
NOTES

DISAPPROVING DEATH: AMENDING THE INTERSTATE AGREEMENT ON DETAINERS IN LIGHT OF *UNITED STATES V. PLEAU*

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Dear Governor Chafee,

My brother was murdered by Jason Pleau.

Our family is hoping for justice for David. It is time for you to stop wasting taxpayers money on this attempt to protect a murderer from being properly prosecuted by the federal system. . . .

If your son Caleb was shot in the head, in broad daylight while doing his job you would be horrified, as we were! . . .

Never in our wildest dreams did we think that the Governor of our state, would get on his own bandwagon to protect a career criminal!

You have made a terrible situation much worse for our family! We should have never had to go through all this! He would have been arraigned a long time ago, if it wasn’t for your agenda. Please stop this now! Enough is enough.

Sincerely,

Deborah Smith¹

[M]y involvement in this case is not about Mr. Pleau. It is not about the terrible ordeal of the Main family. And it is not about my personal feelings or opinions. It is about maintaining and protecting the sovereignty and laws of the state I was elected to govern.

Lincoln D. Chafee, . . . Governor of Rhode Island²

1. Letter from Deborah Smith to Lincoln D. Chafee, Governor, State of Rhode Island, <http://news.providencejournal.com/breaking-news/2012/05/08/dsmith-chafee-letter.pdf>, linked from Katie Mulvaney, *Sister of Slain Gas Station Manager: RI Gov. Chafee Should Surrender Murder Suspect*, PROVIDENCE J. (May 8, 2012), <http://news.providencejournal.com/breaking-news/2012/05/sister-of-slain.html>.

2. Lincoln D. Chafee, Letter to the Editor, *Lincoln D. Chafee: In Pleau Case, I’m Standing Up for State’s Core Values*, PROVIDENCE J. (Aug. 19, 2011), http://news.beloblog.com/ProJo_Blogs/letters/2011/08/lincoln-d-chafee-in-pleau-case-im-s.html (defending his decisions in Pleau’s case).

I. INTRODUCTION

Tragically, the story of Deborah Smith's brother—David Main—was largely lost in the shuffle as the federal government and Rhode Island each jockeyed for position in the legal battle over custody of Main's killer, Jason Pleau. Main, then forty-nine, was a lifelong resident of Lincoln, Rhode Island, where he lived with his wife of twenty-five years and his seventeen-year-old son.³ Main made the daily commute seven miles north to Woonsocket, a town of about 44,000,⁴ where he worked as the well-known manager of a Shell gas station.⁵ As part of his duties, he drove to a nearby Citizens Bank branch every day before noon to deposit money for the business.⁶ September 20, 2010, was no different. Main parked his car in the bank's parking lot, grabbed the gas station's deposit bag, and headed toward the branch.⁷ At 11:10 a.m., just as he came up to the bank's entrance, he was approached suddenly from behind and shot at least four times.⁸ His assailant grabbed the deposit bag, which contained \$12,542, and ran off into the nearby woods.⁹ David Main was pronounced dead later that day.¹⁰

While going about his duties that fall morning, Main was no doubt oblivious to the horrific fate that awaited him only a few short hours ahead. The assault must have been abrupt and inexplicable from Main's perspective—it occurred without warning, his life taken away before he had any real chance to react. For his assailants however, the attack was anything but spontaneous. Jason Pleau, Jose Santiago, and Kelley Lajoie were familiar with Woonsocket and lived in nearby communities: Pleau, thirty-four, of Providence, Rhode Island; Santiago, also thirty-four, of Chicopee, Massachusetts; and Lajoie, thirty-three and Santiago's live-in

3. Kathryn Sotnik, *Bank Shooting Victim Was Loving Father*, WPRI.COM (Sept. 20, 2010, 10:38 PM), http://www.wpri.com/dpp/news/local_news/blackstone/woonsocket-family-of-shooting-victim-speaking-out-.

4. City of Woonsocket, *Woonsocket—Overview & Demographics*, <http://www.ci.woonsocket.ri.us/backgnd.htm> (last visited Nov. 3, 2013).

5. Nancy Krause, *No Bail for Bank Shooting Suspects*, WPRI.COM (Oct. 12, 2010, 11:17 AM), <http://www.wpri.com/news/local/blackstone/woonsocket-bank-shooting-suspects-jason-pleau-jose-santiago-arraigned>.

6. *Id.*

7. *Lajoie Pleads Guilty to Role in Main Murder*, THE CALL (Dec. 9, 2011), <http://www.woonsocketcall.com/node/4060#content> [hereinafter *Lajoie Pleads Guilty*].

8. *Id.*

9. *Id.*

10. Nancy Krause, *Bank Shooting Victim Has Died*, WPRI.COM (Sept. 20, 2010, 11:58 AM), http://www.wpri.com/dpp/news/local_news/blackstone/woonsocket-diamond-hill-road-citizens-bank-shooting.

girlfriend.¹¹ Knowing Main's deposit pattern, the trio devised a plan to exploit it. Pleau would act as the gunman, Santiago the getaway driver, and Lajoie the lookout.¹²

At 7:30 a.m. on that September 20th, all three entered the convenience store of Main's Shell station, made some minor purchases, and identified that Main and his vehicle were there.¹³ Lajoie then dropped Pleau off at the back of the Citizen's Bank, where he would lie in wait while she drove back to the gas station.¹⁴ Meanwhile, Santiago hid his white van in a cul-de-sac near the bank, out of sight through the trees. He would wait there for Pleau to arrive with the money. Back at the gas station, from her parking spot across the street, Lajoie witnessed Main get into his car at 11:08 a.m. with the deposit bag in tow.¹⁵ She called ahead to Pleau to let him know that Main was on the way. She then left for a Providence apartment, the planned rendezvous point. After Pleau saw Main park at the bank, he sprung out of hiding, chased Main down, shot him, grabbed the money, and ran. He met up with Santiago, and the pair sped off to Providence, all according to plan. Once at the apartment, they split the profits: 50 percent for Pleau, and 50 percent to share for the couple. Three days later, however, the jig was up. Pleau was arrested in New York City, Santiago captured in Woonsocket,¹⁶ and Lajoie brought into custody shortly thereafter.

Though unquestionably a tragedy, one might wonder how *United States v. Pleau*¹⁷ differs from the scores of murder cases that appear before courts across the nation every day. After all, it lacks any of the sensationalist features that characterize typical murder cases that have "gone national" in the legal community.¹⁸ Nevertheless, this factually run-of-the-mill murder has generated a disproportionate amount of media attention¹⁹ and created multiple layers of strange bedfellows: a governor

11. *Lajoie Pleads Guilty*, *supra* note 7.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Krause, *supra* note 5.

17. *United States v. Pleau*, 680 F.3d 1 (1st Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 931 (2013).

18. The Trayvon Martin-George Zimmerman case, for instance, is a referendum on the wisdom of "stand-your-ground" laws. But, simmering just underneath the surface of the legal argument lies the provocative tale of a racist, vigilante, neighborhood-watch volunteer claiming self-defense in his slaying of a black teen who was simply on his way home from a 7-11, Skittles in tow. See Leo Benedictus, *How Skittles Became a Symbol of Trayvon Martin's Innocence*, *ShortcutsBlog*, THEGUARDIAN (Jul. 15, 2013), <http://www.theguardian.com/world/shortcuts/2013/jul/15/skittles-trayvon-martin-zimmerman-acquittal>.

19. See, e.g., Editorial, *Gov. Chafee Declines*, N.Y. TIMES, Dec. 29, 2011, at A22, *available at*

standing with an admitted murderer against the victim's family; the American Civil Liberties Union and self-described conservative "think tanks" finding themselves, for once, making the same arguments; and the smallest state in the Union pushing back against the might of the federal government. The case even reached the chambers of the Supreme Court of the United States, where certiorari was recently denied on January 15, 2013.²⁰ What's the catch? In a word: federalism.

Interplay between the Federal Death Penalty Act ("FDPA")²¹ and the Interstate Agreement on Detainers ("IAD")²² has morphed Pleau's murder case into a dispute that highlights the growing tension between the federal interest in prosecuting federal capital crimes and a state's interest in enforcing its own criminal law pursuant to the police power. Even though both Pleau and Main were Rhode Island citizens at the time of the crime—which itself occurred wholly within the state of Rhode Island—the federal government sought jurisdiction over the case under the Hobbs Act.²³ Pleau was then "serving an eighteen-year sentence . . . for parole and probation violations," which was handed down quickly after his arrest for Main's killing, while also awaiting the filing of state murder charges.²⁴ In order to obtain Pleau's presence in federal court despite his Rhode Island custody, the federal government filed a "detainer" directly with Pleau's prison pursuant to the IAD. By using these detainer requests, the IAD essentially provides a shortcut for a prisoner's extradition between jurisdictions by making unnecessary the more complicated, traditional procedure—a writ of habeas corpus ad prosequendum filed with a district court.²⁵

http://www.nytimes.com/2011/12/30/opinion/gov-chafee-declines.html?_r=3&ref=lincolnchafee&; Tina Susman, *R.I. Governor, Feds Fight over Who Gets Custody of Robbery Suspect*, L.A. TIMES (May 30, 2012), <http://www.latimes.com/news/nation/nationnow/la-na-nn-death-penalty-custody-20120530,0,439222.story>. Both elected officials and citizens alike have been interested in the case. See, e.g., Edward J. O'Neill, *Shielding Criminal Betrays Public Trust*, PROVIDENCE J. (Aug. 17, 2011), http://www.senatoroneill.com/Public_Trust_aug13.pdf (State Senator O'Neill represents Lincoln, North Providence, and Pawtucket, Rhode Island). For a collection of citizens' letters relating their opinions on Pleau's case, see *infra* Appendix.

20. *Pleau*, 133 S. Ct. at 931.

21. Federal Death Penalty Act, 18 U.S.C. §§ 3591–3600A (2012).

22. Interstate Agreement on Detainers, 18 U.S.C. app. § 2 (2012).

23. Hobbs Act, 18 U.S.C. § 1951 (2012). Specifically, § 1951(a) criminalizes robbery and conspiracy to commit robbery affecting interstate commerce. Under modern commerce clause jurisprudence, Pleau's robbery of Main certainly qualifies, as it affected the deposit of funds belonging to a national company, Shell Oil Company, Ltd., and a large bank with a presence in the Northeast and Midwest, Citizens Financial Group, Inc.

24. *United States v. Pleau*, 680 F.3d 1, 3 (1st Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 931 (2013).

25. *Id.*

Because the federal government announced its intention to seek the death penalty against Pleau pursuant to the authority granted by the FDPA, Rhode Island Governor Lincoln D. Chafee stepped in.²⁶ Invoking a seldom-used provision of the IAD (the “disapproval provision”) that gives governors the power to disapprove the granting of custody, Governor Chafee refused to turn Pleau over to the federal government.²⁷ In addition to his own personal distaste for the death penalty, Governor Chafee reasoned that letting Pleau be exposed to a potential capital sentence would violate his duty to uphold the public policy choices of his state’s citizens: in 1852, Rhode Island became the second state to abolish the death penalty and has not executed a single prisoner since.²⁸ He also noted that Pleau was prepared to plead to life in prison without parole, Rhode Island’s harshest penalty.²⁹ Thus, the stage was set for a full-fledged federalism battle.

Seeking a way to work around Governor Chafee’s disapproval, the federal government then filed the traditional writ of habeas corpus ad prosequendum in federal district court in Rhode Island, which was granted.³⁰ A series of appeals ensued on the issue of whether the federal government could so circumvent a state’s power to disapprove a transfer under the IAD. The First Circuit’s ultimate decision, en banc, was that Rhode Island must honor the district court’s grant of the writ and hand Pleau over to the federal government.³¹ The majority’s reasoning was based largely on the Supremacy Clause³² as informed by their reading of *United States v. Mauro*,³³ the most important United States Supreme Court case to date concerning the IAD.³⁴ There is, however, a split among the circuits on the proper interpretation of *Mauro*, which would flip the result in *Pleau*. Here, the majority sided with the Third, Fourth, and Tenth Circuits; in an impassioned dissent, Judge Torruella took up the Second Circuit’s interpretation in arguing that Governor Chafee’s invocation of the disapproval provision must be respected.³⁵

The issues raised by Governor Chafee’s subsequent certiorari petition

26. Chafee, *supra* note 2.

27. *Pleau*, 680 F.3d at 3.

28. Chafee, *supra* note 2.

29. *Id.*

30. *Pleau*, 680 F.3d at 3–4.

31. *Id.* at 7–8.

32. U.S. CONST. art. VI, cl. 2.

33. *United States v. Mauro*, 436 U.S. 340 (1978).

34. *See Pleau*, 630 F.3d at 5–7 (analyzing *Mauro* extensively in relation to Governor Chafee’s claims).

35. *Id.* at 23–25 (Torruella, J., dissenting).

could be simplified into a single question: Whether the IAD's disapproval provision applies when the federal government, and not another state, is requesting custody of a state prisoner. As this issue is so narrow, some observers have been skeptical in evaluating the importance of Pleau's case, one calling its stakes "largely symbolic."³⁶ The Supreme Court apparently agreed, summarily declining to hear the case.³⁷ This could not, however, be further from the truth.

This case, in the federal government's own words, is of "exceptional importance."³⁸ The detainer system provided for by the IAD—because it does not require a court filing—is much less cumbersome for the federal government than writs of habeas corpus ad prosequendum; this is why the federal government seeks almost 12,000 detainers for state prisoners annually, as opposed to only around 2000 ad prosequendum writs.³⁹ Turning from practicality to policy, the First Circuit's majority opinion in *Pleau* is concerning. Its casual invocation of the Supremacy Clause to cast aside the disapproval provision ignores the fact that, as an interstate compact, the IAD is transformed into federal law for the purposes of statutory construction via the Compact Clause. This use of the Supremacy Clause by the federal government as a sort of blunt instrument to disregard its "troublesome" obligations to a state sets the foundation for further encroachment upon the states' police power—specifically, the ability of the states to set their own criminal law policy, expressly reserved to them by the Tenth Amendment.⁴⁰ Here, Rhode Island's citizens have decided that the death penalty is never an appropriate punishment. The federal government purports to know better, however, and seeks capital punishment under the FDPA against a Rhode Island man who murdered a Rhode Island citizen in Rhode Island.

The Supreme Court's refusal to grant certiorari—amounting to de facto approval of the First Circuit's reasoning—is discouraging. The Court ignores that the current political climate is evolving in a way that makes these federal-state, criminal law conflicts imminent, and it casually

36. Garret Epps, *A State-Federal Standoff over the Death Penalty*, THE AMERICAN PROSPECT (May 16, 2012), <http://prospect.org/article/state-federal-standoff-over-death-penalty>.

37. *Pleau*, 133 S. Ct. at 931.

38. Petition for a Writ of Certiorari, *Chafee v. United States*, 133 S. Ct. 930 (2013) (No. 12-223), 2012 WL 3596976, at *29 (citation omitted).

39. *Id.*

40. U.S. CONST. amend. X. See *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (explaining that, under the federal system, the states have primary authority to define criminal law, and that Congress may only create crimes against the United States by acting within the scope of its constitutionally delegated powers).

disregards Rhode Island's fundamental identity as an abolition state in doing so. The implication is sweeping: How will the federal government treat other emerging conflicts between federal and state criminal law? The recent legalization of marijuana in Colorado and Washington by referendum readily comes to mind.⁴¹

Part I of this Note, by way of an introduction, identified two major issues that will be addressed: First, whether the IAD's disapproval provision should apply to the federal government, as contended in the *Pleau* certiorari petition. Second, whether the answer to the first issue creates any additional concerns about the IAD in the death penalty context, given the underlying tension caused by the federal government's ability to seek capital punishment against citizens who commit murder in states that have abolished the death penalty. Part II will lay out the three bodies of law necessary for understanding the First Circuit's decision in *Pleau* and this growing tension between conflicting federal and state criminal law in light of the passage of the FDPA. Part III will examine the First Circuit's decision, exploring both the majority and dissent's reasoning in depth. Part IV will then argue that Judge Torruella's dissent is on the correct side of the circuit split; the federal government must respect the IAD's disapproval provision because the IAD is an interstate compact, thus making it a federal law to which the Supremacy Clause does not apply. Part IV will then continue in arguing that, in order to address the tension between the federal authority to prosecute federal capital crimes and the states' interest in enforcing their criminal laws pursuant to the police power, the IAD must be amended. This Note will conclude that the IAD should be amended to expressly allow a state to invoke the disapproval provision against the federal government when its interests in punishing that defendant outweigh those of the federal government. As a model for this balancing test, this Note will look to the Erie Doctrine, which dictates whether federal or state substantive law must apply in civil cases in federal court on diversity jurisdiction.

II. LEGAL BACKGROUND FOR THE ISSUES RAISED BY *UNITED STATES V. PLEAU*

Critiquing the First Circuit's decision in *Pleau* requires familiarity with essentially three areas of law: criminal law's Anti-Federalist roots, the

41. Christina Ng, Abby Phillips & Clayton Sandell, *Colorado, Washington Become First States to Legalize Recreational Marijuana*, ABC NEWS (Nov. 7, 2012), <http://abcnews.go.com/Politics/OTUS/colorado-washington-states-legalize-recreational-marijuana/story?id=17652774#.UNDnS29X2aU>.

interstate agreement on detainees, and the federal death penalty. This part will address each in turn.

A. CRIMINAL LAW'S ANTI-FEDERALIST ROOTS

The founding may bear superficially little relevance to the examination of a murder case. Yet concerns that the Anti-Federalists raised during this period finally are manifesting themselves today as the federal government proves itself increasingly willing to expand the corpus of federal criminal law.⁴² A synthesis of this history with current politics will prove crucial in defining the scope of the problem with the First Circuit's reasoning in *Pleau* and should have given the Supreme Court some pause in declining to hear the case.

As the Federalists and Anti-Federalists hotly debated ratification of the newly proposed Constitution during the winter of 1787 through the spring of 1788, one of the Anti-Federalists' primary concerns was ensuring that the new Constitution would protect state criminal law.⁴³ George Mason, for instance, warned that the new Constitution would allow Congress to "constitute new Crimes . . . and extend their Power as far as they shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them."⁴⁴ Even the staunchest of Federalists thought the federal government would not extend that far; Alexander Hamilton countered, "The administration of private justice between the citizens of the same State . . . are proper to be provided for by local legislation [and] can never be desirable cares of a general jurisdiction."⁴⁵ As the states historically had the near-exclusive power to pass criminal legislation, the Federalists reasoned any attempt by the national government to regulate what is essentially local conduct would be imprudent. The Anti-Federalists did not trust these guarantees, however, and pushed for the passage of the Bill of Rights; it is no coincidence that half of the first ten amendments relate to crime and punishment,⁴⁶

42. *See id.* (stating that in 2005, the Supreme Court held that "Congress had the power to criminalize marijuana," despite state laws legalizing its medical use).

43. Michael J. Zydney Mannheimer, *Self-Government, the Federal Death Penalty, and the Unusual Case of Michael Jacques*, 36 VT. L. REV. 131, 144 (2011).

44. *Id.* (quoting George Mason, *Objections to the Constitution Formed by the Convention* (1787)).

45. THE FEDERALIST NO. 17 at 74 (Alexander Hamilton) (Penn. St. Univ., 2001).

46. As a reminder, these amendments are the Fourth (unreasonable search and seizure), Fifth (due process, double jeopardy, self-incrimination), Sixth (trial by jury, confrontation of adverse witnesses, speedy trial, public trial, right to counsel), Eighth (excessive bail, cruel and unusual punishment), and Tenth (powers not delegated to the United States reserved to the States, or the People). The Tenth Amendment surely reserved to the States the power to create their own criminal

effectively removing any incentive for the federal government to create a criminal system parallel to that of the states.⁴⁷

This debate no doubt informed the early judiciary when the first problems between federal and state criminal law arose just a few years later, appropriately for Pleau's case, in the context of habeas corpus. The Judiciary Act of 1789 had codified the common law habeas writs as federal law,⁴⁸ but the Supreme Court soon faced the question of what writs were permissible, and when.⁴⁹ In *Ex parte Bollman*, Chief Justice Marshall emphasized that, when dealing with criminal law, the federal government and the states were equals:

The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this court They are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government.⁵⁰

This conception of "dual sovereignty" has been repeatedly reaffirmed,⁵¹ as has been the "longstanding public policy against federal court interference with state court proceedings."⁵² Two key principles allow for the seemingly contradictory existence of two independent, equally sovereign court systems: (1) the sovereign that first prosecutes a criminal must be allowed to exhaust its remedy before the criminal must answer to the other jurisdiction,⁵³ and (2) conflicts of jurisdiction between the sovereigns must be resolved based on "reciprocal comity" in order to promote "due and orderly procedure."⁵⁴ Comity⁵⁵ is necessary as neither sovereign has the right to force its will upon the other.

Of course, the balance of dual sovereignty between the sovereigns tilts in favor of the federal government due to the Supremacy Clause. If it is acting within its enumerated Constitutional powers, the federal government

codes under the police power.

47. Mannheim, *supra* note 43, at 147–48.

48. The Judiciary Act of 1789, 1 Stat. 73.

49. Brief for Amici Curiae the Cato Institute and the Independence Institute in Support of Petitioners at 3, *Chafee v. United States*, 133 S. Ct. 930 (2013), *Pleau v. United States*, 133 S. Ct. 931 (2013) (Nos. 12-223, 12-230), 2012 U.S. S. Ct. Briefs LEXIS 4073, at *6 [hereinafter Cato Institute Brief].

50. *Ex parte Bollman & Ex parte Swartwout*, 8 U.S. 75, 97 (1807).

51. See, e.g., *Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922) (discussing "liv[ing] in the jurisdiction of two sovereignties").

52. *Younger v. Harris*, 401 U.S. 37, 43 (1971).

53. *Ponzi*, 258 U.S. at 260.

54. *Id.* at 259.

55. BLACK'S LAW DICTIONARY 183 (6th ed. 1991) (defining comity as, "[c]ourtesy . . . a willingness to grant a privilege, not as a matter of right, but out of deference and good will").

is thereby enabled to “impose its will” on the states.⁵⁶ However, this is an “extraordinary power” subject to an important caveat: “[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”⁵⁷ This limitation is better known as the “plain statement rule.”⁵⁸

B. THE INTERSTATE AGREEMENT ON DETAINERS

1. History and Purposes

The IAD was drafted by the Council of State Governments in 1956.⁵⁹ It proposed a uniform procedure for lodging a detainer against a prisoner. While the agreement itself does not define detainer, contemporary congressional reports define it as “a notification filed with the institution in which a prisoner is serving a sentence[,] advising that he is wanted to face pending criminal charges in another jurisdiction.”⁶⁰ It was thereafter entered into by essentially all of the states (sans Louisiana and Mississippi), with the United States later joining the IAD as a party in 1970.⁶¹

The IAD was designed to address the problem that “charges outstanding against a prisoner . . . and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation.”⁶² As stated by its drafters, the IAD’s purposes are to (1) enable “expeditious and orderly” resolution of charges levied against prisoners in other jurisdictions, and (2) to provide “cooperative procedures” by which the party states may resolve those charges.⁶³

2. Relevant Provisions and Construction

Article II defines state for the purposes of the IAD as any state of the United States, or the United States of America itself.⁶⁴ Therefore, the federal government and each of the fifty states are equal for purposes of the

56. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

57. *Id.* (alteration in original) (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989)) (internal quotation marks omitted).

58. *Id.* at 461.

59. *Alabama v. Bozeman*, 533 U.S. 146, 149 (2001).

60. H.R. REP. NO. 91-1018, at 2 (1970); S. REP. NO. 91-1356, at 2 (1970).

61. *Bozeman*, 533 U.S. at 149.

62. Interstate Agreement on Detainers Act, 18 U.S.C. app. 2 § 2, art. I (2012).

63. *Id.*

64. *Id.* § 2, art. II.

agreement. This lack of distinction is reaffirmed by Article VIII, which makes no distinction between new and existing party states to the agreement.⁶⁵ Further, a state that lodges a detainer against a prisoner is called a “[r]eceiving [s]tate,” while the state in which the prisoner currently resides is called the “[s]ending [s]tate.”⁶⁶

Article III allows a prisoner against whom a detainer has been filed to request that the charges related to that detainer be resolved.⁶⁷ Once a request has been made, trial on those charges must begin within one hundred and eighty days, otherwise they will be dismissed with prejudice (the “speedy trial provision”).⁶⁸

Article IV gives a receiving state the right to request that a prisoner against whom it has lodged a detainer be made available for trial.⁶⁹ This right is subject to several limitations, the most important of which for our purposes is the disapproval provision, in full:

[T]here shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.⁷⁰

Among other limitations, the receiving state is also subject to an “anti-shuttling” provision, which provides that if a prisoner is returned to the sending state before the trial on the detainer charges is resolved, the receiving state’s charges must be dismissed with prejudice.⁷¹

Articles V–VIII place further conditions on a receiving state obtaining temporary custody of the prisoner.⁷² Article VI, for instance, mandates that the IAD does not apply to mentally ill prisoners, who may not be transferred.⁷³

Finally, Article IX states that the IAD “shall be liberally construed so as to effectuate its purposes.”⁷⁴ This call for liberal construction has caused

65. *See id.* § 2, art. VIII (“This agreement shall enter into full force and effect as to a party State when such State has entered the same into law.”).

66. *Id.* § 2, art. II.

67. *Id.* § 2, art. III.

68. *Id.*

69. *Id.* § 2, art. IV.

70. *Id.* § 2, art. IV(a).

71. *Id.* § 2, art. IV(e).

72. *Id.* § 2, art. V–VIII.

73. *Id.* § 2, art. VI(b).

74. *Id.* § 2, art. IX.

the IAD's procedural rules to be enforced strictly by the courts. In *Alabama v. Bozeman*, for example, a prisoner in federal custody for federal drug offenses was transferred to Alabama under the IAD for arraignment on state firearms charges.⁷⁵ After a single day, he was returned to federal custody; he was brought back to Alabama to stand trial one month later. However, the state charges were dismissed with prejudice as the multiple transfers before the start of trial constituted a violation of the anti-shuttling provision.⁷⁶ Therefore, Article IX's call for liberal construction means that there are no "technical" or "implicit" exemptions to the IAD's safeguards, as even a transfer of only one day could interfere meaningfully with a prisoner's rehabilitation.⁷⁷

Of note, the IAD was amended after the United States became a party state. These amendments were largely superficial, made to make the language of the agreement work when applied to the federal government. For example, "governor" was defined for purposes of the United States as the Attorney General.⁷⁸ By contrast, two substantive amendments were made, applying only when the United States is the receiving state: (1) dismissals under the IAD against the federal government may be with or without prejudice; and (2) the federal government is not bound by the anti-shuttling provision in some situations.⁷⁹ Congress thus chose to enter the federal government into the IAD only with these particular procedural rules relaxed.

3. Federal Compact Status

A compact is a contract entered into by sovereign states by mutual consent.⁸⁰ The Compact Clause prevents the states from entering into compacts without congressional consent.⁸¹ The IAD, as an agreement between forty-eight states, is surely an interstate contract subject to the Compact Clause. Fortunately, in passing the Crime Control Consent Act of 1934, Congress gave its consent to the IAD in advance.⁸² Thus, the

75. *Alabama v. Bozeman*, 533 U.S. 146, 151 (2001).

76. *Id.* at 152.

77. *Id.* at 153–155.

78. 18 U.S.C. App. 2 § 3 (2012).

79. *Id.* § 9.

80. BLACK'S LAW DICTIONARY 281 (6th ed. 1991).

81. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State . . .").

82. Crime Control Consent Act of 1934, Pub. L. No. 293, 48 Stat. 909 (codified as amended at 4 U.S.C. § 112(a) (2012)) ("The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort . . . in the prevention of crime and in the enforcement of their respective criminal laws and policies . . .").

Supreme Court has repeatedly held that the IAD is a validly enacted interstate compact.⁸³

As a congressionally sanctioned interstate compact, the IAD thereby is transformed into federal law under the Compact Clause.⁸⁴ This means that even a compact between only two states would be considered a federal law for purposes of statutory interpretation.⁸⁵ This is doubly true for the IAD, as the federal government itself entered into the agreement as a party state. As a federal law, the IAD cannot be subject to the Supremacy Clause, as that clause only governs conflicts between federal and state statutes.⁸⁶

4. *United States v. Mauro*

United States v. Mauro, the most important decision to date interpreting the IAD, sought to answer the question of whether a writ of habeas corpus ad prosequendum filed against a prisoner by the federal government constituted a detainer under the IAD.⁸⁷ This question was important because, if the writ was a detainer, the federal government would be subject to all of the IAD's limitations placed upon receiving states.⁸⁸ Prior to *Mauro*, there was disagreement among the circuits on this question: some courts held that the writ and a detainer were distinct methods for getting custody of a prisoner, while others equated the two because they found it inequitable that use of the writ would allow the federal government to circumvent the IAD.⁸⁹

In *Mauro*, two different cases—and three different defendants—were grouped together. In the first case (the “Fusco” case), defendants Mauro and Fusco were serving time in New York on state charges when the federal government filed an ad prosequendum writ against them in order to secure their presence for a federal contempt prosecution. Both men were transferred to federal control. Thereafter, they pled not guilty to the contempt charges, but before trial began, the federal government returned

83. *Cuyler v. Adams*, 449 U.S. 433, 442 (1981). *Accord* *Alabama v. Bozeman*, 533 U.S. 146, 148 (2001) (“[T]he Interstate Agreement on Detainers . . . [is] an interstate compact.” (internal citation omitted)); *New York v. Hill*, 528 U.S. 110, 111 (2000) (“As ‘a congressionally sanctioned interstate compact’ within the Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, the IAD is a federal law subject to federal construction.” (internal citation omitted)).

84. *Cuyler*, 449 U.S. at 438.

85. *See Hill*, 528 U.S. at 111 (applying the IAD between two states).

86. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citing *McCulloch v. Maryland*, 17 U.S. 316, 427 (1819)).

87. *United States v. Mauro*, 436 U.S. 340, 344 (1978).

88. *See id.*

89. Leslie W. Abramson, *The Interstate Agreement on Detainers: Narrowing Its Availability and Application*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 8 (1995).

them to New York state prison. The defendants argued that the ad prosequendum writ was a detainer under the IAD and, thus, their return to state prison before the federal trial began amounted to a violation of the anti-shuttling provision. This would require that the federal contempt charges against them be dismissed.⁹⁰

In the second case (the “Ford” case), defendant Ford was incarcerated in Massachusetts on state charges when the federal government lodged a detainer against him, alleging federal bank robbery. Ford was transferred to federal custody on April 1, 1974, but trial did not begin until September 2, 1975, due to five continuances, each requested by the federal government. Between some of these continuances, Ford was moved between federal and Massachusetts custody. In securing Ford’s presence for trial at the end of the string of continuances, the federal government filed an ad prosequendum writ in federal district court. Like in the Fusco case, Ford argued that the writ was a detainer under the IAD. Therefore, the federal bank robbery charge must be dismissed as the federal government violated both the speedy trial provision and the anti-shuttling provision of the IAD.⁹¹

In *Mauro*, the Supreme Court held that an ad prosequendum writ is not a detainer within the meaning of the IAD.⁹² However, after a detainer has been filed against a prisoner, a subsequent ad prosequendum writ to secure his presence is a “written request” that triggers the IAD’s activation.⁹³ While somewhat confusing, the resulting rule (the “*Mauro* rule”) is relatively easy to apply. In the Fusco case, the defendants’ argument was rejected because a detainer had never been filed; their presence was secured by the writ alone. Therefore, the court ruled that Fusco and Mauro must stand trial on the federal contempt charges.⁹⁴ In the Ford case, however, the detainer came before the writ. This meant that the IAD was invoked in full and that Ford’s rights under the IAD were violated. Thus, the court dismissed the federal bank robbery charge.⁹⁵

Although this result might seem arbitrary, it was relatively well reasoned. The Court first identified the policy goals of the IAD, which can be summarized as the following: (1) resolving outstanding charges against prisoners as quickly as possible; (2) assuring that prisoners will be returned

90. *Mauro*, 436 U.S. at 344–45.

91. *Id.* at 345–48.

92. *Id.* at 349.

93. *Id.* at 352.

94. *Id.* at 361.

95. *Id.* at 365.

to their original jurisdiction after trial; (3) allowing prison authorities to take prompt action to settle detainees; (4) preventing prisoners from suffering any penalty because they have a detainer in their file; and (5) encouraging all jurisdictions to “observe the principles of interstate comity in the settlement of detainees.”⁹⁶ It then observed that nothing in the legislative history indicates that Congress intended the United States to enter into the IAD as anything other than a full member; therefore, if invoked, the agreement would apply to the federal government in full.⁹⁷ But, because the writ of habeas corpus *ad prosequendum* had a long common law history and was codified by the Judiciary Act, it does provide an entirely separate mechanism of extraditing a prisoner to stand trial in federal court when used alone.⁹⁸ Therefore—when no detainer is filed—none of the IAD’s policy goals are put in jeopardy because there is no detainer sitting in the prisoner’s file (the agreement’s drafters noted that having a detainer in a prisoner’s file was detrimental for his psychological health and, at the majority of prisons, denied him access to any prison rehabilitation programs).⁹⁹

If a detainer comes before the *ad prosequendum* writ, however, the state of affairs is different. Now, there is a detainer in the prisoner’s file, and all of the IAD policy concerns are implicated. Thus, the IAD was activated by the original detainer. Because the IAD extends to both detainees and “written requests” for custody, an *ad prosequendum* writ must then be considered such a written request once the IAD is invoked.¹⁰⁰ When viewed with the policy goals of the IAD in mind, the Court’s opposite decisions in the Fusco case and the Ford case seem justified.

5. Circuit Split Interpreting *Mauro*

Though *Mauro* solved one circuit split, another one quickly developed based on differing interpretations of the following “disputed language”:

The Government points to two provisions of the Agreement which it contends demonstrate that “written request” was not meant to include *ad prosequendum* writs; neither argument is persuasive. First the Government notes that under Art. IV(a) there is to be a 30-day waiting period after the request is presented during which the Governor of the sending State may disapprove the receiving State’s request. Because a writ of habeas corpus *ad prosequendum* is a federal-court order, it would

96. *Id.* at 350.

97. *Id.* at 355.

98. *Id.* at 357–58.

99. *Id.* at 359–61.

100. *Id.* at 362.

be contrary to the Supremacy Clause, the United States argues, to permit a State to refuse to obey it. *We are unimpressed*. The proviso of Art. IV(a) does not purport to augment the State's authority to dishonor such a writ. As the history of the provision makes clear, it was meant to do no more than preserve previously existing rights of the sending States, not to expand them. If a State has never had authority to dishonor an *ad prosequendum* writ issued by a federal court, then this provision could not be read as providing such authority. Accordingly, we do not view the provision as being inconsistent with the inclusion of writs of habeas corpus *ad prosequendum* within the meaning of "written requests."

The Government also points out that the speedy trial requirement of Art. IV(c) by its terms applies only to a "proceeding made possible by this article" When a prisoner is brought before a district court by means of an *ad prosequendum* writ, the Government argues, the subsequent proceedings are not *made possible* by Art. IV because the United States was able to obtain prisoners in that manner long before it entered into the Agreement. We do not accept the Government's narrow reading of this provision; rather we view Art. IV(c) as requiring commencement of trial within 120 days whenever the receiving State initiates the disposition of charges underlying a detainer it has previously lodged against a state prisoner. Any other reading of this section would allow the Government to gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action.¹⁰¹

Presently, the circuits are in disagreement whether, and to what extent, this language limits the *Mauro* rule when the disapproval provision is at issue.

Three circuits hold that this language absolutely bars a state from refusing a federal writ of habeas corpus *ad prosequendum*: the Third Circuit in the 1980 case of *United States v. Graham*,¹⁰² the Fourth Circuit in the 1979 case of *United States v. Bryant*,¹⁰³ and the Tenth Circuit in the 2009 case of *Trafny v. United States*.¹⁰⁴

In *Graham*, the federal government first filed a detainer against an Ohio prisoner, and thereafter filed an *ad prosequendum* writ.¹⁰⁵ The defendant argued that he should be given thirty days under the IAD to seek governor disapproval before the transfer. The Third Circuit rejected this

101. *Id.* at 362–64 (second emphasis added and ellipses in original). See *infra* Part III.B for further discussion on why this emphasis is important.

102. *United States v. Graham*, 622 F.2d 57 (3d Cir. 1980).

103. *United States v. Bryant*, 612 F.2d 799 (4th Cir. 1979).

104. *Trafny v. United States*, No. 07-4217, 2009 U.S. App. LEXIS 2452 (10th Cir. Feb. 6, 2009).

105. *Graham*, 622 F.2d at 58.

argument, holding that *Mauro* meant that “a state clearly was forbidden by the Supremacy Clause from disobeying a federal writ of habeas corpus ad prosequendum,” and that Congress did not intend to confer on the states any additional power that they did not have before the federal government entered the IAD.¹⁰⁶

In *Bryant*, the federal government lodged a detainer against a defendant in Maryland state prison and subsequently filed an ad prosequendum writ to secure his presence.¹⁰⁷ Again, the defendant argued that he should be given thirty days under the IAD to seek governor disapproval. The Fourth Circuit rejected this argument as well, holding that a state could not refuse a federal ad prosequendum writ in any context.¹⁰⁸ Its argument was based upon its interpretation of a portion of the *Mauro* disputed language: “If a State has never had authority to dishonor an ad prosequendum writ issued by a federal court, then this provision could not be read as providing such authority.”¹⁰⁹ Interestingly, the Court also argued that this power was unique to the federal government under the IAD, and that another state could reject the ad prosequendum writ in the exact same situation.¹¹⁰

Trafny, albeit an unpublished opinion from 2009, deals with the exact same factual situation described in *Graham* and *Bryant*, this time with a Utah prisoner.¹¹¹ The Tenth Circuit, citing *Mauro*, the *Graham* and *Bryant* interpretations, and the Supremacy Clause, likewise held that a state could never use the disapproval provision to refuse a federal ad prosequendum writ.¹¹²

In sum, these circuits reason that—despite that the IAD is invoked when a detainer comes before the writ—the disputed language in *Mauro* prevents the governor of the sending state from invoking the disapproval provision against the federal government.

In contrast, the Second Circuit is of the opinion that, once invoked, the IAD applies in full against all signatories. In *United States v. Scheer*, the federal government lodged a detainer against a California state prisoner.¹¹³

106. *Id.* at 59.

107. *Bryant*, 612 F.2d at 801.

108. *Id.* at 802.

109. *United States v. Mauro*, 436 U.S. 340, 363 (1978).

110. *Bryant*, 612 U.S. at 802.

111. *Trafny v. United States*, No. 07-4217, 2009 U.S. App. LEXIS 2452, at *2 (10th Cir. Feb. 6, 2009).

112. *Id.* at *6–7.

113. *United States v. Scheer*, 729 F.2d 164, 165–67 (2d Cir. 1984).

The defendant then requested that the detainer against him be resolved quickly under Article III of the IAD. To secure his presence in federal district court in Vermont for prosecution for various violations of federal firearms statutes allegedly committed therein, the government filed an ad prosequendum writ. The defendant argued that his rights under the IAD had been violated, specifically the speedy trial provision, information disclosure provision, and the disapproval provision. Citing the *Mauro* rule, the Second Circuit first noted that the IAD certainly applied in this situation.¹¹⁴ Thereafter, it rejected defendant's speedy trial and information disclosure arguments on the merits. Turning to the disapproval provision, the Second Circuit also noted that the federal government and the states could not be treated differently under the IAD as they were equal party states.¹¹⁵ They interpreted the disputed language in *Mauro* to mean that "the historic power of the writ [of habeas corpus ad prosequendum] seems unavailing once the government elects to file a detainer in the course of obtaining a state prisoner's presence for disposition of federal charges."¹¹⁶ As such, the federal government did have to honor the disapproval provision in this context. However, because the defendant here had requested prompt resolution of the detainer according to Article III of the IAD, the Second Circuit held that he had waived his right to seek governor disapproval.¹¹⁷

In short, the Second Circuit reasons that the *Mauro* rule applies in full to all provisions of the IAD, and against the federal government and the states equally.

C. THE FEDERAL DEATH PENALTY

Recent changes in how the federal government is administering the federal death penalty have breathed new life into this decades-old conflict of law. This part will detail the Federal Death Penalty Act ("FDPA"), the recent shifts in Department of Justice policy that have expanded the federal prosecution power, and the federal government's increased willingness to seek capital punishment against defendants who committed their crimes within abolitionist jurisdictions. These elements—combined with the death penalty's unique status as the only criminal punishment for which both the

114. *Id.* at 170.

115. *Id.*

116. *Id.* In a quizzically unhelpful concurrence, Judge Kearse indicates that the disputed language in *Mauro*, from which the majority derived this holding, is "debatable" and that reasonable jurists can differ in their interpretation of it. *Id.* at 172 (Kearse, J., concurring).

117. *Id.* at 170–71 (majority opinion).

stakes and the potential for politicking are maximal—set the stage for a case to return to the forefront this almost forgotten circuit split. That case was *United States v. Pleau*.¹¹⁸

1. Brief History

The Supreme Court struck down all state and federal death penalty statutes in 1972, essentially telling legislatures to start over if they wanted to keep the penalty.¹¹⁹ While many states scrambled to pass new and improved statutes, the federal government long sat out. In 1988, the federal government began a gradual return of the federal death penalty with the Anti-Drug Abuse Act,¹²⁰ passed at the height of the “War on Drugs.” The act added the death penalty to the continuing criminal enterprise statute.¹²¹ The most significant expansion of the modern federal death penalty occurred with the passage of the FDPA in 1994.¹²² The FDPA permitted capital sentences for approximately sixty crimes,¹²³ and the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) added four more.¹²⁴ Almost all of these death-eligible federal crimes are indistinguishable from conduct already criminalized at the state level.¹²⁵ Thus, the current federal death penalty regime is expansive and complicated, defined by the substantive and procedural requirements of three separate statutes.¹²⁶

2. Shifting Department of Justice Enforcement Policies

The Department of Justice (“DOJ”) realizes that the majority of conduct punishable under the federal death penalty is already criminalized—and enforced successfully—by the states. Federal capital

118. *United States v. Pleau*, 680 F.3d 1 (1st Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 931 (2013).

119. *See Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (holding that the death penalty could not be applied for rape convictions and causing a de facto prohibition on the death penalty throughout the country).

120. Anti-Drug Abuse Act, 21 U.S.C. § 848(e) (2006), *repealed by implication*, *United States v. Stitt*, 552 F.3d 345, 352 (4th Cir. 2008).

121. Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CONST. L. 57, 74 (2009).

122. *See* Eileen M. Connor, *The Undermining Influence of the Federal Death Penalty on Capital Policymaking and Criminal Justice Administration in the States*, 100 J. CRIM. L. & CRIMINOLOGY 149, 155 (2010) (discussing the effect of the FDPA).

123. *See* Federal Death Penalty Act, 18 U.S.C. § 3591 (2012) (specifying which code section violations warrant the death penalty).

124. Connor, *supra* note 122, at 155–56.

125. *Id.*

126. *See id.* (discussing the overlap of federal and state law).

prosecutions, therefore, have been rare.¹²⁷ In fact, the first execution carried out under the regime came in 2001.¹²⁸ What limited the application of the federal death penalty was the DOJ's strict internal policy regarding their selection of cases to prosecute capitally.¹²⁹ This section will demonstrate that these policies, however, have changed under each new Attorney General, becoming progressively more liberal and allowing for a substantial increase in federal capital prosecutions.

The original policy, the 1995 Protocol propagated by Attorney General Janet Reno, provided substantial deference to the states. Under the 1995 Protocol, a United States Attorney who wanted to begin a federal capital prosecution had to first prepare a "Death Penalty Evaluation" form with supporting materials for review by a DOJ committee in Washington.¹³⁰ This committee was tasked with evaluating whether a "substantial federal interest" "justified federal, rather than state[], prosecution."¹³¹ The factors used in this analysis were: (1) "strength of the [s]tate's interest in prosecution"; (2) "extent to which the criminal activity reached beyond [local] boundaries"; and (3) "the relative likelihood of effective stateside prosecution."¹³² In evaluating the last factor, the committee was specifically instructed not to consider whether the state in which the defendant committed the crime had abolished the death penalty.¹³³ In the six years that the DOJ operated under the 1995 Protocol, U.S. Attorneys from across the country recommended a total of 588 defendants for capital prosecution, of which the committee approved only twenty-six.¹³⁴

With the election of President George W. Bush came a new Attorney General, John Ashcroft, and a new protocol. Attorney General Ashcroft's 2001 Protocol kept the entire system in place exactly as Reno had left it, except for one important change. Under the 1995 Protocol, the ability of individual U.S. Attorneys to recommend cases to Washington gave them a gatekeeping role: if they were able to plea bargain a case away, or simply

127. Michele Martinez Campbell, *Federalism and Capital Punishment: New England Stories*, 36 VT. L. REV. 81, 81 (2011).

128. *See id.* at 87 (noting that the federal government did not execute any prisoners between 1963 and 2001).

129. *See* Tirschwell & Hertzberg, *supra* note 121, at 77–78 (describing the DOJ's internal procedures for capital cases).

130. *Id.*

131. *Id.* at 79.

132. *Id.*

133. *Id.*

134. *Id.* at 84.

did not think death was an appropriate penalty for a case, the matter was settled and a capital prosecution could never be pursued.¹³⁵ The 2001 Protocol, in contrast, required that every potential federal capital case be sent to the committee in Washington.¹³⁶ When Ashcroft was replaced by Alberto Gonzales in 2005, Gonzales kept this policy in place. The results from the six years under the 2001 Protocol were predictable: many more recommendations were sent to Washington (1240), and the number of federal capital prosecutions increased to seventy-three—an almost three-hundred percent increase over the prior protocol.¹³⁷

In 2007, Michael Mukasey replaced Gonzales as Attorney General. Mukasey's 2007 Protocol was a drastic change from the previous two. Replacing the balancing test in place since the 1995 Protocol, the 2007 Protocol called for "national consistency" in the enforcement of the federal death penalty.¹³⁸ National consistency meant that similar crimes should be treated similarly, regardless of where they occurred. The analysis, thus, changed to whether the state was unlikely to impose an "appropriate punishment," or the state punishment was simply "too lenient" in light of national norms.¹³⁹ Also, unlike the 1995 Protocol, the committee was specifically instructed to consider whether the state in which the crime occurred did or did not have the death penalty.¹⁴⁰

A balancing test of a different kind remains in the 2007 Protocol, however. This "petite policy" applies when a state has already prosecuted a defendant, but the federal government still wants to seek capital punishment against that defendant based on the same incident.¹⁴¹ The petite policy allows the federal government to seek a second prosecution only to "vindicate a substantial federal interest"¹⁴² when that interest was "demonstrably unvindicated" in the state prosecution.¹⁴³ While it may seem that a second, federal prosecution on the same facts violates a defendant's constitutional double jeopardy right, the practice has long been allowed

135. *Id.* at 79–80, 82.

136. *Id.* at 81–82.

137. *Id.* at 84.

138. *Id.* at 82–83 (citing U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-10.130 (2007) [hereinafter U.S. ATTORNEYS' MANUAL], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm).

139. Connor, *supra* note 122, at 159 (citing U.S. ATTORNEYS' MANUAL, *supra* note 138, § 9-10.090.C).

140. Campbell, *supra* note 127, at 96–97.

141. Connor, *supra* note 122, at 159–60.

142. *Id.* at 159.

143. *Id.* at 160 (citing U.S. ATTORNEYS' MANUAL, *supra* note 138, § 9-2.031.A).

under the principles of the “dual sovereignty doctrine.”¹⁴⁴ Because federal and state criminal courts represent distinct sovereigns, the doctrine reasons, double jeopardy concerns are not implicated.¹⁴⁵

3. Increased Use in Jurisdictions That Have Abolished Capital Punishment

The sum total result of these changes to DOJ policy has resulted in a precipitous increase in the number of federal capital prosecutions brought against defendants in states that have abolished the death penalty.¹⁴⁶ Under the 1995 Protocol, only 2 percent of federal capital prosecutions were against defendants who committed their crimes in abolitionist states.¹⁴⁷ The 2001 Protocol saw a modest increase, doubling this ratio.¹⁴⁸ But the most recent 2007 Protocol caused an explosion in the number of these prosecutions, no doubt due to the department’s new emphasis on “national consistency.” For instance, within the first year operating under the 2007 Protocol, there were six federal capital cases in the Eastern District of New York alone, an abolitionist state, and only eight in the eighteen federal districts making up the combined Fifth and Eleventh Circuits, representing regions whose states overwhelmingly allow the death penalty.¹⁴⁹

These numbers cannot be accidental—the new policy has encouraged the DOJ to actively seek capital sentences in abolitionist jurisdictions. Puerto Rico is the most glaring example. The commonwealth has become “a virtual repository for the Department of Justice’s capital prosecution efforts,” the tiny island community being the on-again, off-again leader in pending death penalty cases across the entire federal system.¹⁵⁰ This is despite that the people of Puerto Rico have long disallowed capital sentences—and the punishment is banned by the Puerto Rico Constitution.¹⁵¹ Puerto Rico has attempted to fight back; the Puerto Rican Secretary of Justice testified before Congress in 2007 that “the Puerto

144. *Id.* at 170.

145. *Id.* (citing *Bartkus v. Illinois*, 359 U.S. 121, 121 (1959)).

146. Campbell, *supra* note 127, at 98–99.

147. Tirschwell & Hertzberg, *supra* note 121, at 79 (citing U.S. DEP’T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000), T-200 to T-203 (2000), available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>).

148. *Id.* at 85 (citing Letter from Brian A. Benzckowski, Principal Deputy Assistant Attorney General, U.S. Department of Justice, to Senator Russell D. Feingold, Chairman, Subcommittee on the Constitution, Federalism, and Property Rights of the Senate Committee on the Judiciary 20 (Dec. 17, 2007)).

149. *See id.* at 87 & n.191 (citation omitted).

150. *Id.* at 91 (citation omitted).

151. Sean M. Morton, Comment, *Death Isn’t Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment*, 64 ALB. L. REV. 1435, 1446 (2001).

Rican people strongly disagree with the use of death as a form of punishment,” a disagreement rooted in “the religious convictions of the majority of Puerto Ricans” and “the grounding of [their] legal system on the principles of a continental European model which has moved away from the death penalty.”¹⁵² Nevertheless, the federal capital prosecutions continue, with the federal government most recently seeking the death penalty against Lashaun Casey in February 2013 despite the United States Attorney’s Office in Puerto Rico requesting Attorney General Eric Holder to seek only a life sentence.¹⁵³

III. EXAMINING THE FIRST CIRCUIT’S DECISION IN *UNITED STATES V. PLEAU*

Now armed with all the necessary doctrine, we return to *Pleau*. In addition to the facts already laid out,¹⁵⁴ a few in particular bear repeating: (1) while in Rhode Island custody, the federal government issued a detainer for Pleau pursuant to the IAD; (2) subsequently, Governor Chafee invoked the disapproval provision; (3) next, the federal government issued a writ of habeas corpus ad prosequendum in an attempt to secure Pleau’s presence, but Governor Chafee objected and the case was underway.¹⁵⁵ The First Circuit thus faced the same question that produced the *Mauro* circuit split: whether, despite the *Mauro* rule, the IAD’s disapproval provision does not apply when the federal government is the receiving state.¹⁵⁶

A. EN BANC MAJORITY

The First Circuit majority, led by Judge Boudin, sided with the Third, Fourth, and Tenth Circuits in holding that the governor of a sending state cannot use the disapproval provision against the federal government.¹⁵⁷ At the heart of their analysis was the disputed language from *Mauro*.¹⁵⁸ The majority reasoned that this language drew a distinction between the speedy trial provision and the disapproval provision, holding that only the former is implicated when an ad prosequendum writ is filed after a detainer and the

152. Tirschwell & Hertzberg, *supra* note 121, at 91 (internal quotation marks omitted) (citations omitted).

153. Editorial, *A Death Penalty Case in Puerto Rico*, N.Y. TIMES, Feb. 4, 2013, at A22, available at www.nytimes.com/2013/02/05/opinion/a-death-penalty-case-in-puerto-rico.html.

154. See *supra* text accompanying notes 3–30.

155. *United States v. Pleau*, 680 F.3d 1, 3 (1st Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 931 (2013).

156. *Id.* at 4–5.

157. *Id.* at 6.

158. See *supra* text accompanying note 101.

Mauro rule comes into force.¹⁵⁹ This was because it treated the following statement from the disputed language in *Mauro* as an express holding: “If a State has never had authority to dishonor an ad prosequendum writ issued by a federal court, then this provision could not be read as providing such authority.”¹⁶⁰ Looking to *Graham*, the court then reasoned that the states never had this authority: the Supremacy Clause must cause the ad prosequendum writ, codified federal law due to the Judiciary Act, to override any inferior statute, such as the IAD.¹⁶¹ To the majority, any other interpretation would “fail[] the test of common sense,” as Congress could have never intended to allow governors to veto a federal habeas corpus writ.¹⁶²

The First Circuit next turned to Pleau’s arguments. First, Pleau argued that under *Ponzi v. Fessenden*,¹⁶³ federal writs of habeas corpus ad prosequendum were granted as a matter of comity, and while they had always been granted, states did have the power to deny them, but chose not to do so.¹⁶⁴ The majority characterized this as a misreading: only the federal government’s deliverance of prisoners to the states was a matter of comity, while the states were compelled to honor the federal writ because “[t]he Supremacy Clause operates in only one direction and has nothing to do with comity.”¹⁶⁵ Second, Pleau argued that the federal government had to honor the disapproval provision when it was a receiving state¹⁶⁶—which the Second Circuit held in *Scheer*.¹⁶⁷ The First Circuit majority dismissed the Second Circuit in a single sentence, stating that this was a plain misreading of the disputed language from *Mauro*; in doing so, they cited only Judge Kearse’s one-paragraph concurrence in *Scheer* that cited no authority.¹⁶⁸

Finally, the majority turned to policy concerns. It argued that “there is an overriding federal interest in prosecuting defendants indicted on federal crimes.”¹⁶⁹ Also, the court expressed fear that, under the Second Circuit interpretation of *Mauro*, Pleau could be permanently immune from federal

159. *Pleau*, 680 F.3d at 5.

160. *Id.* (emphasis omitted) (quoting *United States v. Mauro*, 436 U.S. 340, 363 (1978)).

161. *Id.* at 6–7.

162. *Id.* at 7.

163. *Ponzi v. Fessenden*, 258 U.S. 254 (1922).

164. *Pleau*, 680 F.3d at 6.

165. *Id.*

166. *Id.* at 7.

167. *United States v. Scheer*, 729 F.2d 164, 170 (2d Cir. 1984).

168. *Pleau*, 680 F.3d at 7 (citing *Scheer*, 729 F.2d at 172 (Kearse, J., concurring)).

169. *Id.*

prosecution if he were sentenced to life in prison, which they suggested was unfair.¹⁷⁰

B. JUDGE TORRUELLA'S DISSENT

Judge Torruella snapped back at the majority, characterizing their ruling as a series of compounding errors that “snub[bed] the rules.”¹⁷¹ He argued that the result of *Pleau* should be clear: the federal government filed a detainer, thus invoking the IAD, and then filed a writ of habeas corpus ad prosequendum. Under the *Mauro* rule, a writ filed after a detainer has been lodged is equivalent to a written request under the IAD. Therefore, the federal government was subject to the entirety of the IAD's safeguards, including the disapproval provision.¹⁷²

Judge Torruella continued by dissecting the majority's opinion point by point. He first argued that the majority's Supremacy Clause argument is only one of many “smoke screens.”¹⁷³ He pointed out that the Supremacy Clause is not even invoked in this case as it is unquestioned that the IAD is an interstate compact; thus, it is transformed into federal law, and there is nothing in the Judiciary Act, the FDPA, or the AEDPA that would override another federal statute that is specifically on point.¹⁷⁴ Also, to Judge Torruella, the disputed language in *Mauro* stated clearly that the Supreme Court was “unimpressed” specifically with the federal government's argument that the disapproval provision did not apply due to the Supremacy Clause.¹⁷⁵ Therefore, the majority superficially used the Supremacy Clause as a “[b]ig brother” argument of sorts, blindly declaring that the federal government always wins without any legal basis.¹⁷⁶

Second, Judge Torruella deconstructed the majority's interpretation of *Mauro*. To him, the *Mauro* rule was clear in its statement that the federal government is bound by all of the IAD's provisions.¹⁷⁷ The majority's distinction between the speedy trial and disapproval provisions was, thus, nothing more than a convenient rationalization with no basis in the opinion. Judge Torruella then chastised the majority for treating the disputed language—“[i]f a State has never had authority to dishonor an ad

170. *Id.* at 7–8.

171. *Id.* at 8 (Torruella, J., dissenting).

172. *Id.*

173. *Id.* at 11.

174. *Id.* at 11–13.

175. *Id.* at 16 (citing *United States v. Mauro*, 436 U.S. 340, 363 (1978)).

176. *Id.* at 10–11.

177. *Id.* at 15.

prosequendum writ issued by a federal court, then this provision could not be read as providing such authority¹⁷⁸—as a holding. To him, the initial “if” made the statement “patently conditional.”¹⁷⁹ He supported this view by turning to footnote twenty-eight in *Mauro*, which immediately precedes the statement. Footnote twenty-eight notes that a governor’s right to refuse making a prisoner available was explicitly “preserved” and “retained” in the Congressional reports.¹⁸⁰ He thus repelled the majority’s argument that Congress could never have intended to allow state governors to exercise the disapproval provision against the federal government. Also, because *Ponzi* sheds some light onto what rights were “preserved” and “retained” to the states under the principles of comity, Judge Torruella believed that argument had some merit and should not have been summarily dismissed by the majority.¹⁸¹

Turning last to policy, Judge Torruella opined that “[t]he consequences of allowing the United States to avoid its obligations under a validly-enacted compact are surely graver than the consequences of allowing Rhode Island’s justice system to prosecute Pleau.”¹⁸² Finally, in expressing his overall agreement with the Second Circuit, Judge Torruella rebuked the majority for rejecting the Second Circuit’s stance in a single sentence and implicitly accused them of examining Pleau’s case with bias.¹⁸³

IV. ANALYSIS

A comparison of the majority and dissenting opinions in *Pleau* reveals that Judge Torruella—and the Second Circuit—have the right interpretation of *Mauro*, albeit for not entirely the right reasons. This part will first demonstrate that the federal government should be subject to the

178. *Mauro*, 436 U.S. at 363 (italics omitted).

179. *Pleau*, 680 F.3d at 17 (Torruella, J, dissenting).

180. *Id.* (emphasis omitted) (quoting *Mauro*, 436 U.S. at 363 n.28 (“Both Committee Reports note that ‘a Governor’s right to refuse to make a prisoner available is preserved.’ . . . The [IAD’s drafters] discussed the provision in similar terms: ‘[A] Governor’s right to refuse to make the prisoner available (on public policy grounds) is retained.’” (internal citations omitted) (emphasis omitted) (alterations in original))).

181. *Id.* at 19 (emphasis omitted) (quoting *Mauro*, 436 U.S. at 363 n.28); *id.* at 19–21.

182. *Id.* at 18.

183. *See id.* at 19 (“A balanced appraisal of these cases, when they are actually read and analyzed, creates some doubt as to the majority’s dismissal.”). Judge Torruella’s motivation for writing such a strongly worded dissent in this case may have been partially based on his background: Judge Torruella is a native of Puerto Rico and is intimately familiar with the commonwealth’s issues with the federal death penalty. *See generally* Garrett Epps, *A State-Federal Standoff over the Death Penalty*, THE AM. PROSPECT, May 16, 2012, available at <http://prospect.org/article/state-federal-standoff-over-death-penalty>.

disapproval provision whenever the IAD is invoked, as either a sending or receiving state. As the federal government likely will be unhappy with this result, this part will continue by offering an amendment to the IAD that might address the concerns of the federal government while preserving the rights of the states to determine their own criminal law in the death penalty context, pursuant to their reserved police powers.

A. GOVERNORS MAY DISAPPROVE A TRANSFER TO THE FEDERAL GOVERNMENT UNDER THE IAD

The First Circuit majority's use of the Supremacy Clause in overriding the IAD's disapproval provision is both incorrect and dangerous.

It is incorrect because the Supremacy Clause never should have applied, since the IAD is not state law.¹⁸⁴ As a congressionally sanctioned interstate compact, the IAD is effectively federal law and—as attested to in *Cuyler v. Adams*, *Alabama v. Bozeman*, and even *Mauro* itself—is equal to any federal statute.¹⁸⁵ “Congress . . . did not carve out special protections [to the disapproval provision] for the federal government,”¹⁸⁶ and the argument that it is “common sense” that Congress did not intend the disapproval provision to apply to the federal government is on equally unsound footing.¹⁸⁷ The amendments to the IAD that Congress did pass before entering into the agreement are telling. Section three defines “governor” for the federal government as the Attorney General.¹⁸⁸ As the word “governor” only appears within the IAD as a part of the disapproval provision, Congress surely was aware of its existence. In section nine, Congress added two exceptions that limited the extent of the federal government's obligations under the IAD. Absent, however, is any exception to the disapproval provision.¹⁸⁹ Had Congress not intended the disapproval provision to apply, it had knowledge of the provision and a conspicuous location to place a limitation on it before passing the IAD. Nonetheless, Congress was silent.

In spite of all this, the First Circuit used a blanket invocation of the Supremacy Clause to defeat federal law. This unsubstantiated use of the

184. Brief of Amici Curiae National Governors Association et al. in Support of Petitioner at 2, *Chafee v. United States*, 133 S. Ct. 930 (2013) (No. 12-223), 2012 U.S. S. Ct. Briefs LEXIS 4007, at *4 [hereinafter National Governors Association Brief].

185. *Id.* at 7. See also *supra* Part II.B.3.

186. National Governors Association Brief, *supra* note 184, at 3.

187. *Id.* at 7.

188. 18 U.S.C. App. 2 § 3 (2012). See also *supra* text accompanying note 78.

189. National Governors Association Brief, *supra* note 184, at 9.

Supremacy Clause as an “absolute trump card”¹⁹⁰ to defeat any claim made by a state, no matter the merits, also is inconsistent with the plain statement rule from *Gregory v. Ashcroft*.¹⁹¹ Here, there is no unmistakably clear statement that Congress wanted to restrict the state’s right to use the disapproval provision, which it must do if it wishes to change the usual “balance between the States and the Federal Government.”¹⁹² While one could argue that the Judiciary Act would give the federal government the ability to use the writ of habeas corpus ad prosequendum to power through the disapproval provision, this argument runs afoul of statutory construction. When two federal statutes conflict, the later and more specific statute should control.¹⁹³ Here, the IAD controls: it is much more recent than the Judiciary Act and, unquestionably, is the federal law most on point.

Using the Supremacy Clause as the First Circuit majority did sets a potentially dangerous precedent. It dramatically impacts the legitimacy of existing compacts, which could cause states to have reservations about entering into a compact with the federal government going forward, leading to inefficiency.¹⁹⁴ Also, allowing the Supremacy Clause to be the federal government’s “I win” button, when its use is unsupported by the law, improperly shifts the balance of power to the federal government and continues the long trend of disregarding federalist limitations on the national government in order to secure more centralized authority.

Additionally, Judge Torruella correctly argued that the disputed language in *Mauro* is patently conditional, and the First Circuit majority was in error when they treated it like an explicit holding. This outcome can be reached most easily by a plain reading of the language; if it was not conditional, why would the Court begin the statement with “if”?¹⁹⁵ This, combined with the fact that the Court cites no authority for the proposition, strongly implies that the disputed language is not a holding. In any event, the Court in *Mauro* had no need to answer this question; all of the issues in the case were already solved by its announcement of the *Mauro* rule. Thus, at best, the disputed language upon which First Circuit relies is dicta.

Judge Torruella’s interpretation makes even more sense when viewed

190. Cato Institute Brief, *supra* note 49, at 2.

191. *Id.* at 5.

192. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

193. *See Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 29 F.3d 727, 732 (1st Cir. 1994) (discussing rules regarding statutory interpretation).

194. National Governors Association Brief, *supra* note 184, at 12–13.

195. Cato Institute Brief, *supra* note 49, at 16–17.

next to the IAD's purposes.¹⁹⁶ Allowing a governor to disapprove of a federal transfer is entirely consistent with IAD's stated policy goals of rehabilitation and finality: (1) it ensures that the state may keep the prisoner for the duration of his sentence, guaranteeing exposure to the state's selected rehabilitation programs, and (2) the prisoner retains the right under Article III of the IAD to demand trial on outstanding federal charges, meaning he can have finality if he wants it. The First Circuit, therefore, should not be allowed to exempt the federal government from the disapproval provision merely because it does not make "common sense" to them; besides, the plain meaning of a statute may only be disregarded if it is "absurd or glaringly unjust."¹⁹⁷ Because the disapproval provision comports with the IAD's stated policy goals, this is surely not the case.

Yet, this still does not resolve the overarching question: did states ever have the power to dishonor a federal writ of habeas corpus ad prosequendum? In citing *Mauro* footnote twenty-eight, Judge Torruella suggested that states did have this power, which Congress intended to "reserve" and "preserve" to the states when it entered the IAD.¹⁹⁸ More specific support, however, is found by going back to the Judiciary Act and Chief Justice Marshall in *Ex parte Bollman*. As the writ of habeas corpus ad prosequendum was not mentioned by name or defined in the Judiciary Act, it remains subject to judicial, common law construction.¹⁹⁹ In *Bollman*, Marshall held that the writ of habeas corpus respondendum, a similar writ subject to common law interpretation, "could not be used to compel state action."²⁰⁰ Principles of federalism have always pointed away from allowing the federal government to compel state action, and the federal government is frequently on shaky constitutional ground when it tries to do so.²⁰¹ Here, the federal government is trying to compel state action by characterizing the writ of habeas corpus ad prosequendum as an incontestable mandate on the states. Under *Bollman*, this is impermissible. In *Puerto Rico v. Branstad*,²⁰² for instance, the Court noted a possible Tenth Amendment issue would be raised if an ad prosequendum writ was

196. See *supra* Part II.B.1.

197. *Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs, Dep't. of Labor*, 519 U.S. 248, 261 (1997) (citing *United States v. Rogers*, 466 U.S. 475, 484 (1984)).

198. See *supra* note 180 and accompanying text.

199. Cato Institute Brief, *supra* note 49, at 7–10.

200. *Id.* at 9 (referring to *Ex parte Bollman* & *Ex parte Swartwout*, 8 U.S. 75, 97 (1807)).

201. Brief of Amici Curiae States of New Mexico et al. in Support of Petitioner at 5, *Chafee v. United States*, 133 S. Ct. 930 (2013) (No. 12-223), 2012 U.S. S. Ct. Briefs LEXIS 4449, at *9 [hereinafter States Brief].

202. *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

compulsory on the states, and not just granted as a matter of comity.²⁰³ These feelings have been longstanding, as many courts—even prior to the IAD—have found that a state cannot be absolutely required to surrender prisoners pursuant to a federal ad prosequendum writ.²⁰⁴ It is, therefore, likely that state governors did have the power to refuse to grant federal ad prosequendum writs, and were only consistently granting them as a matter of comity, not of right.

Even if state governors never had this right, the disapproval provision would still be saved due to the IAD's compact status. Compacts represent compromises between "discrete sovereigns."²⁰⁵ Thus, to obtain the benefits of a compact, the federal government must, like any other sovereign, "[surrender] a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law."²⁰⁶ A compact, therefore, is like the articles of incorporation in the realm of business associations: it governs the affairs of its signatories notwithstanding whatever "default" provisions exist in outside law. Since the federal government gave the states the right to use the disapproval provision against the federal government when it entered into the IAD, whether or not the states had that right independent of the agreement is moot. Interestingly, the federal government does not dispute that it has the power to disapprove state writs of habeas corpus ad prosequendum,²⁰⁷ an argument that some lower courts have picked up.²⁰⁸ This, as the First Circuit contended, would make the federal government a superior party under the compact, which just simply cannot be correct under the principles of compact federalism. A compact is like a contract; the parties get what they bargained for. Here, the states did not sign an IAD that exempted the federal government from the

203. States Brief, *supra* note 201, at 8–9.

204. *Id.* at 11. *See, e.g.,* McDonald v. Ciccone, 409 F.2d 28, 30 (8th Cir. 1969) ("The release by the state authorities, however, is achieved as a matter of comity and not of right."); United States *ex rel.* Moses v. Kipp, 232 F.2d 147, 150 (7th Cir. 1956) ("In spite of the terminology of the writ, the consent of Michigan authorities was necessary to obtain the custody of [the prisoner]."); Stamphill v. Johnston, 136 F.2d 291, 292 (9th Cir. 1943) (the state "could not be required to surrender [the prisoner] to the custody of the United States marshal for trial in the federal court"); Lunsford v. Hudspeth, 126 F.2d 653, 655 (10th Cir. 1942) (discussing that states have the discretion to surrender a prisoner to the federal government).

205. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 40 (1994).

206. C.T. Hellmuth & Assocs., Inc. v. Wash. Metro. Area Transit Auth., 414 F. Supp. 408, 409 (D. Md. 1976).

207. Petition for a Writ of Certiorari, Chafee v. United States, *supra* note 38, at 15.

208. *See, e.g.,* Runck v. State, 497 N.W. 2d 74, 80 n.3 (N.D. 1993) ("The federal government is not bound to honor state writs of habeas corpus ad prosequendum seeking prisoners in federal custody, but may consent, in its discretion, to do so on the principles of comity . . .").

disapproval provision.²⁰⁹ When the IAD's mandate for liberal construction has required that cases be dismissed for the most de minimis of violations²¹⁰—such as being one day late for the start of trial—an entire provision should not be disregarded cavalierly.

In sum, the IAD's disapproval provision applies even when the federal government is the receiving state as (1) the IAD is an interstate compact and, thus, federal law not subject to the Supremacy Clause; (2) the disputed language in *Mauro* that the First Circuit would use to divest the states of their authority is patently conditional; and (3) state governors likely could refuse to grant federal ad prosequendum writs, even before the IAD was passed, as a matter of comity.

B. AMENDING THE IAD IN LIGHT OF FEDERAL CONCERNS AND STATES' RIGHTS

A ruling that the IAD's disapproval provision applies to the federal government when it is a receiving state surely creates issues from the federal perspective. The federal government issues up to 5000 ad prosequendum writs each year after it has filed a detainer, causing worry that the entire criminal justice system would be clogged up by states' liberal use of the disapproval provision.²¹¹ This is because the federal government would still be forced to use the detainer system, as they admit that proceeding by ad prosequendum writs alone would be "untenable" due to their increased complexity.²¹²

The natural solution for the federal government then is to amend the IAD. Its first thought is likely to be exempting the federal government from the disapproval provision entirely. This is, however, unwise. It would essentially give the federal government the absolute right to "divest state courts and state governments of their legitimate police power to hold and punish prisoners for crimes under state law to the full extent of the punishment imposed by the state."²¹³ Merely by turning to the ad prosequendum writ, the federal government would have the power to remove any state prisoner to the federal system and do with him what they would. Just like the Anti-Federalists argued as they pushed for the Bill of

209. National Governors Association Brief, *supra* note 184, at 10–11.

210. See *supra* notes 75–77 and accompanying text.

211. Brief for the United States at 10, *Pleau v. United States*, 680 F.3d 1 (1st Cir. 2012) (Nos. 11-1775 & 11-1782), 2011 WL 3009761, at *10.

212. Petition for a Writ of Certiorari at 28, *Pleau v. United States*, 133 S. Ct. 931 (2013) (No. 12-230), 2012 U.S. S. Ct. Briefs LEXIS 3526, at *46, *cert. denied*, 133 S. Ct. 931 (2013).

213. Cato Institute Brief, *supra* note 49, at 12.

Rights,²¹⁴ the federal government cannot be trusted with this level of power vis-à-vis the states in the criminal context. This is how the inequitable dual sovereignty doctrine developed. When concern was originally expressed that both the federal and state governments would be allowed to punish a defendant for the same crime, the courts reasoned that the “benignant spirit” of the federal government was “almost certain” to prevent double punishment, except “in instances of peculiar enormity.”²¹⁵ This is not true for a vast majority of federal capital defendants, most of whom were already punished at the state level.

An amendment so drastic is not necessary, however, because the federal government’s concerns are overstated and could be addressed by a more tailored remedy. Realistically, a state governor is only going to use the disapproval provision in one instance: when the federal government is seeking the death penalty against a citizen and the state is abolitionist. This is because, as numerous commentators and even the courts themselves have realized, “death is different in kind from any other punishment imposed under our system of criminal justice.”²¹⁶ Indeed, it is “qualitatively and in terms of the passions it raises” distinct from any other public law issue.²¹⁷ It is no accident that the stale IAD circuit split on the disapproval provision’s application only came back to life in *Pleau* shortly after the DOJ started more capital prosecutions in abolitionist jurisdictions due to changes in their internal protocol.²¹⁸

Of course, the other extreme option would be for the federal government to simply stop seeking the death penalty against defendants already incarcerated in abolitionist jurisdictions. Legal scholars have overwhelmingly concluded that federalism should prevent the federal government from seeking the death penalty in these jurisdictions as a matter of equity.²¹⁹ Under modern Eighth Amendment and Supremacy Clause doctrine, however, the federal government certainly has power to enforce the FDPA nationwide, including in states that do not have the death penalty.²²⁰ Some commentators have even argued that the federal death penalty, used in restraint, is good for abolitionist states: it allows the federal government to take over in the most gruesome murder cases when,

214. See *supra* Part II.A.

215. Connor, *supra* note 122, at 172 (quoting *Fox v. Ohio*, 46 U.S. 410, 435 (1847)).

216. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

217. Morton, *supra* note 151, at 1459 (citing *Gholson v. Estelle*, 675 F.2d 734, 737 (5th Cir. 1982)).

218. See *supra* Part II.C.3.

219. Campbell, *supra* note 127, at 81.

220. *Id.* at 126–27.

otherwise, the state might decide to reinstitute the death penalty.²²¹ Other commentators sharply disagree, arguing that the federal death penalty is a “get out of jail free card” that allows state citizens to avoid “consider[ing] . . . th[e] most vexing of legal and moral issues.”²²² This in turn removes a sense of personal responsibility from state citizens, decreasing the role they have in determining their state’s public policy issues and discouraging them from approaching their government to enact change.²²³

A few commentators have proposed amendments to the IAD that would only apply in the death penalty context.²²⁴ These proposals are essentially the same: once the death penalty becomes a potential punishment in a defendant’s case, the IAD as a whole should become inoperable, presumably because, if convicted, the prisoner will be dead. Thus, none of the IAD’s rehabilitation concerns are implicated. This amendment would be imprudent, however, because it only contemplates a situation in which a defendant has committed two distinct crimes in two different states. There, each state usually has an equal interest in punishing the defendant according to its own criminal law; one jurisdiction has to take the hit. However, the federal government is typically seeking the death penalty in wholly different circumstances: the state has already punished or will punish the defendant for the exact same incident the federal government is trying to prosecute. In this situation, the federal government’s interest in prosecuting the crime could be much lower than the state’s interest, such as if the nature of the crime was distinctly local. Thus, transfer to a new jurisdiction would not make sense because of the IAD’s policy concerns against unnecessary shuttling.

Neither extreme seems desirable. Therefore, a middle ground amendment to the IAD is needed. This amendment must allay the federal government’s concerns about misuse of the disapproval provision while simultaneously protecting a state’s right to define its criminal laws. The states need to be ultimately responsible for criminal law. The nature of the police power means that state citizens hold their state legislatures responsible for enforcement of everyday crimes; this is simply untrue for

221. *Id.* at 127.

222. Mannheim, *supra* note 43, at 162.

223. *See id.* (discussing consequences of a federal death penalty on abolitionist states’ citizens).

224. *See* Daniel Genet, Comment, *Courts v. Governors: Prisoners Torn Between States: Who Should Determine Their Fate?*, 16 PACE L. REV. 155, 183 (1995) (proposing a “Death Penalty Exception” to the IAD). *See also* Edward G. Hild, Note, *The Death Penalty and the Interstate Agreement on Detainers Act: A Proposal for Change*, 29 J. MARSHALL L. REV. 499, 507–25 (1996) (proposing that the IAD become inoperable in light of a death sentence).

federal crimes, since even murder is seen as a local, community issue.²²⁵ The federal government should not be allowed to reap the benefits of pursuing the death penalty against defendants in abolitionist states unimpeded without bearing some of the burden.²²⁶ Here, that burden is state governors being able to disapprove of the transfer in some circumstances to protect their state's policy interests.

In crafting an appropriate amendment, let us start by looking to another area of law that determines whether federal or state law should control when both are at issue. The familiar Erie Doctrine provides that, in federal diversity cases, state law governs substantive matters, while federal law governs procedural matters.²²⁷ In complex disputes, however, the lines between substantive and procedural law becomes more than blurry. Thus, the Supreme Court developed an additional test to help resolve these uncertain cases: a balancing test between the federal and state versions of the disputed rule. Whichever sovereign's underlying interest behind the rules contending for application was greater would get to apply that rule in court.²²⁸

To be effective in the IAD context, any balancing test would require more specific factors to guide the analysis. Luckily, the three factors that the DOJ used under their 1995 Protocol in determining whether a federal capital prosecution was warranted provide a good base.²²⁹ The heightened concerns expressed by the DOJ's petite policy (used when the federal government is seeking to prosecute a state defendant on facts for which he has already received a state punishment) may also be addressed by the addition of a fourth factor.²³⁰

The resulting balancing test would permit the federal government to override a state governor's invocation of the disapproval provision only when the federal interest in prosecuting that defendant substantially outweighs the state interest. Four factors would be used in this analysis: (1) the strength of each sovereign's interest in the prosecution; (2) the extent to which the criminal activity reached beyond local boundaries; (3) the likelihood of effective prosecution at the state level; and, if a state

225. Connor, *supra* note 122, at 185–86.

226. See *Stone, Sand & Gravel Co. v. United States*, 234 U.S. 270, 278 (1914) (discussing that the government cannot avail itself of benefits of a contract without accepting its burdens).

227. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938) (explaining choice of law rules in federal diversity cases).

228. See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 533–40 (1958) (discussing the considerations a court must weigh when deciding to apply federal versus state law).

229. See *supra* notes 130–32 and accompanying text.

230. See *supra* notes 141–43 and accompanying text.

punishment has already been meted out, (4) whether the state punishment leaves the federal interest “demonstrably unvindicated.”²³¹

In general, this balancing test would allow governors of abolitionist states to use the disapproval provision the vast majority of the time to prevent federal capital prosecutions against their citizens. Most murders are wholly local in nature. Their connections to federal jurisdiction (such as affecting interstate commerce) are not as substantial as the state’s interest under the police power in enforcing its criminal law and protecting its citizens. Also, the mere fact that a state does not sentence a particular defendant to death cannot be said to leave the federal interest demonstrably unvindicated in all but the most extreme cases as, “it seems strange to posit that a federal interest may only be vindicated by a specific outcome when that outcome cannot be guaranteed even in a federal prosecution.”²³² However, in cases that are truly federal in nature, such as massive interstate drug distribution as originally criminalized under the Anti-Drug Abuse Act,²³³ or terrorism cases like the Oklahoma City bombing of a federal building, the federal government’s interest would rise to a high enough level to overtake that of the individual state. This would allow for federal prosecution in spite of a state governor’s use of the disapproval provision.

Some may critique this proposed rule because it has the potential to lead to more litigation between the federal government and state governors over the question of who has a superior interest. However, this neglects the balancing test’s intrinsic design as a gatekeeper: by placing the burden on the federal government to show that its interest substantially outweighs that of the state before allowing it to override the disapproval provision, the federal government would be discouraged from bringing all but the cases in which the federal interest is most legitimate. This is preferable in order to both encourage economy of federal resources and allow states the freedom to enforce their own criminal policy without needless interference. Also, state governors in most cases will still transfer prisoners over to the federal government as a matter of comity under the new system without using the disapproval provision, just as they had done for decades prior to *Pleau*.

Applying this balancing test to *Pleau*, Governor Chafee would be allowed to disapprove of the federal government’s written request for transfer under the IAD, and the federal government would be unable to

231. Connor, *supra* note 122, at 160 (citing U.S. ATTORNEYS’ MANUAL, *supra* note 138, § 9-2.031.A).

232. *Id.* at 203–04.

233. See *supra* text accompanying note 121.

override it. Pleau's crime was committed in Rhode Island against a Rhode Island victim, and Pleau himself is a Rhode Island citizen. By contrast, the federal connection—that the money stolen was going into a national bank—is nominal. Rhode Island has a tremendous interest in punishing this type of horrific crime within its small community. The federal government's interest in this prosecution, however, only seems to be increasing the punishment against Pleau from the second harshest available under the law (life in prison in Rhode Island) to the harshest (a federal death sentence). Thus, the federal government's interest in prosecuting Pleau simply does not rise to a substantial enough level to defeat Governor Chafee's choice to protect Rhode Island's more than 150-year-old public policy forbidding the death penalty.

V. CONCLUSION

In conclusion, the IAD's disapproval provision should apply against the federal government when it is a receiving state. Because this legal conclusion raises problems that will likely cause the federal government to look toward amending the Agreement, this Note suggests that the federal government adopt a balancing test that would govern the disapproval provision's application. Under it, a governor would be allowed to disapprove of a prisoner's transfer to federal custody but, if the federal government's interest in prosecuting that defendant substantially outweighs the state's interest, the federal government should be able to override the transfer. Such a balancing test is necessary because it provides protection to inmates along the core concerns of the IAD: preventing interruption of rehabilitation and treatment programs by needless shuttling between jurisdictions. It also provides reasonable protection, in light of the federal government's continuing development of a more substantial body of criminal law, to the states' police power right to define crimes and enforce them within their territory. Finally, it prevents establishing a dangerous precedent by which the federal government may skirt its problematic obligations to the states by resorting to the Supremacy Clause when use of the clause is unsubstantiated by law.

APPENDIX

LETTERS IN SUPPORT OF GOVERNOR CHAFEE

I commend Governor Chafee for his successful action that blocked the efforts of the U.S. attorney's office to prosecute murder suspect Jason Wayne Pleau.

The governor is correct: The majority of us in Rhode Island do not want anyone subjected to the death penalty. It is a dreadful, flawed method of punishment that demeans the very essence of a civilized society.

Chafee showed courage by confronting the Justice Department, which, unfortunately, has little hesitation when considering capital punishment as an option. The governor has upheld his personal conviction that the death penalty is wrong, and was willing to battle the federal prosecutors to protect the state from its possible use.

Thank you, Governor Chafee.

Elizabeth Morancy

*North Scituate*²³⁴

I disagree with Rhode Island state Sen. Edward J. O'Neill's criticism of Governor Chafee for refusing to surrender a Rhode Island criminal to federal authorities. ("Shielding criminal betrays public trust," Aug. 17, news). Under federal law, Jason Wayne Pleau might face the death penalty. Since Rhode Island has outlawed the death penalty, he will face life imprisonment here.

Senator O'Neill seems to think that the argument is only about Pleau's criminal record, his disciplinary infractions while in prison, and the cost of imprisoning him for life. To me, the issue is rather about 1) a universal respect for humanity and 2) states' rights.

It's true that Jason Pleau did not respect the humanity of David Mann [sic] and that his horrible crime can never be erased. But the 16 states plus the District of Columbia that outlaw executions do so because they do not want to stoop to the inhumanity of the accused criminals.

Further, it was a mistake for Congress in 1988 to let the federal

234. Elizabeth Morancy, Letter to the Editor, *Proper to Block Pleau Transfer*, PROVIDENCE J., Oct. 31, 2011, at B7.

government impose the death penalty for 41 (!) different crimes. Only states should use the death penalty. The federal death penalty should be repealed, and the Pleau case is a good example of why.

I support Governor Chafee 100 percent on this, and appreciate his respect for Rhode Island law and our heritage of conscience.

Catherine Orloff

*Providence*²³⁵

LETTERS AGAINST GOVERNOR CHAFEE

Governor Chafee should be ashamed of what he is doing to murder victim David Main's family by refusing to hand over alleged murderer Jason Pleau to federal authorities. This family's suffering has been dragged out thanks to Governor Chafee.

David Main and his family deserve justice and closure. Governor Chafee is more concerned with the rights of Jason Pleau than he is of the murder victim and his family. The governor is abusing his power. Regardless of his feelings about the death penalty, he needs to hand Jason Pleau over to federal authorities so that Mr. Pleau can face the consequences of what he allegedly did and the victim's family can finally have the closure it deserves.

Helga Murray

*North Kingstown*²³⁶

Like many other Rhode Islanders, I am tired of Lincoln Chafee ramming his "values" down our throats. Take the Jason Wayne Pleau case. Chafee doesn't want to turn him over because he "doesn't want to subject a human being to the death penalty" and because it puts "a human life at stake." What about the life of David Main, who wasn't even given the chance to give up the money without a fight? I hope this "independent man" attitude will get Chafee fired. Again.

Jim Iavarone

*Warwick*²³⁷

235. Catherine Orloff, Letter to the Editor, *Chafee Right About Pleau Case*, PROVIDENCE J., Apr. 7, 2012, at B7.

236. Helga Murray, Letter to the Editor, *Chafee Is Extending Main Family Suffering*, PROVIDENCE J., May 25, 2012, at B7.

237. Jim Iavarone, Letter to the Editor, *Chafee's "Values,"* PROVIDENCE J., May 22, 2012, at B7.

