges. On the contrary, the criminal history of the person to be transported and/or any pending charges are not provided for in the EEI, and are not to be included in the data entered for participation in CAPTIS cooperative transports. This information is omitted specifically to insure that CAPTIS will not be subject to compliance with LEAA privacy regulations, by eliminating any criminal history record information from the CAPTIS data.

This does not mean that the necessary criminal history record information will not be available to the cooperating criminal justice agencies. The large majority of agencies that will participate in CAPTIS qualify as "criminal justice agencies," and are not limited in dissemination of criminal history record information to other criminal justice agencies.

This dissemination would not be part of the CAPTIS system, rather, it would be accomplished through administrative messages between the criminal justice agencies.

Those agencies not qualifying as "criminal justice agencies," by devoting less than a "substantial part"(3) of their budget to criminal justice matters can nonetheless participate in CAPTIS, for again, the privacy regulations are not applicable in a system not disseminating criminal history record information.

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(3) "Privacy and Security Planning Instructions," Criminal Justice Information and Statistics Service, Law Enforcement Assistance Administration, U.S. Department of Justice, revised April 1976, p. 5 -- "substantial part" is defined as meaning "more than fifty percent..."

END