
Saying “No” After *Pleau*:
Exploring the Conflict Between the Interstate Agreement on
Detainers Act and the Federal Writ *Ad Prosequendum*

*“We have no way of knowing what ramifications would result from a holding that Congress has the implied constitutional power ‘to alter, amend or repeal’ its consent to an interstate compact. . . . No doubt the suspicion of even potential impermanency would be damaging to the very concept of interstate compacts.”*¹

I. INTRODUCTION

In 2010, federal prosecutors indicted Jason Pleau after he shot and killed a man outside of a Rhode Island bank.² The indictment appeared to be a sure sign that the federal government would seek the death penalty against Pleau, given that Pleau had already agreed to plead guilty to state charges and accept a life sentence without the possibility of parole.³ When federal prosecutors requested Rhode Island prison officials transfer Pleau to federal custody for prosecution, however, Rhode Island Governor Lincoln Chafee responded in unprecedented fashion: Chafee refused to turn Pleau over, citing Rhode Island’s long-standing opposition to the death penalty.⁴

The subsequent litigation between Pleau, Chafee, and the United States revealed a conflict between two procedural mechanisms—the Interstate Agreement on Detainers Act (IAD) and the writ of habeas corpus *ad prosequendum*—that had been simmering for decades.⁵ Initially, the government had requested custody of Pleau under the IAD, which expressly provides governors with the right to deny such requests; a governor had simply

1. *Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1962).

2. *See United States v. Pleau*, No. 10-184-1 S, 2011 WL 2605301, at *1 (D.R.I. June 30, 2011) (describing federal indictment), *aff’d on reh’g*, 680 F.3d 1 (1st Cir. 2012) (en banc).

3. *See United States v. Pleau*, 680 F.3d 1, 12 n.18 (1st Cir. 2012) (Torruella, J., dissenting) (inferring prosecutorial intent), *cert. denied*, 133 S. Ct. 930 (2013), and *cert. denied*, 133 S. Ct. 931 (2013); *Pleau*, 2011 WL 2605301, at *2 n.1 (noting potential for capital prosecution).

4. *See Pleau*, 2011 WL 2605301, at *3 (noting unprecedented nature of Chafee’s objection).

5. *See infra* Part II.B.3 (analyzing courts’ conflicting interpretations of writ *ad prosequendum* and IAD). *Compare* Interstate Agreement on Detainers, 18 U.S.C. app. § 2 (2012) (providing uniform system for transferring prisoners to stand trial in another jurisdiction), *with* 28 U.S.C. § 2241 (2012) (conferring power on judiciary to order individuals to appear for prosecution).

never invoked the provision before Chafee.⁶ The United States then attempted to compel Pleau's transfer by obtaining a writ *ad prosequendum*, which had previously always been understood as a mandatory court order.⁷ In *United States v. Pleau*, the First Circuit—forced to choose which procedural mechanism to enforce—ultimately enforced the writ *ad prosequendum* over the IAD, requiring Rhode Island to transfer Pleau for federal prosecution.⁸ Nevertheless, the potential for conflict between the writ *ad prosequendum* and IAD remains outside the First Circuit, and resolving this conflict presents a unique question of federalism.⁹

This Note analyzes that question, identifying the competing interests at stake and ultimately suggesting that upholding the IAD over the writ *ad prosequendum* would better preserve principles of federalism without eroding the federal government's prosecutorial prerogatives.¹⁰ After laying out the basic operations and statutory foundations of the writ *ad prosequendum* and IAD in Part II.A, Part II.B details how courts have adopted inconsistent interpretations of the writ *ad prosequendum* and IAD, including the First Circuit's interpretation in *Pleau*.¹¹ Part II.C gauges the potential for further conflict between the writ *ad prosequendum* and IAD by considering how the federal death penalty implicates contentious issues of federalism.¹² Finally, Part III critiques the First Circuit's treatment of the IAD and writ *ad prosequendum* and argues that future courts addressing this issue should resolve the conflict between these two mechanisms by enforcing the IAD.¹³

6. See 18 U.S.C. app. § 2, art. IV(a) (“[T]he Governor of the sending State may disapprove the request for temporary custody or availability”); *Pleau*, 2011 WL 2605301, at *1 (noting United States first requested custody of Pleau pursuant to IAD); *supra* note 4 and accompanying text (explaining Chafee first governor to refuse request under IAD).

7. See *Pleau*, 2011 WL 2605301, at *2 (explaining government's response to Chafee's denial); see also *Pleau*, 680 F.3d at 4-5 (framing issue on appeal as conflict between provisions of IAD and writ *ad prosequendum*).

8. See *Pleau*, 680 F.3d at 8 (upholding writ *ad prosequendum*).

9. See *infra* Part II.C (explaining divergence between federal and state policies on death penalty); see also *infra* Part III.C (analyzing federalism interests at stake in *Pleau*). In May 2012, the Supreme Court denied Chafee and Pleau's application to stay the First Circuit's order to transfer Pleau to federal custody and in January 2013, the Court denied their petitions for certiorari. See *Chafee v. United States*, 133 S. Ct. 930, 930 (2013); *Pleau v. United States*, 133 S. Ct. 931, 931 (2013); Lyle Denniston, *New Dispute over Death Sentencing (UPDATE: DENIED)*, SCOTUSBLOG (May 24, 2012, 4:12 PM), <http://www.scotusblog.com/2012/05/new-dispute-over-death-sentencing>.

10. See *infra* Part III.C.

11. See *infra* Part II.A-B.

12. See *infra* Part II.C.

13. See *infra* Part III.

II. HISTORY

A single criminal act can constitute a violation of both state and federal law.¹⁴ In such instances, it is well settled that states and the federal government are treated as independent sovereigns, each entitled to enforce its own laws against the offender.¹⁵ The first jurisdiction to take physical custody of a suspected criminal has “primary jurisdiction” over the suspect, which allows that jurisdiction to try, sentence, and punish the defendant before any other.¹⁶ Other jurisdictions may subsequently exercise “secondary jurisdiction” by bringing charges against the same defendant for the same conduct.¹⁷ The IAD

14. See *Moore v. Illinois*, 55 U.S. 13, 20 (1852).

Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both.

Id.; Michele Martinez Campbell, *Federalism and Capital Punishment: New England Stories*, 36 VT. L. REV. 81, 84 (2011) (noting state and federal governments have concurrent jurisdiction over “many crimes”); Rachel A. Mills, Comment, *Too Many Cooks Spoil the Sentence: Fragmentation of Authority in Federal and State Sentencing Schemes*, 41 SETON HALL L. REV. 1637, 1637 (2011) (explaining overlapping state and federal statutes allow different jurisdictions to contemporaneously prosecute an individual).

15. See, e.g., *Abbate v. United States*, 359 U.S. 187, 196 (1959) (holding state prosecution did not bar subsequent federal prosecution); *Bartkus v. Illinois*, 359 U.S. 121, 132-36 (1959) (holding federal prosecution did not bar subsequent state prosecution); *United States v. Lanza*, 260 U.S. 377, 382 (1922) (“[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.”). The doctrine of dual sovereignty rests on the Supreme Court’s determination that successive federal and state prosecutions do not violate the Fifth Amendment’s Double Jeopardy Clause. See *Lanza*, 260 U.S. at 382 (interpreting Double Jeopardy Clause as applying only to successive prosecutions by same sovereign); *United States v. Zone*, 403 F.3d 1101, 1105 (9th Cir. 2005) (holding Double Jeopardy Clause not violated by federal prosecution after state prosecution for same act); *United States v. Ng*, 699 F.2d 63, 70-71 (2d Cir. 1983) (reinstating federal indictment because Double Jeopardy Clause not violated); 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, 170-74 (2010) (critiquing interpretation of Double Jeopardy Clause under dual-sovereignty doctrine). In *United States v. Wheeler*, the Supreme Court elucidated the doctrine of dual sovereignty by stating that it “rest[s] on the basic structure of our federal system, in which States and the National Government are separate political communities. . . . Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses” 435 U.S. 313, 320 (1978) (citation omitted), *superseded by statute*, 25 U.S.C. § 1301(2) (2012), *as recognized in* *United States v. Lara*, 541 U.S. 193 (2004).

16. See *United States v. Cole*, 416 F.3d 894, 897 (8th Cir. 2005) (explaining actual custody determines primary jurisdiction); Savvas Diacosavvas, Note, *Vertical Conflicts in Sentencing Practices: Custody, Credit, and Concurrency*, 57 N.Y.U. ANN. SURV. AM. L. 207, 210-12 (2000) (outlining priorities system of concurrent jurisdiction); Mills, *supra* note 14, at 1656-57 (discussing rules of concurrent state and federal jurisdiction).

17. See *Taylor v. Reno*, 164 F.3d 440, 444 n.1 (9th Cir. 1998) (explaining lack of primary jurisdiction does not preclude prosecution by another jurisdiction); Mills, *supra* note 14, at 1656-58 (discussing relationship between states with primary and secondary jurisdiction). Determining the order in which state and federal prison sentences are served in situations of concurrent jurisdiction is outside the scope of this Note. See generally Erin E. Goffette, Note, *Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 VAL. U. L. REV. 1035, 1073-74 (2003) (arguing against federal courts with secondary jurisdiction determining whether state sentence runs

and the writ *ad prosequendum* make exercising concurrent jurisdiction possible by providing the means to transfer defendants between jurisdictions for prosecution and sentencing.¹⁸

A. Mechanisms for Interjurisdictional Transfers of Prisoners

1. The Writ Ad Prosequendum

The writ of habeas corpus *ad prosequendum* is a court order directing prison officials to immediately bring a prisoner from another jurisdiction before the court to face criminal charges.¹⁹ Not to be confused with the writ of habeas corpus *ad subjiciendum*, which provides relief to detainees held without cause, the writ *ad prosequendum* requires an individual to appear in court for prosecution.²⁰ When exercising secondary jurisdiction, a writ *ad prosequendum* allows federal and state prosecutors to obtain temporary custody of a prisoner incarcerated in another jurisdiction.²¹ The writ *ad prosequendum* has been used for centuries at common law to transfer prisoners from one jurisdiction to be prosecuted in another and has been recognized as one of the

concurrently or consecutively).

18. See Diacosavvas, *supra* note 16, at 212-15 (comparing detainers to writs *ad prosequendum*); Mills, *supra* note 14, at 1658 (addressing means by which sovereign with primary jurisdiction can “loan” custody of prisoner); *infra* Part II.A (outlining basic functions of writ *ad prosequendum* and detainers).

19. See, e.g., Flick v. Blevins, 887 F.2d 778, 781 (7th Cir. 1989) (per curiam) (explaining operation of writ *ad prosequendum*); Ridgeway v. United States, 558 F.2d 357, 361 (6th Cir. 1977) (defining writ *ad prosequendum*); Grant v. United States, 856 A.2d 1131, 1135 (D.C. 2004) (characterizing writ *ad prosequendum* as “commanding the immediate removal” of prisoner); see also Leslie W. Abramson, *The Interstate Agreement of Detainers: Narrowing Its Availability and Applications*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 7 (1995) (“A writ of habeas corpus *ad prosequendum* is a court order demanding that an inmate be produced to face criminal charges.”); Daniel E. Casagrande, Note, *The Effect of the Interstate Agreement on Detainers Upon Federal Prisoner Transfer*, 46 FORDHAM L. REV. 492, 492 (1977) (setting out basic function of writ *ad prosequendum*).

20. See Carbo v. United States, 364 U.S. 611, 615 (1961) (detailing history of writ *ad prosequendum*); *Ex parte Bollman*, 8 U.S. 75, 98 (1807) (defining writ *ad prosequendum*). In *Ex parte Bollman*, Chief Justice John Marshall explained that habeas corpus is “a generic term” encompassing a variety of forms of the writ, including writs *ad subjiciendum*, *respondendum*, *satisfaciendum*, *testificandum*, *deliberandum*, and *prosequendum*. See 8 U.S. at 95-99. Chief Justice Marshall defined the scope of the writ *ad prosequendum*, stating that writs “[a]d prosequendum . . . issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed.” *Id.* at 98 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *129) (internal quotation marks omitted).

21. See, e.g., *Ex parte Bollman*, 8 U.S. at 98 (noting use of writ *ad prosequendum* for removing prisoners for prosecution); Jake v. Herschberger, 173 F.3d 1059, 1061 n.1 (7th Cir. 1999) (describing writ *ad prosequendum* as instrument for “borrowing” prisoner from another jurisdiction); United States *ex rel.* Moses v. Kipp, 232 F.2d 147, 149-50 (7th Cir. 1956) (explaining use of writ *ad prosequendum*); Rose v. United States, 365 F. Supp. 841, 843 (N.D. Ill. 1973) (“A writ of habeas corpus *ad prosequendum* is the correct way to bring a prisoner under incarceration by state or federal courts to trial for alleged violations of law.”). Typically, a jurisdiction that seeks to prosecute a prisoner with a writ *ad prosequendum* is referred to as the “receiving state,” and the jurisdiction in which the prisoner was originally incarcerated is referred to as the “sending state.” See *Jake*, 173 F.3d at 1061 n.1 (denoting terms for jurisdictions); *Flick*, 887 F.2d at 781 n.5 (“The term ‘state’ refers to any jurisdiction, whether federal or state.”).

oldest writs available to the federal judiciary.²² The Supreme Court first acknowledged federal courts’ statutory authority to issue writs *ad prosequendum* in 1807 in *Ex parte Bollman*, holding that the First Judiciary Act of 1789 implicitly authorized federal courts to do so.²³ Federal courts’ power to issue writs *ad prosequendum* was not expressly codified, however, until 1948 when Congress consolidated all of the writs of habeas corpus into 28 U.S.C. § 2241.²⁴

22. See *United States v. Hayman*, 342 U.S. 205, 221 & n.35 (1952) (stating issuance of writs *ad prosequendum* “finds ample precedent in the common law”); *Ridgeway*, 558 F.2d at 361-62 (“The writ of habeas corpus *ad prosequendum* is one of the oldest writs available to the judiciary.”); cf. *Ex parte Bollman*, 8 U.S. at 93-94 (“[F]or the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law . . .”). Prisoners are natural candidates for writs *ad prosequendum*, as they are obviously unable to appear before a court voluntarily. See *Kipp*, 232 F.2d at 149-50 (expounding on rationale for use of writ *ad prosequendum* against prisoners).

23. See *Carbo*, 364 U.S. at 614-19 (reviewing legislative history of writ *ad prosequendum*); see also First Judiciary Act, ch. 20, 1 Stat. 73, 81-82 (1789) (authorizing federal courts to issue writs of habeas corpus); *Ex parte Bollman*, 8 U.S. at 98 (interpreting habeas writ provision in First Judiciary Act as including writ *ad prosequendum*).

24. See Act of June 25, 1948, ch. 646, 62 Stat. 964 (codified as amended at 28 U.S.C. § 2241 (2012)) (providing courts power to grant writ of habeas corpus); *Carbo*, 364 U.S. at 618-19. Section 2241 provides:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

.....

(c) The writ of habeas corpus shall not extend to a prisoner unless—

.....

(5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2241(a), (c)(5). In *Carbo v. United States*, the Supreme Court interpreted § 2241 as granting federal courts the power to issue writs *ad prosequendum* to prisoners incarcerated outside their respective jurisdictions, which is in contrast to the writ *ad subjiciendum* (Great Writ). See 364 U.S. at 611, 619 (distinguishing Great Writ from writs *ad prosequendum*). The Court reasoned that such an interpretation of § 2241 was necessary to ensure the writ *ad prosequendum* remained “a tool for jurisdictional potency as well as administrative efficiency.” *Id.* at 618; see *Casagrande*, *supra* note 19, at 506 n.124 (explaining rationale of *Carbo* Court). Federal courts issue a writ *ad prosequendum* upon a showing by a federal prosecutor that proper grounds exist for the charges brought against the prisoner. See 28 U.S.C. § 2243 (2012) (providing standard for issuance of habeas writs); *Hayman*, 342 U.S. at 222 & n.38 (indicating issuance of writs *ad prosequendum* subject to standards of § 2243); *Casagrande*, *supra* note 19, at 503-04 (setting forth prosecutor’s burden of proof for obtaining writs *ad prosequendum*). State courts may also issue writs *ad prosequendum*, whether by statute or common law, to bring a prisoner in federal custody before it to face state criminal charges. See *Ponzi v. Fessenden*, 258 U.S. 254, 261-62 (1922) (announcing federal government may transfer prisoner pursuant to state writ *ad prosequendum*); *Commonwealth v. Domanski*, 123 N.E.2d 368, 72-73 (Mass. 1954) (upholding state court’s secondary jurisdiction of federal prisoner after federal government consented to transfer); cf. *Commonwealth v. Florence*, 387 N.E.2d 152, 153 (Mass. App. Ct. 1979) (upholding validity of state writ *ad prosequendum* despite it being “precatory in nature”); *People v. McLemore*, 291 N.W.2d 109, 115 (Mich. Ct. App. 1980) (“A state *ad prosequendum* writ, directed outside the jurisdiction of the issuing court, need not be honored.”), *rev’d on other grounds*, 311 N.W.2d 720 (Mich. 1981); *infra* Part II.B.1 (discussing *Ponzi* and nonmandatory nature of state writs *ad prosequendum*).

2. *The Interstate Agreement on Detainers*

A detainer is a document that prosecutors and law enforcement officials use to request custody of a prisoner upon the prisoner's release from a penal institution in another jurisdiction.²⁵ In contrast to a writ *ad prosequendum*, detainers are used by law enforcement officials independently of courts and, historically, have been observed only as a matter of interstate comity.²⁶ A detainer itself simply gives prison officials notice that another jurisdiction intends to prosecute one of their prisoners *after* the prisoner's present term of incarceration, rather than functioning as a demand for temporary custody to prosecute a prisoner *during* his or her prison term.²⁷ Historically, the imposition of a detainer caused significant problems for prisoners, as it often led to criminal charges remaining unresolved for the duration of prisoners' sentences.²⁸ In 1956, the Council of State Governments convened to resolve

25. See *Carchman v. Nash*, 473 U.S. 716, 719 (1985) (defining detainer as request to hold prisoner or notify agency prior to prisoner's release); S. REP. NO. 91-1356, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4864, 4865 (describing detainer as notification prisoner wanted for criminal prosecution in another jurisdiction); Abramson, *supra* note 19, at 14 (characterizing detainer as notification to inmate's custodian of pending charges in another state). The IAD does not define the term "detainer" or specify who may file one, and while there is no consensus as to what constitutes a detainer, courts have recognized a certified copy of a charging document or a letter from a court clerk as a detainer. See Abramson, *supra* note 19, at 3 n.12, 14 n.70 (highlighting lack of agreement on documents constituting detainer); see also *Cuyler v. Adams*, 449 U.S. 433, 436 n.3 (1981) (noting IAD does not define "detainer"); Note, *The Detainer: A Problem in Interstate Criminal Administration*, 48 COLUM. L. REV. 1190, 1190-91 (1948) (observing detainers usually take form of warrant or hold order); *infra* Part II.B.2 (discussing *Mauro* establishing writs *ad prosequendum* do not constitute detainer).

26. See *United States v. Mauro*, 436 U.S. 340, 358 (1978) (distinguishing writs *ad prosequendum* from detainers); Larry W. Yackle, *Taking Stock of Detainer Statutes*, 8 LOY. L.A. L. REV. 88, 96-97 (1975) (noting detainers impose no obligations on incarcerating jurisdictions); Casagrande, *supra* note 19, at 503 & n.93 (recognizing compliance with detainers at discretion of prison officials); Note, *supra* note 25, at 1191 ("[Detainers'] effectiveness is almost wholly dependent upon interstate comity and administrative courtesy."); see also *supra* Part II.A.1 (reviewing function and nature of writs *ad prosequendum*).

27. See *Mauro*, 436 U.S. at 358 ("Rather than requiring the immediate presence of the prisoner a detainer merely puts the officials of the institution in which the prisoner is incarcerated on notice that the prisoner is wanted in another jurisdiction for trial . . ."); Abramson, *supra* note 19, at 14 (defining detainer as form of notification); Casagrande, *supra* note 19, at 503-04 (comparing detainer to "notice order" not requiring immediate transfer of prisoner).

28. See COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1957, at 74 (1956) (outlining hardships for prisoners created by lodging of detainers). Prior to the IAD, the imposition of a detainer created a multitude of problems for prisoners, as it was often grounds for denial of parole, disqualification from rehabilitative programs, and assignment of a higher security status. See *United States v. Kenaan*, 557 F.2d 912, 916 (1st Cir. 1977) ("Prior to the Agreement, detainers were filed indiscriminately, often with no notification to the prisoner, on mere suspicion, and without procedural safeguards."); COUNCIL OF STATE GOV'TS, *supra* (discussing numerous problems detainers created for prisoners); Paul M. Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U. CIN. L. REV. 179, 180-83 (1966) (summarizing detrimental effects of delayed adjudication for prisoners); Yackle, *supra* note 26, at 91 ("A prison inmate against whom a detainer is lodged may suffer dire consequences within the penal institution where he is confined."); Note, *supra* note 25, at 1191-94 (analyzing problems detainers created for prisoners). Prior to 1969 and the Supreme Court's decision in *Smith v. Hooyey*, detainers were particularly problematic for prisoners because they did not have a Sixth Amendment right to demand a speedy trial for charges pending in a jurisdiction other than the one in which they were confined. See 393 U.S. 374, 382 (1969) (holding Sixth

these problems by drafting the IAD—an interstate compact creating a uniform procedural scheme for interjurisdictional transfers of prisoners that allows for the “expeditious and orderly disposition of . . . all detainees based on untried indictments, informations, or complaints.”²⁹ The heart of the IAD is Article III, which gives prisoners against whom a detainer has been lodged the right to demand final disposition of the outstanding charges, thereby protecting prisoners from having perpetually unresolved charges hanging over them.³⁰

Article IV(a) provides prosecutors with a mechanism to initiate final disposition of the charges on which a detainer is based.³¹ After lodging a detainer against a prisoner, a prosecutor may file a “written request for temporary custody” of the prisoner with the jurisdiction in which the prisoner is incarcerated (the “sending state”).³² Upon receiving such a request, Article IV(a) gives the governor of the sending state thirty days to deny the request before transfer of the prisoner to the requesting jurisdiction (the “receiving

Amendment speedy-trial right applies to charges against prisoner pending in another jurisdiction); Schindler, *supra*, at 180 (explaining prior lack of right to speedy trial for extra-jurisdictional charges); *see also* Grant v. United States, 856 A.2d 1131, 1133 (D.C. 2004) (citing detainer’s “deleterious side effects” as creating need for IAD); Abramson, *supra* note 19, at 2 (arguing *Hooey* served as impetus for adopting IAD in most party states); Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U. CHI. L. REV. 535, 535-41 (1964) (emphasizing unfairness of detainers). The unregulated use of detainers was problematic for not only prisoners but also judges, prison officials, and parole boards, as the resulting uncertainty made it difficult to determine appropriate sentences and to structure rehabilitative programs. *See* COUNCIL OF STATE GOV’TS, *supra* (recognizing broad implications of detainers for administration of criminal justice system); Yackle, *supra* note 26, at 88 (noting detainers caused problems for correctional administrators and judiciary in addition to prisoners); Thomas R. Clark, Note, *The Effect of Violations of the Interstate Agreement on Detainers on Subject Matter Jurisdiction*, 54 FORDHAM L. REV. 1209, 1221 & n.63 (1986) (addressing effects of detainers on penal system administrators).

29. Interstate Agreement on Detainers Act, 18 U.S.C. app. § 2, art. I (2012). The IAD’s express purpose is to resolve the “uncertainties which obstruct programs of prisoner treatment and rehabilitation” created by detainers and outstanding charges. *Id.*; *see* Abramson, *supra* note 19, at 2 (“The purpose of the [IAD] is to provide a comprehensive and coherent solution to the problems that beset the criminal justice system under the old detainer system.”).

30. *See* 18 U.S.C. app. § 2, art. III(a) (granting prisoners right to demand disposition of charges pending in another jurisdiction); Felix v. United States, 508 A.2d 101, 104 (D.C. 1986) (delineating IAD’s dual mechanisms for expediting disposition of charges pending in another jurisdiction); William A. Meadows, Comment, *Interstate Agreement on Detainers and the Rights It Created*, 18 AKRON L. REV. 691, 695-97 (1985) (laying out prisoner-initiated procedure for disposition of detainers). The IAD ensures the timely resolution of outstanding charges by requiring an inmate be brought to trial in the appropriate jurisdiction within 180 days after he requests final disposition of the charges. *See* 18 U.S.C. app. § 2, art. III(a) (establishing time limitation for commencing disposition of pending charges); *see also* Fex v. Michigan, 507 U.S. 43, 53 (1993) (holding 180-day period begins upon state’s actual receipt of prisoner’s request).

31. *See* 18 U.S.C. app. § 2, art. IV(a) (providing prosecutor-initiated procedure for disposing of detainers’ underlying charges); Comment, *supra* note 28, at 551-52 (outlining IAD’s two transfer provisions).

32. 18 U.S.C. app. § 2, art. IV(a) (granting prosecutors right to request temporary custody of prisoners); Casagrande, *supra* note 19, at 495 (remarking prosecutor may file request for custody of prisoner after filing detainer); Meadows, *supra* note 30, at 697-99 (explaining prosecutor-initiated transfer procedure); Comment, *supra* note 28, at 552 (summarizing provisions of Article IV). When a prisoner is transferred pursuant to Articles III or IV(a), the jurisdiction that originally incarcerated the prisoner is referred to as the “sending state,” and the jurisdiction to which the prisoner is transferred to stand trial is referred to as the “receiving state.” *See* 18 U.S.C. app. § 2, art. II.

state”) becomes mandatory.³³ Article IV’s transfer provision gives federal prosecutors a convenient alternative for obtaining temporary custody over state prisoners, as filing a detainer and a written request for temporary custody under the IAD is less burdensome than petitioning a federal court for a writ *ad prosequendum*.³⁴ The IAD is not, however, the exclusive means by which prosecutors may obtain custody of prisoners in another jurisdiction as the agreement does not preclude the use of writs *ad prosequendum*.³⁵

As an interstate compact, the IAD rests on the Compact Clause of the U.S. Constitution, which allows states, acting in their sovereign capacity, to contract with one another and the federal government.³⁶ Interstate compacts are binding

33. See 18 U.S.C. app. § 2, art. IV(a) (requiring transfer pursuant to written request unless governor withholds consent); Abramson, *supra* note 19, at 29 & n.134 (listing governor’s options in responding to Article IV(a) prosecutor request); Casagrande, *supra* note 19, at 495 & n.29, 496, 505 (noting transfer of prisoner mandatory save for governor’s denial). Specifically, Article IV provides:

[T]here shall be a period of thirty days after receipt [of the written request for temporary custody] 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.

18 U.S.C. app. § 2, art. IV(a). The Council of State Governments explained the inclusion of this provision by stating, “The possibility [of the Governor withholding consent] is left open merely to accommodate situations involving public policy which occasionally have been found in the history of extradition.” COUNCIL OF STATE GOV’TS, *supra* note 28, at 79; see Comment, *supra* note 28, at 552 (suggesting drafters included governor-consent provision “[i]n deference to traditional conflict principles”). Article IV includes the thirty-day period to give the prisoner an opportunity to petition the governor of the sending state to deny the transfer request. See 18 U.S.C. app. § 2, art. IV(a) (stating denial possible “upon [governor’s] own motion or upon motion of the prisoner”). When a state requests custody of a federal prisoner, the ninety-four federal judicial districts are treated as one jurisdiction under the IAD, and for the purposes of Article IV’s governor-consent provision, the U.S. Attorney General is treated as the “governor” of the United States. See *Atkinson v. Hanberry*, 589 F.2d 917, 919 n.2 (5th Cir. 1979); *Lopez v. Levi*, 422 F. Supp. 846, 850 (S.D.N.Y. 1976); Abramson, *supra* note 19, at 5 & n.18 (explaining courts treat all federal jurisdictions as one jurisdiction for purposes of IAD). After obtaining temporary custody of a prisoner under Article IV(a), the receiving state must bring that prisoner to trial within 120 days after the prisoner is transferred and must do so before returning the prisoner to the original incarcerating jurisdiction. See 18 U.S.C. app. § 2, art. IV(c), (e); see also Abramson, *supra* note 19, at 37-39 (critiquing courts’ interpretation of Article IV(e) antishuttling provision).

34. See *United States v. Pleau*, 680 F.3d 1, 3 (1st Cir. 2012) (en banc) (characterizing IAD as “efficient shortcut” to “prior custom of a federal habeas action”), *cert. denied*, 133 S. Ct. 930 (2013), and *cert. denied*, 133 S. Ct. 931 (2013).

35. See *United States v. Mauro*, 436 U.S. 340, 364 n.30 (1978) (establishing IAD does not preclude prosecutors from obtaining writ *ad prosequendum*); see also *State v. Eesley*, 591 N.W.2d 846, 853-54 (Wis. 1999) (rejecting prisoner’s assertion IAD precludes use of writs *ad prosequendum* based on *Mauro*); Mills, *supra* note 14, at 1658 (discussing writs *ad prosequendum* and detainers as alternative means for obtaining custody of prisoners).

36. See U.S. CONST. art. I, § 10, cl. 3 (providing constitutional basis for interstate compacts); *Cuyler v. Adams*, 449 U.S. 433, 442 (1981) (concluding IAD constitutes interstate compact); Clark, *supra* note 28, at 1216-23 (stressing contractual nature of IAD). See generally Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925) (discussing historical significance of Compact Clause and interstate compacts). The federal government first became a party to an interstate compact in 1961 when it joined the Delaware River Basin Compact, and today is a direct participant in 94 of the more than 200 interstate compacts that exist. See Frank P. Grad, *Federal-State*

on those jurisdictions that choose to enter into them as party states may not unilaterally change their terms.³⁷ Since the IAD’s inception, forty-eight states have adopted it and, in 1970, Congress adopted the IAD on behalf of the federal government and the District of Columbia.³⁸

The Compact Clause prohibits states from forming interstate compacts that infringe on the sovereignty of the federal government, unless Congress gives its consent.³⁹ Once obtained, Congress’s consent transforms an interstate compact into federal law.⁴⁰ In *Cuyler v. Adams*, the Supreme Court determined that although the IAD “interfere[s] with the full and free exercise of federal authority,” Congress prospectively consented to the agreement by passing the Crime Control Consent Act of 1934, which authorized states to enter agreements relating to criminal law enforcement.⁴¹ Therefore, the IAD

Compact: A New Experiment in Co-Operative Federalism, 63 COLUM. L. REV. 825, 825 (1963) (recognizing Delaware River Basin Compact as first interstate compact with full federal participation); NAT’L CENTER FOR INTERSTATE COMPACTS DATABASE, <http://apps.csg.org/ncic/SearchResults.aspx?&state=65> (last visited Feb. 3, 2014) (listing interstate compacts in which federal government participates).

37. See Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 2-3 (1997) (explaining unalterable and mandatory nature of interstate compact); Clark, *supra* note 28, at 1216-23 (examining IAD through principles of contract law). One court summarized the ramifications of entering into an interstate compact by stating:

Upon entering into an interstate compact, a state effectively surrenders 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. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties.

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

38. See *New York v. Hill*, 528 U.S. 110, 111 (2000) (noting jurisdictions having adopted IAD); *Mauro*, 436 U.S. at 353-54, 356 (recognizing United States as full participant of IAD); Abramson, *supra* note 19, at 2 n.7 (specifying jurisdictions having enacted IAD); see also, e.g., Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397 (1970) (codified at 18 U.S.C. app. § 2 (2012)); CAL. PENAL CODE § 1389 (West 2013); MASS. GEN. LAWS ANN. ch. 276 app., § 1-1 (West 2013); N.Y. CRIM. PROC. LAW § 580.20 (McKinney 2013); TEX. CODE CRIM. PROC. ANN. art. 51.14 (West 2013). The IAD expressly allows for federal participation in the agreement, as it defines “State” as including “the United States of America.” 18 U.S.C. app. § 2, art. II(a). Puerto Rico and the U.S. Virgin Islands have also enacted the IAD, while Louisiana and Mississippi are the only states that have not. See Abramson, *supra* note 19, at 2 n.7.

39. See U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State”); *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (defining scope of Compact Clause); Todd Jefferson Hartley, *Handshake Deals: The Future of Informal State Agreements and the Interstate Compacts Clause*, 22 U. FLA. J.L. & PUB. POL’Y 91, 92 (2011) (summarizing constitutional requirements for interstate compacts); Hasday, *supra* note 37, at 11-18 (evaluating congressional-consent requirement of Compact Clause). See generally Note, *Congressional Supervision of Interstate Compacts*, 75 YALE L.J. 1416 (1966) (analyzing history of interstate compacts and rationale for congressional-consent requirement).

40. See *Cuyler*, 449 U.S. at 440 (“[T]he consent of Congress transforms the States’ agreement into federal law under the Compact Clause.”).

41. See *id.* at 440-42 (holding IAD “is a congressionally sanctioned interstate compact” within scope of Compact Clause); see also Crime Control Consent Act of 1934, ch. 406, 48 Stat. 909 (codified as amended at 4 U.S.C. § 112(a) (2012)) (authorizing state “compacts for cooperative effort and mutual assistance in the

constitutes federal law under *Cuyler*.⁴²

B. Enforceability of the Writ Ad Prosequendum

As a judicial instrument expressly authorized by Congress under the federal habeas corpus statute, the writ *ad prosequendum* would presumably be held enforceable over any contrary state action under the Supremacy Clause.⁴³ Prior to *Pleau*, however, no court had ever directly ruled on whether a state must comply with a federal writ *ad prosequendum* because a state had never previously refused to comply with one.⁴⁴ In its seminal case on the federal writ *ad prosequendum*, *United States v. Carbo*, the Supreme Court expressly declined to consider whether, and on what basis, a federal writ *ad prosequendum* would be held enforceable if a state refused to transfer a prisoner pursuant to the writ.⁴⁵ Nevertheless, the Supreme Court and circuit courts of appeals have contemplated the enforceability of the writ *ad prosequendum* while interpreting it in the context of the IAD, albeit primarily in dicta.⁴⁶ A survey of such authority suggests that, in spite of the writ *ad prosequendum*'s language of command, not every court would agree with the First Circuit's position in *Pleau* that a state must always comply with a federal writ *ad prosequendum*.⁴⁷

I. Ponzi v. Fessenden and its Progeny

Although the Supreme Court has never definitively answered whether a state

prevention of crime"); Gordon Dean, *The Interstate Compact—A Device for Crime Repression*, 1 LAW & CONTEMP. PROBS. 460, 461-62 (1934) (explaining rationale for enacting Crime Control Consent Act); Hasday, *supra* note 37, at 13 n.58 (noting Crime Control Consent Act as rare instance of advanced congressional consent to compacts).

42. See *Cuyler v. Adams*, 449 U.S. 433, 442 (1981) (holding IAD constitutes federal law); *supra* notes 39-40 and accompanying text (discussing function of Compact Clause). Once transformed into federal law, a congressionally sanctioned interstate compact carries additional weight, as "no court may order relief inconsistent with [a compact's] express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *cf.* *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) (emphasizing judicial limitations in interpreting interstate compacts).

43. See U.S. CONST. art. VI, § 2, cl. 2 (detailing reciprocal extradition relationship between states under federal law); Casagrande, *supra* note 19, at 506 (predicting courts would enforce federal writ *ad prosequendum* under Supremacy Clause); *infra* Part II.B.3 (discussing circuit courts interpreting writ *ad prosequendum* as enforceable under Supremacy Clause).

44. See *United States v. Pleau*, No. 10-184-1 S, 2011 WL 2605301, at *3 (D.R.I. June 30, 2011) *aff'd on reh'g*, 680 F.3d 1 (1st Cir. 2012) (en banc) (identifying Rhode Island as first state ever to refuse to comply with writ *ad prosequendum*).

45. See 364 U.S. 611, 621 n.20 (1961); see also *infra* Part II.B.2 (examining Supreme Court's ambiguous treatment of writ *ad prosequendum*'s enforceability in *Mauro*).

46. See *infra* Part II.B.2-4 (surveying cases interpreting writ *ad prosequendum* in context of IAD); see also *supra* note 44 and accompanying text (establishing enforceability of writ *ad prosequendum* as issue of first impression).

47. See *United States v. Pleau*, 680 F.3d 1, 6-7 (1st Cir. 2012) (en banc) (holding writ *ad prosequendum* mandatory in nature), *cert. denied*, 133 S. Ct. 930 (2013), and *cert. denied*, 133 S. Ct. 931 (2013).

must always comply with a federal writ *ad prosequendum*, the Court has unequivocally established that the *federal* government cannot be compelled to produce a federal prisoner for state prosecution pursuant to a writ *ad prosequendum* issued by a state court.⁴⁸ In *Ponzi v. Fessenden*, a Massachusetts superior court issued a writ *ad prosequendum* to have federal prisoner Charles Ponzi transferred to stand before it on state larceny charges, which federal officials expressly consented to and Ponzi challenged.⁴⁹ Ultimately, the Supreme Court held that the federal government was free to temporarily relinquish its exclusive jurisdiction over a prisoner as a matter of interstate comity.⁵⁰

In the following decades, a majority of courts interpreted *Ponzi*'s “comity” doctrine as applying not only to state writs *ad prosequendum*, but also to those issued by *federal* courts.⁵¹ The Second, Seventh, Eighth, Ninth, and Tenth Circuits all expressly or implicitly stated that under *Ponzi*, state governments are free to transfer prisoners for federal prosecution as a matter of interstate comity but are not *obligated* to do so by a federal writ *ad prosequendum*.⁵²

48. See *Ponzi v. Fessenden*, 258 U.S. 254, 261-62 (1922) (holding transfer of federal prisoner for state prosecution discretionary); see also *State v. Eesley*, 591 N.W.2d 846, 855 (Wis. 1999) (“We recognize that a federal institution may not be compelled to honor a writ of habeas corpus *ad prosequendum* issued by a state court.”); Goffette, *supra* note 17, at 1056 n.81 (noting states cannot obtain custody of federal prisoner without federal government’s consent).

49. See *Ponzi*, 258 U.S. at 255-56. *Ponzi* objected to the transfer, asserting that the federal government’s primary jurisdiction was exclusive and precluded it from allowing states to exercise secondary jurisdiction over him. See *id.* at 256.

50. See *id.* at 261-62; Schindler, *supra* note 28, at 183-85 (summarizing holding in *Ponzi*). The principle of “comity” dictates that the federal government should avoid interfering with the “separate functions” of states to the greatest extent possible. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (expounding limiting principle for proper operation of federal system). In *Ponzi*, the Court declared that “no state court could assume control of [a federal prisoner] without the consent of the United States,” thereby establishing that writs *ad prosequendum* issued by state courts have no compulsory effect but rather are mere requests with which the federal government may or may not choose to comply. *Ponzi*, 258 U.S. at 261.

51. See *United States v. Mauro*, 544 F.2d 588, 596 n.1 (2d Cir. 1976) (Mansfield, J., dissenting) (listing cases extending *Ponzi* to federal writs *ad prosequendum*), *rev’d*, 438 U.S. 340 (1978). The Tenth Circuit’s statement in *Lunsford v. Hudspeth* was the clearest extension of *Ponzi*’s comity principle to federal writs *ad prosequendum*, as the court stated,

there has evolved the now well established rule of comity which is reciprocal, whereby one sovereignty having exclusive jurisdiction of a person may temporarily waive its right to the exclusive jurisdiction of such person for purposes of trial in the courts of another sovereignty. . . . [B]ut such a waiver is a matter addressed solely to the discretion of the sovereignty. . . . [T]his respectful duty is reciprocal, whether federal or state, because neither sovereignty has the power to override it.

126 F.2d 653, 655 (10th Cir. 1942).

52. See, e.g., *United States v. Oliver*, 523 F.2d 253, 258-59 (2d Cir. 1975) (applying comity principle equally to federal and state writs *ad prosequendum*); *McDonald v. Ciccone*, 409 F.2d 28, 30 (8th Cir. 1969) (per curiam) (stating states release prisoners to federal officials as matter of comity rather than right); *United States ex rel. Moses v. Kipp*, 232 F.2d 147, 150 (7th Cir. 1956) (proclaiming consent of state officials necessary for transfer of state prisoners to federal government); *Stamphill v. Johnston*, 136 F.2d 291, 292 (9th

Although these statements constituted dicta—as none of these courts faced a state actually refusing to comply with a federal writ *ad prosequendum*—they suggest that the federal writ *ad prosequendum* is not inherently compulsory.⁵³

Courts were not unanimous in their interpretation of *Ponzi*, as a minority asserted, again in dicta, that a federal writ *ad prosequendum* is a mandatory court order giving the federal government the right to secondary jurisdiction over a state prisoner, regardless of whether or not the respective state consents to the transfer of its prisoner for federal prosecution.⁵⁴ The First and Fifth Circuits indicated that if a state refused to obey a federal writ *ad prosequendum*, they would enforce the writ under the Supremacy Clause and force the state to transfer its prisoner.⁵⁵ Although these courts provided scant reasoning for their position, they apparently considered the federal codification of the writ *ad prosequendum* as necessarily precluding any interpretation of *Ponzi*'s comity doctrine from applying equally to the government and states.⁵⁶

2. United States v. Mauro

Although the Supreme Court has never heard a case in which a state has disobeyed a federal writ *ad prosequendum* by refusing to transfer a state prisoner, the Court expressly addressed the issue of the writ's enforceability in

Cir. 1943) (asserting states entitled to retain their own prisoners); *Lunsford*, 126 F.2d at 655 (contending state and federal sovereigns equal with respect to retaining custody of prisoners); see also Casagrande, *supra* note 19, at 506 n.121 (noting some courts suggest states obey federal writ *ad prosequendum* as matter of comity).

53. See *United States v. Pleau*, No. 10-184-1 S, 2011 WL 2605301, at *3 (D.R.I. June 30, 2011) (observing no state had ever previously refused to comply with writ *ad prosequendum*), *aff'd on reh'g*, 680 F.3d 1 (1st Cir. 2012) (en banc); see also *supra* note 44 and accompanying text (framing issue of federal writ *ad prosequendum* as unsettled prior to *Pleau*). In *McDonald v. Ciccone*, the Eighth Circuit stated, “[t]he release [of a prisoner] by the state authorities . . . is achieved as a matter of comity and not of right.” 409 F.2d at 30. Similarly, in *United States ex rel. Moses v. Kipp*, the Seventh Circuit stated, “[i]n spite of the terminology of the writ, the consent of [state] authorities was necessary to obtain the custody of [the state prisoner].” 232 F.2d at 150. In *United States v. Oliver*, while discussing a federal writ *ad prosequendum* issued to obtain custody of a state prisoner, the Second Circuit stated, “[w]hile a writ of Habeas corpus *ad prosequendum* may use mandatory language, the jurisdiction to which such a writ is addressed is relied upon to cooperate in turning over the defendant to the other sovereign.” 523 F.2d at 258.

54. See *United States v. Kanaan*, 557 F.2d 912, 916 n.8 (1st Cir. 1977) (predicting federal writ *ad prosequendum* enforceable over contrary state preference); *United States v. Scallion*, 548 F.2d 1168, 1173 n.7 (5th Cir. 1977) (implying federal writ *ad prosequendum* enforceable under Supremacy Clause).

55. See *Keenan*, 557 F.2d at 916 n.8 (“In the unlikely event of [a state refusing to honor a federal writ *ad prosequendum*], we are confident that the writ would be held enforceable [sic].”); *Scallion*, 548 F.2d at 1173 n.7 (rejecting extension of comity principle to federal writs *ad prosequendum*).

56. See *Scallion*, 548 F.2d at 1173 n.7 (“It would seem that the state authority honors the writ pursuant to 28 U.S.C. § 2241”); Schindler, *supra* note 28, at 191-92 (“Where there is a state imprisonment and a pending federal prosecution there is, clearly, no place for the principle of ‘comity.’”); Casagrande, *supra* note 19, at 506-07 (claiming federal writ *ad prosequendum* enforceable under Supremacy Clause). Although the Second Circuit stated in dicta that federal writs *ad prosequendum* were not compulsory, the court divided on the issue, with one dissenting justice stating, “I have no doubt that if a state institution refused to obey a federal writ of habeas corpus *ad prosequendum* properly issued pursuant to s 2241 and thus provoked a federal-state confrontation, the writ would be held enforceable [sic] against the institution under the Supremacy Clause.” *Mauro*, 544 F.2d at 596 (Mansfield, J., dissenting).

United States v. Mauro.⁵⁷ In the 1970s, a circuit split emerged over whether a writ *ad prosequendum* itself constitutes a detainer within the meaning of the IAD, which would require federal prosecutors to comply with the provisions of the IAD after obtaining such a writ.⁵⁸ In *Mauro*, the Court resolved the split by holding that a federal writ *ad prosequendum* itself does not constitute a detainer under the IAD.⁵⁹ The Court also held, however, that a federal writ *ad prosequendum* does constitute a “written request” for temporary custody of a state prisoner under Article IV(a) if the writ is obtained *after* a detainer has already been lodged against the prisoner.⁶⁰ The Court explained, “it clearly would permit the United States to circumvent its obligations under the Agreement to hold that an *ad prosequendum* writ may not be considered a written request for temporary custody.”⁶¹

57. See 436 U.S. 340, 363 (1978).

58. Compare *Ridgeway v. United States*, 558 F.2d 357, 362 (6th Cir. 1977) (refusing to interpret “detainer” as including writs *ad prosequendum*), *Kenaan*, 557 F.2d at 915 (distinguishing detainers from writs *ad prosequendum*), and *Scallion*, 548 F.2d at 1173 (deciding writ *ad prosequendum* does not constitute detainer under IAD), with *United States v. Sorrell*, 562 F.2d 227, 230-31 (3d Cir. 1977) (en banc) (classifying writ *ad prosequendum* as detainer), and *United States v. Mauro*, 544 F.2d 588, 592 (2d Cir. 1976) (concluding writs *ad prosequendum* constitute detainers within meaning of IAD), *rev’d*, 436 U.S. 340 (1978). *Mauro* addressed two cases in which state prisoners claimed the federal government had violated their rights under the IAD after obtaining custody over them with writs *ad prosequendum*. See *Mauro*, 436 U.S. at 344-48. Specifically, the prisoners argued that the government had violated the IAD’s antishuttling provision and time requirements for commencing trial. See *id.* The Court consolidated the two appeals to resolve the circuit split and broadly define the relationship between writs *ad prosequendum* and the IAD. See *id.* at 349 & n.14 (tracing circuit split).

59. See *Mauro*, 436 U.S. at 361 (“[A] writ of habeas corpus *ad prosequendum* is not a detainer for purposes of the Agreement.”). The *Mauro* Court reasoned that it was unnecessary to interpret “detainer” as including writs *ad prosequendum* because the writ *ad prosequendum* prompts the immediate transfer of a state prisoner to federal court and, therefore, “the problems that the Agreement seeks to eliminate do not arise.” *Id.*; see *supra* Part II.A.2 (discussing problems arising from unregulated use of detainers). The Court’s holding in *Mauro* established that federal prosecutors are not subject to the IAD if they obtain custody over a state prisoner with a writ *ad prosequendum* instead of a detainer and written request for custody under Article IV(a) of the IAD. See *Mauro*, 436 U.S. at 361 (holding IAD not violated because detainer never filed).

60. See *Mauro*, 436 U.S. at 349. The Court broadly interpreted “written requests” as including writs *ad prosequendum* so as to effectuate the IAD’s fundamental purpose of encouraging the expeditious resolution of outstanding criminal charges in other jurisdictions. See *id.* at 362-63 (emphasizing IAD’s objective). Under *Mauro*, a writ *ad prosequendum* obtained after a detainer has been filed triggers the provisions of the IAD, including Article IV(c)’s requirement of commencing trial within 120 days after the request for custody has been made. See *id.* at 362-65; see also 18 U.S.C. app. § 2, art. IV(c) (2012) (requiring commencement of trial within 120 days). In *Mauro*, the Supreme Court agreed with the Second Circuit that if Article IV(c) was applicable, the government violated the provision by failing to bring the prisoner to trial within 120 days. See *Mauro*, 436 U.S. at 365 (affirming Second Circuit’s decision). The government also would have violated Article IV(e)’s antishuttling provision had the prisoner not waived his right to it. See *id.* at 348 (summarizing appellate court’s decision). Under *Mauro*, a federal prosecutor who lodges a detainer against a state prisoner and subsequently obtains a federal writ *ad prosequendum* to bring that prisoner to federal court is considered to have filed a written request for temporary custody of the state prisoner under Article IV of the IAD and must thereafter abide by the provisions of the IAD. See *id.* at 342 (“The United States is bound by the Agreement when it activates its provisions by filing a detainer against a state prisoner and then obtains his custody by means of a writ of habeas corpus *ad prosequendum* . . .”).

61. *Mauro*, 436 U.S. at 362. The Court further stated, “[a]ny other reading of this section would allow

The *Mauro* Court addressed the obvious implication of its holding—that a post-detainer writ *ad prosequendum* would trigger Article IV(a)'s gubernatorial-consent provision—by stating:

Because a writ of habeas corpus *ad prosequendum* is a federal-court order, it would 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.⁶²

The Court's use of ambiguous and conditional language did little to clarify the enforceability of the writ *ad prosequendum* and has given rise to contradictory interpretations of the writ in lower courts.⁶³

3. Interpretations of *Mauro*

The only opportunities courts have had to interpret the language in *Mauro* regarding the gubernatorial-consent provision have been cases in which prisoners have argued the government violated Article IV(a) by lodging a detainer, obtaining a writ *ad prosequendum*, and then transferring the prisoners in less than thirty days—the period in which the governor of the sending state may deny the request of the receiving state.⁶⁴ The Third, Fourth, and Tenth

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." *Id.* at 364. The Court emphasized that the federal government is subject to the provisions of the IAD not only when it transfers federal prisoners to states, but also when it requests and receives state prisoners pursuant to the IAD, stating, "Congress . . . enact[ed] the Agreement into law in its entirety, and it placed no qualification upon the membership of the United States." *Id.* at 356; see *United States v. Scallion*, 548 F.2d 1168, 1174 (5th Cir. 1977) (interpreting United States' participation in IAD as unqualified).

62. *Mauro*, 436 U.S. at 363 (footnote omitted).

63. See *infra* Part II.B.3-4 (analyzing conflicting interpretations of *Mauro*). *But cf.* *United States v. Graham*, 622 F.2d 57, 59 (3d Cir. 1980) (characterizing *Mauro* Court's interpretation of Article IV(a) as "clear"). This statement is the closest the Supreme Court has come to directly addressing whether states must comply with federal writs *ad prosequendum*. See *supra* note 45 and accompanying text (noting Court declined to address enforceability of writ *ad prosequendum* in *Carbo*). Whether the statement constitutes part of the Court's holding or mere dicta, however, is unclear. See *infra* Part II.B.3-4.

64. See, e.g., *United States v. Scheer*, 729 F.2d 164, 170-71 (2d Cir. 1984) (addressing prisoner's assertion Article IV(a) violated by premature transfer); *Graham*, 622 F.2d at 59 (framing issue on appeal as applicability of gubernatorial-consent provision after IAD triggered by writ); *United States v. Bryant*, 612 F.2d 799, 802 (4th Cir. 1979) (considering prisoner's appeal to reverse conviction for alleged violation of Article IV(a)); see also *supra* note 44 and accompanying text (explaining unprecedented nature of conflict in *Pleau*). For instance, in *Graham*, a prisoner objected to his transfer from an Ohio state prison to the Western District of Pennsylvania less than thirty days after a detainer was lodged, and writ *ad prosequendum* obtained, by the

Circuits have all rejected such appeals, holding that the gubernatorial-consent provision does not apply to post-detainer writs *ad prosequendum*.⁶⁵ These courts did not contest *Mauro*'s holding that the provisions of the IAD apply when a writ *ad prosequendum* is obtained after a detainer has been lodged, but instead they interpreted *Mauro* as distinguishing the gubernatorial-consent provision from the rest of the IAD as the only provision not activated by such a writ.⁶⁶ Each of these courts interpreted the critical passage in *Mauro* as saying that states have never had the authority to disregard a federal writ *ad prosequendum* and the IAD does not confer such power on them.⁶⁷

In *United States v. Scheer*, the Second Circuit adopted the opposite interpretation of *Mauro* and the IAD's gubernatorial-consent provision.⁶⁸ In *Scheer*, a California state prisoner argued that federal prosecutors for the District of Vermont violated the gubernatorial-consent provision of the IAD by having him transferred pursuant to a writ *ad prosequendum* just seven days after filing a detainer against him.⁶⁹ The Second Circuit stated the federal government had activated the gubernatorial-consent provision of the IAD by obtaining the writ *ad prosequendum*, and implied that the Governor of California could have rightfully refused to transfer the prisoner in spite of the federal writ *ad prosequendum*, but ultimately rejected the prisoner's appeal on the basis that the prisoner had waived his right to petition the Governor by

government. See *Graham*, 622 F.2d at 58. In *Bryant*, a Maryland state prisoner objected to his transfer to the Western District of North Carolina pursuant to a writ *ad prosequendum* after the Eastern District of North Carolina had already lodged a detainer against him. See *Bryant*, 612 F.2d at 801. The prisoner challenged his subsequent federal conviction, asserting that the government had violated Article IV(a) by transferring him before the thirty-day period in which the Governor of Maryland could have denied the government's request had expired. See *id.* at 802.

65. See *United States v. Trafny*, 311 F. App'x 92, 96 (10th Cir. 2009) (holding gubernatorial-consent provision inapplicable when custody obtained with federal writ *ad prosequendum*); *Graham*, 622 F.2d at 59 (rejecting possibility of governor denying federal government's demand for state prisoner through writ *ad prosequendum*); *Bryant*, 612 F.2d at 802 (rendering gubernatorial-consent provision inapplicable to federal writ *ad prosequendum* request). The *Bryant* court expressly stated that the gubernatorial-consent provision applies only to state requests, and federal "requests" other than post-detainer writs *ad prosequendum*. *Bryant*, 612 F.2d at 802 (distinguishing post-detainer writs *ad prosequendum* from other Article IV(a) requests).

66. See *Trafny*, 311 F. App'x at 96 (distinguishing gubernatorial-consent provision from other IAD provisions); *Graham*, 622 F.2d at 59 (treating writ *ad prosequendum* as written request); *Bryant*, 612 F.2d at 801-02 (recognizing writ as written request under Article IV).

67. See *Trafny*, 311 F. App'x at 95-96 (citing *Mauro* in rejecting prisoner's appeal); *Graham*, 622 F.2d at 59 (interpreting *Mauro* as disabling gubernatorial-consent provision when writ *ad prosequendum* constitutes written request); *Bryant*, 612 F.2d at 802 (relying on *Mauro* to interpret gubernatorial-consent provision of Article IV(a)). In *Graham*, the Third Circuit interpreted *Mauro* as establishing that "Congress did not intend to confer on state governors the power to disobey writs issued by federal courts as 'written requests for custody' under the [IAD]." *Graham*, 622 F.2d at 59. The Tenth Circuit also reasoned that the writ *ad prosequendum* necessarily trumps any contrary state action under the Supremacy Clause. See *Trafny*, 311 F. App'x at 96; see also *United States v. Kanaan*, 557 F.2d 912, 916 n.8 (1st Cir. 1977) (basing writ *ad prosequendum*'s enforceability on Supremacy Clause).

68. See *Scheer*, 729 F.2d at 170 (interpreting *Mauro* as giving operative effect to gubernatorial-consent provision).

69. See *id.*

requesting his transfer to Vermont.⁷⁰ The court reasoned that interpreting the IAD otherwise would allow the federal government to circumvent its obligations under the agreement, a result the *Mauro* Court expressly sought to prevent by holding that writs *ad prosequendum* constitute written requests if a detainer has already been filed.⁷¹ The Second Circuit acknowledged the fact that writs *ad prosequendum* had always been interpreted as a mandatory court order but stated, “the historic power of the writ seems unavailing once the government elects to file a detainer in the course of obtaining a state prisoner’s presence.”⁷²

70. See *United States v. Scheer*, 729 F.2d 164, 170-71 (2d Cir. 1984) (holding rights under Article IV(a) waived, but governors may refuse writ *ad prosequendum* requests). The *Scheer* court took *Mauro*’s central holding at face value, reasoning that if a writ *ad prosequendum* obtained after a detainer constituted a “written request” for custody triggering the provisions of the IAD, then the gubernatorial-consent provision of the IAD must be triggered by such a writ. See *id.* at 170 (characterizing post-detainer writs *ad prosequendum* as “simply equivalent” to written requests under *Mauro*). In *Scheer*, the Second Circuit also noted that the Supreme Court recognized in *Cuyler* that governors have the right under Article IV(a) to reject the written request for temporary custody of a prisoner and that the Court did not expressly place any qualifications on that right. See *id.* (quoting *Cuyler v. Adams*, 449 U.S. 433, 444 (1981)).

71. See *id.*; cf. *Bloomgarden v. Bureau of Prisons*, 426 F. App’x 487, 489-90 (9th Cir. 2011) (disallowing California’s attempt to circumvent obligations under IAD with writ *ad prosequendum*). The *Scheer* court also reasoned that it would contradict the IAD’s purpose of creating a uniform system for interjurisdictional transfers of prisoners to interpret the gubernatorial-consent provision as being applicable when a state acts as the receiving state but not when the government does. See *Scheer*, 729 F.2d at 170 (explaining legislative history of IAD denotes uniformity as priority); COUNCIL OF STATE GOV’TS, *supra* note 28, at 74 (propounding uniformity as one purpose of IAD). In *Bloomgarden v. Bureau of Prisons*, California prosecutors charged a federal prisoner with murder, lodged a detainer against the prisoner, and then obtained a writ *ad prosequendum* from a California court to initiate the prisoner’s transfer. See 426 F. App’x at 488. The federal prisoner challenged his transfer from federal custody in Texas to state custody in California on the grounds he had been denied his right under Article IV(a) to petition the “governor” of the sending state—the U.S. Attorney General—to deny the receiving state’s request for custody. See *id.* at 488-89; *supra* note 33 (explaining role of U.S. Attorney General under IAD). The Ninth Circuit held that the prisoner had been wrongfully denied his right to petition the governor of the sending state under Article IV(a) and awarded the prisoner thirty days to petition the U.S. Attorney General to negate the transfer under the gubernatorial-consent provision of Article IV(a). See *Bloomgarden*, 426 F. App’x at 489. *Bloomgarden* does not necessarily indicate how the Ninth Circuit would address the federal government’s use of a writ *ad prosequendum* to obtain custody of a state prisoner, as the prisoner here was transferred pursuant to a state writ *ad prosequendum*. See *id.* at 488-89; *supra* notes 48-50 and accompanying text (distinguishing state writs *ad prosequendum* from federal writs *ad prosequendum*). Nevertheless, the court interpreted *Mauro* the same way the Second Circuit did in *Scheer*, and used arguably even stronger language to enforce the gubernatorial-consent provision under Article IV(a), stating that federal prison officials had violated “the IAD’s clear directive affording a prisoner the opportunity to contest a transfer.” *Bloomgarden*, 426 F. App’x at 490.

72. *Scheer*, 729 F.2d at 170. While the weight of the Second Circuit’s interpretation of *Mauro* and Article IV(a) in *Scheer* is debatable, it undeniably contradicts that of the Third, Fourth, and Tenth Circuits. Compare *United States v. Pleau*, 680 F.3d 1, 7 (1st Cir. 2012) (en banc) (dismissing *Scheer* court’s interpretation of *Mauro* as dictum), *cert. denied*, 133 S. Ct. 930 (2013), and *cert. denied*, 133 S. Ct. 931 (2013), with *Pleau*, 680 F.3d at 19 (Torruella, J., dissenting) (crediting *Scheer* court’s interpretation of *Mauro* as mandatory authority in Second Circuit); *supra* note 68 (contrasting *Scheer* with other circuits’ interpretations of *Mauro*).

4. United States v. Pleau

In *Pleau*, the First Circuit became the first federal appeals court to confront the conflict about which the *Mauro* Court and other circuit courts had only hypothesized: a state’s invocation of the IAD’s gubernatorial-consent provision and refusal to transfer a prisoner pursuant to a writ *ad prosequendum* to stand trial for federal offenses.⁷³ After lodging a detainer against Pleau in November 2010, federal prosecutors sent a written request for temporary custody of Pleau to Rhode Island prison officials pursuant to Article IV(a) of the IAD.⁷⁴ Only *after* Governor Chafee invoked the gubernatorial-consent provision and denied the government’s request did federal prosecutors seek a writ *ad prosequendum* to compel Rhode Island prison officials to transfer Pleau, thereby setting up a direct conflict between the writ *ad prosequendum* and the IAD.⁷⁵ Ultimately, the First Circuit upheld the district court’s issuance of the writ *ad prosequendum*, holding that Rhode Island was required to transfer Pleau to federal authorities, as Article IV(a) of the IAD did not give Governor Chafee the right to disobey the district court’s writ.⁷⁶ After Pleau was transferred from the Rhode Island prison to federal custody, the government announced it would seek the death penalty against him.⁷⁷

The First Circuit rested its decision primarily on *Mauro*, interpreting it—like the Third, Fourth, and Tenth Circuits had—as precluding states from using the IAD to disobey a writ *ad prosequendum*.⁷⁸ The *Pleau* court argued that states

73. See *Pleau*, 680 F.3d at 3 (noting Rhode Island Governor’s refusal to comply with writ *ad prosequendum*); *supra* note 44 and accompanying text (explaining unprecedented nature of conflict in *Pleau*).

74. See *United States v. Pleau*, No. 10-184-1 S, 2011 WL 2605301, at *1 (D.R.I. June 30, 2011), *aff’d on reh’g*, 680 F.3d 1 (1st Cir. 2012) (en banc). The United States charged Pleau with robbery affecting commerce, conspiracy to do the same, and using a firearm in relation to a crime of violence resulting in death. See *id.* Prior to the adjudication of the state murder charges, Pleau was sentenced to eighteen years in state prison for violating his parole and received a suspended state sentence. See *id.*

75. See *id.* at *2 (considering government’s petition for writ *ad prosequendum*). Citing Rhode Island’s longstanding opposition to the death penalty, Chafee explained that he could not, in good faith, voluntarily expose a Rhode Island citizen to the death penalty. See *Update: Chafee Won’t Turn Murder Suspect over to Feds*, PROVIDENCE J., June 23, 2011, <http://news.providencejournal.com/breaking-news/2011/06/chafee-wont-turn-man-accused-o.html> (quoting Chafee); see also *Pleau*, 2011 WL 2605301, at *2 n.1.

76. See *Pleau*, 680 F.3d at 6 (holding writ *ad prosequendum* trumps IAD under Supremacy Clause). The district court issued the writ *ad prosequendum* and ordered Rhode Island to deliver Pleau to federal authorities. See *Pleau*, 2011 WL 2605301, at *4. On appeal, however, a panel of First Circuit judges overturned the district court’s decision and granted Pleau and the governor a writ of prohibition to bar the district court from enforcing the writ. See *United States v. Pleau*, 662 F.3d 1 (1st Cir.), *reh’g granted*, 663 F.3d 542 (1st Cir. 2011), *withdrawn and vacated*, 680 F.3d 1 (1st Cir. 2012). Ultimately, the First Circuit granted rehearing en banc, vacated the panel decision, and reversed the panel. See *Pleau*, 680 F.3d at 6.

77. See Katie Mulvaney, *Feds To Seek Death Penalty Against Accused RI Killer Pleau*, PROVIDENCE J., June 18, 2012, <http://news.providencejournal.com/breaking-news/2012/06/feds-to-seek-de.html> (reporting federal prosecutors’ decision).

78. See *United States v. Pleau*, 680 F.3d 1, 6 (1st Cir. 2012) (en banc) (“*Mauro* was saying that a habeas writ—even though it followed a detainer—retained its pre-IAD authority to compel a state to surrender a prisoner.”), *cert. denied*, 133 S. Ct. 930 (2013), and *cert. denied*, 133 S. Ct. 931 (2013); *supra* Part II.B.2 (providing relevant language in *Mauro*). Compare *Pleau*, 680 F.3d at 6 (enforcing writ *ad prosequendum* over

have never had the authority to disobey a writ *ad prosequendum* under the Supremacy Clause, and the IAD did not enhance their authority to do so.⁷⁹ The court rejected the line of circuit court cases extending the comity doctrine to federal writs *ad prosequendum* as misreading *Ponzi*, stating, “[t]he Supremacy Clause operates in only one direction and has nothing to do with comity.”⁸⁰ Moreover, the court characterized the contradictory language in *Scheer* as dictum and a misreading of *Mauro*.⁸¹ The First Circuit was sharply divided in *Pleau*, as two dissenting judges pointed out that the Supremacy Clause could not be determinative because the case presented a conflict between two federal statutes.⁸²

C. Concurrent Jurisdiction and the Death Penalty

With the general expansion of federal criminal law under the Commerce Clause in recent decades, virtually every homicide is now potentially punishable at both the state and federal levels.⁸³ Federal cases represent only a fraction of all capital prosecutions nationwide, as less than two percent of inmates currently on death row were convicted under federal law.⁸⁴ Capital

IAD based on *Mauro*, with *United States v. Trafny*, 311 F. App’x 92, 96 (10th Cir. 2009) (arguing gubernatorial-consent provision inapplicable for writ *ad prosequendum* requests), *United States v. Graham*, 622 F.2d 57, 59 (3d Cir. 1980) (rejecting IAD as grounds for disobeying writ *ad prosequendum*), and *United States v. Bryant*, 612 F.2d 799, 802 (4th Cir. 1979) (rebuffing IAD as means of refusing to comply with writ *ad prosequendum*). *Contra Pleau*, 680 F.3d at 13-18 (Torruella, J., dissenting) (interpreting *Mauro* as saying post-detainer writ *ad prosequendum* triggers gubernatorial-consent provision). Maintaining that *Mauro* was determinative of the issue in *Pleau*, the First Circuit asserted that the language in *Mauro* relating to the gubernatorial-consent provision was part of the Court’s holding rather than mere dicta. *See Pleau*, 680 F.3d at 5 (describing contested language in *Mauro* as rationale for holding).

79. *See Pleau*, 680 F.3d at 5-6 (arguing Supremacy Clause renders gubernatorial-consent provision ineffectual); *see also United States v. Kanaan*, 557 F.2d 912, 916 n.8 (1st Cir. 1977) (presuming enforceability of writ over state objection); *supra* Part II.B.1 (discussing interpretations of *Ponzi*).

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

81. *See id.* at 7 (discounting Second Circuit’s interpretation of *Mauro*); *supra* Part II.B.3 (explaining *Scheer*).

82. *See Pleau*, 680 F.3d at 11 (Torruella, J., dissenting) (“[T]he issue here is how two federal statutes interact, a determination in which the Supremacy Clause plays no part.”); *supra* note 42 and accompanying text (explaining IAD constitutes federal law under *Cuyler*). The First Circuit split three judges to two in *Pleau*. *See Pleau*, 680 F.3d at 1-2. The dissent also contested the majority’s interpretation of *Mauro* and dismissal of *Scheer*, arguing *Mauro* failed to resolve whether the writ *ad prosequendum* is enforceable over the IAD. *See id.* at 13-18 (Torruella, J., dissenting) (analyzing *Mauro*). Lastly, the dissent objected to the majority’s dismissal of the authority interpreting *Ponzi* as making federal writs *ad prosequendum* nonobligatory. *See id.* at 19-21 (reviewing authority interpreting *Ponzi*).

83. *See Campbell*, *supra* note 14, at 84-85 & n.28 (discussing bases for concurrent federal and state jurisdiction); Connor, *supra* note 15, at 151, 154-55 & n.19 (observing expansion of federal criminal law driving increased instances of concurrent jurisdiction); *see also The Federal Death Penalty: An Overview*, DEATH PENALTY FOCUS, <http://www.deathpenalty.org/article.php?id=46> (last visited Feb. 3, 2014) [hereinafter *Federal Death Penalty Overview*] (noting every homicide convict death-eligible).

84. *See* CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A., FALL 2012, at 33 (2012), http://www.naacpldf.org/files/publications/DRUSA_Fall_2012.pdf (listing 60 of 3152 death row inmates as convicted under federal law); *see also Federal Death Penalty Overview*, *supra* note 83

prosecution by the federal government in states that have abolished the death penalty is even more rare—only 7 individuals out of 3152 nationwide await execution in one of the 17 states that do not provide for the death penalty—but has nevertheless raised concerns over federalism and state sovereignty.⁸⁵ Where concurrent state and federal jurisdiction exists, United States Department of Justice (DOJ) policy instructs federal prosecutors to pursue prosecution only when the “Federal interest” in prosecution substantially outweighs the state’s interest in prosecution.⁸⁶ Under this policy, capital charges are more likely to be levied in cases arising in non-death penalty states than states with the death penalty because the “Federal interest” in any given prosecution is defined, in part, by a respective state’s ability and willingness to secure “appropriate punishment” against the offender.⁸⁷

Courts have uniformly rejected constitutional challenges to the federal death penalty on the basis that the federal criminal statutes providing for the death penalty trump contrary state preferences under the Supremacy Clause.⁸⁸ States

(counting sixty federal inmates currently on death row). Congress reinstated the federal death penalty in 1988 with the passage of the Anti-Drug Abuse Act. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 21 U.S.C.) (providing capital punishment for certain crimes); Connor, *supra* note 15, at 154-56 (outlining legislative scheme of federal death penalty).

85. *See* Campbell, *supra* note 14, at 81-82, 99-100 (noting scholars’ opposition to application of federal death penalty in abolitionist states); Connor, *supra* note 15, at 197-206 (arguing federal death penalty undermines states’ ability to determine their respective criminal justice policies); Michael J. Zydney Mannheim, *Self-Government, the Federal Death Penalty, and the Unusual Case of Michael Jacques*, 36 VT. L. REV. 131, 132-33 (2011) (condemning federal death penalty for undermining self-government and contradicting principles of federalism); 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, 1458-66 (2001) (arguing capital punishment policy best left as state prerogative); *Federal Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/federal-death-penalty?scid=29&did=147> (last visited Feb. 3, 2014) (listing seven federal death row inmates in non-death penalty states). Currently, thirty-two states, as well as the United States government and military, authorize the death penalty, while eighteen states and the District of Columbia do not. *See States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Feb. 3, 2014) [hereinafter *States With and Without*].

86. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL ch. 9-10.090 (2007), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam (prescribing prosecutorial conduct in capital cases where concurrent jurisdiction exists); *see also* Campbell, *supra* note 14, at 97 (explaining federal death penalty protocol); Connor, *supra* note 15, at 158-60 (analyzing DOJ policy in concurrent jurisdiction capital cases). The DOJ’s “Petite Policy,” which governs successive federal and state prosecutions, includes nearly identical language. *See* U.S. DEP’T OF JUSTICE, *supra*, ch. 9-2.031 (requiring “substantial federal interest” for capital prosecution).

87. *See* U.S. DEP’T OF JUSTICE, *supra* note 86, ch. 9-10.090(C) (instructing prosecutors to consider potential outcome of successive or concurrent state prosecution); *see also* Campbell, *supra* note 14, at 97 (claiming policy “intended to encourage” capital prosecutions in non-death penalty states); Connor, *supra* note 15, at 159-60, 167 (“[F]ederal prosecutions are utilized when the array of potential state sentences is deemed too lenient.”).

88. *See* *United States v. Fell*, 571 F.3d 264, 268-78 (2d Cir. 2009) (Raggi, J., concurring) (rejecting Sixth and Eighth Amendment challenges to federal death penalty); *United States v. Acosta-Martinez*, 252 F.3d 13, 20 (1st Cir. 2001) (holding federal death penalty legislation trumps Puerto Rico’s constitutional ban on capital punishment); Campbell, *supra* note 14, at 99-108 (surveying failed constitutional challenges to federal death

appear to be trending in the opposite direction of the federal government, however, as six states in the past eight years have repealed the death penalty by statute, and eleven others have commissioned studies to reevaluate their death penalty systems.⁸⁹ The potential for interjurisdictional conflict over capital punishment will remain while states continue to diverge with one another and the federal government on whether the death penalty is an appropriate form of punishment.⁹⁰

III. ANALYSIS

A. Overlapping Operation of IAD and Writ Ad Prosequendum: An Intractable Problem

The conflict in *Pleau* arises from overlapping operation of the writ *ad prosequendum* and the IAD, two procedural mechanisms that by their own terms contradict one another.⁹¹ The *Mauro* Court's holding that a post detainer writ *ad prosequendum* constitutes a "written request" under Article IV(a) set up a "Catch-22" for any court facing the issue in *Pleau*: either ignore the federal judiciary's express statutory authority to compel the presence of an individual for prosecution, or violate the Compact Clause of the U.S. Constitution by allowing the federal government to circumvent its obligations under the IAD.⁹² The result is a zero-sum conflict between the writ *ad prosequendum* and IAD in which prioritizing one of the mechanisms necessarily undermines the other.⁹³

Enforcing the writ *ad prosequendum* over the gubernatorial-consent provision, as the First Circuit did in *Pleau*, contradicts *Mauro*'s central holding that the federal government is equally bound to the terms of the IAD as any other party state, and that it must not be allowed to escape its obligations under

penalty); Connor, *supra* note 15, at 167-81 (listing constitutional provisions interpreted as not barring federal death penalty legislation).

89. See Connor, *supra* note 15, at 191 (listing states ordering commissions to review propriety of death penalty); *States With and Without*, *supra* note 85 (listing jurisdictions without death penalty and dates of abolishment); *supra* note 84 (explaining Congress's reinstatement of death penalty). Since 2007, the death penalty has been declared unconstitutional or legislatively repealed in Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York. See *States With and Without*, *supra* note 85.

90. See Connor, *supra* note 15, at 191-94, 207 (contrasting state and federal trends in capital legislation and predicting increased future conflict); Morton, *supra* note 85, at 1465 (predicting increased likelihood of federal capital prosecution in abolitionist states).

91. Compare Interstate Agreement on Detainers Act, 18 U.S.C. app. § 2, art. IV(a) (2012) (providing for transfer of state prisoners but only at discretion of governor of sending state), with 28 U.S.C. § 2241 (2012) (conferring power to order production of prisoner for federal prosecution).

92. See *United States v. Mauro*, 436 U.S. 340, 348-49 (1978) (holding writ *ad prosequendum* obtained after detainer constitutes written request for custody under IAD); see also *supra* Part II.A.1 (analyzing federal court's statutory authority to issue writ *ad prosequendum*); *supra* notes 36-38 and accompanying text (discussing immutable nature of interstate compacts); *supra* notes 60-61 and accompanying text (explaining implications of *Mauro* holding).

93. See *supra* note 91 (highlighting conflicting terms of IAD and writ *ad prosequendum*).

the Agreement.⁹⁴ As the dissent in *Pleau* noted, nullifying the gubernatorial-consent provision “fails the test of common sense” because it would “balkanize” the provision as the only in Article IV(a) that is not triggered by a post-detainer writ *ad prosequendum*.⁹⁵ More fundamentally, such an interpretation of the IAD contradicts the Compact Clause of the U.S. Constitution, as it effectively allows the government to change the bargained-for terms of an agreement it made with the other party states to the IAD.⁹⁶ On the other hand, upholding the gubernatorial-consent provision over the writ *ad prosequendum* would contradict the federal habeas corpus statute and centuries of unquestioned precedent affirming federal district courts’ power to compel an individual to appear before it for prosecution.⁹⁷ Additionally, such an interpretation would allow states to abrogate the federal government’s ability to enforce its laws, a scenario that the Supreme Court expressly sought to avoid by establishing the doctrine of dual sovereignty.⁹⁸

The circuit courts’ disagreement over whether the IAD’s gubernatorial-consent provision allows a state to disobey a writ *ad prosequendum* illustrates the fact that there is no clear answer as to which transfer mechanism should be prioritized.⁹⁹ Underlying the circuit courts’ divergent interpretations of the IAD is an even more fundamental disagreement over whether the federal writ *ad prosequendum* necessarily requires the transfer of state prisoners.¹⁰⁰

B. Pleau: *The First Circuit’s Solution*

Forced to choose between two undesirable alternatives, the *Pleau* court adopted the majority interpretation of the IAD in the context of post-detainer writs *ad prosequendum*.¹⁰¹ While the First Circuit’s rationale was generally

94. See *supra* note 61 and accompanying text (reviewing *Mauro*); see also *United States v. Pleau*, 680 F.3d 1, 5-6 (1st Cir. 2012) (en banc) (attempting to reconcile holding IAD inoperable with *Mauro*), *cert. denied*, 133 S. Ct. 930 (2013), and *cert. denied*, 133 S. Ct. 931 (2013); *United States v. Scheer*, 729 F.2d 164, 170 (2d Cir. 1984) (interpreting *Mauro* as requiring full participation in IAD by United States).

95. *Pleau*, 680 F.3d at 18 (Torruella, J., dissenting).

96. See *id.* at 12 (arguing United States “bound” to terms of IAD); see also *supra* notes 36-38 (explaining nature of Compact Clause); cf. *Scheer*, 729 F.2d at 170 (stating United States required to abide by terms of IAD).

97. See *Mauro*, 436 U.S. at 358 (commenting validity of writ *ad prosequendum* “has never been doubted”); *Pleau*, 680 F.3d at 6 (asserting unconditional nature of federal courts’ authority to compel appearance of individuals).

98. See *Pleau*, 680 F.3d at 7-8 (expressing concern over allowing Rhode Island to inoculate *Pleau* from federal prosecution); see also *Abbate v. United States*, 359 U.S. 187, 195 (1959) (“[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered.”); Connor, *supra* note 15, at 171 (noting Supreme Court’s concern over lenient state prosecution obstructing federal prosecutions); *supra* notes 14-17 and accompanying text (explaining doctrine of dual sovereignty).

99. See *supra* Part II.B.3 (explaining circuit courts’ conflicting interpretations of IAD under *Mauro*).

100. See *supra* notes 51-56 and accompanying text (analyzing circuit courts’ clashing interpretations of *Ponzi*).

101. See *supra* notes 76-81 and accompanying text (summarizing majority opinion in *Pleau*). The First

sound, its assertion that the Supremacy Clause resolves the conflict between the writ *ad prosequendum* and the IAD was misguided.¹⁰² As the dissent in *Pleau* correctly pointed out, the conflict in question is not one between federal law and a state's contrary, independent action, but rather, is a conflict between two federal laws that contradict one another.¹⁰³ The majority's reliance on the Supremacy Clause therefore seems unavailing and only heightens concerns over federalism in a conflict already fraught with tension over the appropriate balance between federal and state authority.¹⁰⁴

The First Circuit correctly determined that *Ponzi* does not settle the dispute in *Pleau* and that it does not stand for the proposition that states have complete discretion in transferring prisoners for federal prosecution.¹⁰⁵ The issue presented in *Ponzi* was structurally diametric to that in *Pleau*: in *Ponzi*, the question was whether the federal government could permissibly transfer a federal prisoner to state authorities for prosecution on state charges, not whether state authorities could permissibly *refuse to transfer* a state prisoner for federal prosecution as was the question in *Pleau*.¹⁰⁶ *Ponzi*'s holding was limited to defining the scope of the U.S. Attorney General's authority to "authoriz[e] the transfer of a federal prisoner to a state court" for prosecution.¹⁰⁷ Although the *Ponzi* Court never affirmatively stated that a governor may refuse to transfer a state prisoner to the federal government, it also did not state the converse; the *Pleau* majority and dissent both correctly noted that *Ponzi* is silent on the question of whether a federal writ *ad*

Circuit reasoned—as did the Third, Fourth, and Tenth Circuits before it—that the Supremacy Clause and the brief passage in *Mauro* addressing the gubernatorial-consent provision dictate that states must obey a writ *ad prosequendum*, even if it follows a detainer. See *supra* notes 65-67, 78-79 and accompanying text (explaining majority interpretation of IAD and *Mauro*).

102. See *United States v. Pleau*, 680 F.3d 1, 7 (1st Cir. 2012) (en banc) (painting habeas statute as providing district courts with unqualified authorization to compel defendants' presence), *cert. denied*, 133 S. Ct. 930 (2013), and *cert. denied*, 133 S. Ct. 931 (2013).

103. See *id.* at 11 (Torruella, J., dissenting) (framing issue as one of conflicting federal laws). Compare Interstate Agreement on Detainers Act, 18 U.S.C. app. § 2, art. IV (2012) (providing uniform system for interjurisdictional transfers of prisoners), with 28 U.S.C. § 2241 (2012) (authorizing federal courts to issue writs *ad prosequendum*). In *Cuyler v. Adams*, the Supreme Court made clear that Congress's ratification of the IAD on behalf of the federal government transformed the IAD into federal law. See 449 U.S. 433, 442 (1981) (holding IAD constitutes federal law); *supra* notes 40-42 and accompanying text (distilling holding of *Carbo*); see also *Pleau*, 680 F.3d at 10-13 (Torruella, J., dissenting) (arguing IAD's federal codification makes Supremacy Clause not determinative of conflict between transfer mechanisms). The question in *Pleau*, therefore, is how two federal statutes interact with one another, "a determination in which the Supremacy Clause plays no part." *Pleau*, 680 F.3d at 11 (Torruella, J., dissenting).

104. See *Pleau*, 680 F.3d at 10-11 (Torruella, J., dissenting) (describing conflict between IAD and writ *ad prosequendum* in terms of federalism principles).

105. See *Pleau*, 680 F.3d at 6 (rejecting *Ponzi* as determinative).

106. Compare *Ponzi v. Fessenden*, 258 U.S. 254, 261-62 (1922) (addressing authority of federal government to transfer custody of federal prisoners to states), with *Pleau*, 680 F.3d at 3-4 (considering whether state required to transfer prisoner to federal government pursuant to writ *ad prosequendum*).

107. *Ponzi*, 258 U.S. at 261.

prosequendum requires a state to transfer the wanted prisoner.¹⁰⁸

The majority in *Pleau* came dangerously close to misconstruing the critical language in *Mauro* related to the gubernatorial-consent provision by suggesting that it unequivocally resolved the issue of the writ *ad prosequendum*'s enforceability.¹⁰⁹ In fact, *Mauro* left open the issue of whether states have ever had the authority to disobey a writ *ad prosequendum*, stating, “If a State has never had authority to dishonor an *ad prosequendum* writ issued by a federal court, then [the gubernatorial-consent] provision could not be read as providing such authority.”¹¹⁰ The *Pleau* court argued that states have never had the authority to disobey a writ *ad prosequendum* because Congress authorized the writ and therefore, in light of *Mauro*, Rhode Island had no authority to do so under the IAD.¹¹¹ It is critical to note, however, that the First Circuit’s conclusion regarding the enforceability of the writ *ad prosequendum* was its own and not that of the *Mauro* Court, which expressly left the question undecided.¹¹² The *Pleau* dissent casts some doubt on the majority’s ultimate conclusion by pointing out that the states included the gubernatorial-consent provision in the IAD for the express purpose of retaining governors’ “right[s] to refuse to make a prisoner available (on public policy grounds),” and that Congress noted that the IAD “preserved” that right.¹¹³

108. See *id.* (addressing only United States’ power to transfer prisoners to states); *United States v. Pleau*, 680 F.3d 1, 6, 20 (1st Cir. 2012) (en banc) (characterizing *Ponzi* as limited in scope), *cert. denied*, 133 S. Ct. 930 (2013), and *cert. denied*, 133 S. Ct. 931 (2013). The First Circuit’s decision to not extend the comity doctrine to state-to-federal transfers appears to be an equally viable interpretation of *Ponzi* as the circuit court cases extending the comity doctrine to such transfers. Compare *Pleau*, 680 F.3d at 6 (rejecting *Ponzi* as relevant to state-to-federal transfers), with *supra* notes 51-53 and accompanying text (reviewing circuit court cases interpreting *Ponzi* as applicable to state-to-federal transfers).

109. See *Pleau*, 680 F.3d at 7.

110. *United States v. Mauro*, 436 U.S. 340, 363 (1978) (emphasis added).

111. See *United States v. Pleau*, 680 F.3d 1, 5, 7 (1st Cir. 2012) (en banc) (combining *Mauro* with Supremacy Clause to conclude writ *ad prosequendum* trumps IAD), *cert. denied*, 133 S. Ct. 930 (2013), and *cert. denied*, 133 S. Ct. 931 (2013).

112. See *supra* note 110 and accompanying text (quoting *Mauro*); see also *supra* Part II.B.2 (examining *Mauro*). Compare *Mauro*, 436 U.S. at 363 (leaving open whether states have right to disobey writ *ad prosequendum* pre-existing IAD), with *Pleau*, 680 F.3d at 6 (rejecting notion of states ever having right to disobey writ *ad prosequendum*). In contrast to the First Circuit, the Third and Fourth Circuits—in *United States v. Graham* and *United States v. Bryant*, respectively—misconstrued the holding in *Mauro* as positing that states have never had the authority to reject a writ *ad prosequendum*. Compare *Pleau*, 680 F.3d at 7 (acknowledging *Mauro* only defined states’ power under IAD), with *United States v. Graham*, 622 F.2d 57, 59 (3d Cir. 1980) (“Prior to the enactment of the [IAD], the [*Mauro*] Court observed, a state clearly was forbidden by the Supremacy Clause from disobeying a federal writ of habeas corpus ad prosequendum.”), and *United States v. Bryant*, 612 F.2d 799, 802 (4th Cir. 1979) (citing *Mauro*, 436 U.S. at 363) (“[A]n individual state . . . does not have authority and is not empowered by the Act to reject a federal writ of habeas corpus ad prosequendum . . . as the Supreme Court noted in *Mauro*.”).

113. See *Pleau*, 680 F.3d at 17-18 (Torruella, J., dissenting) (citing *Mauro*, 436 U.S. at 363 n.28) (recounting IAD’s legislative history); see also S. REP. NO. 91-1356, at 2 (1970), reprinted in 1970 U.S.C.C.A.N. 4864, 4865 (noting “Governor’s right to refuse to make a prisoner available is preserved” under IAD); COUNCIL OF STATE GOV’TS, *supra* note 28, at 79 (providing rationale for inclusion of gubernatorial-consent provision in IAD). While the logic of the *Pleau* majority is sound, there appears to be more room for

C. A Proposal for a Principled Approach

The question presented in *Pleau* is not whether the federal government has the power to prosecute individuals in state custody; *Mauro* makes clear that the government is free to take custody of a state prisoner by obtaining a writ *ad prosequendum* without filing a detainer.¹¹⁴ Rather, the question is whether the IAD's gubernatorial-consent provision, when activated by the government, gives states the right to ignore a subsequent writ *ad prosequendum* and refuse to transfer a prisoner.¹¹⁵ The federal government's prosecution of *Pleau* was the most blatant attempt to circumvent the IAD imaginable; not only did the government voluntarily activate the IAD by lodging a detainer against *Pleau*, but it then chose to proceed under Article IV(a) by filing a true "written request" for custody of *Pleau*, only obtaining a writ *ad prosequendum* after Governor Chafee denied its written request.¹¹⁶ At the heart of this conflict are two competing values: prosecutorial efficiency versus principles of federalism.¹¹⁷

Had the First Circuit upheld the gubernatorial-consent provision instead of the writ *ad prosequendum*, federal prosecutors most likely would have responded by circumventing the IAD altogether and obtaining custody over state prisoners with a writ *ad prosequendum* alone, at least in cases they suspected a state might not comply with an Article IV(a) written request.¹¹⁸ Forcing federal prosecutors to rely on a more burdensome method of obtaining custody would appear to unnecessarily make the transfer process less efficient,

interpretation of *Mauro* than the First Circuit makes it appear. See *Pleau*, 680 F.3d at 13-18 (Torruella, J., dissenting) (interpreting *Mauro* differently than majority).

114. See 28 U.S.C. § 2241 (2012) (allowing federal courts to order individuals to appear for prosecution); *Mauro*, 436 U.S. at 364 n.30 (framing IAD as alternative to obtaining writ *ad prosequendum*). But see *supra* notes 51-53 and accompanying text (discussing circuit courts interpreting *Ponzi* as making transfers of state prisoners to federal government discretionary). If a prosecuting jurisdiction never lodges a detainer, then the IAD is not applicable. See 18 U.S.C. app. § 2, arts. III-V (2012) (making provision applicable only to prisoners encumbered with detainer); *supra* notes 30-32 and accompanying text (discussing threshold for IAD).

115. See *Pleau*, 680 F.3d at 4-5 (considering issues on appeal).

116. See *id.* at 3-4. This is in contrast to nearly all prior cases contemplating the enforceability of the writ, in which the government filed a detainer and then a writ *ad prosequendum* rather than making a written request under Article IV(a). Compare *Pleau*, 680 F.3d at 3-4 (explaining government issued Article IV request then sought writ *ad prosequendum*), with *United States v. Trafny*, 311 F. App'x 92, 94 (10th Cir. 2009) (explaining government obtained writ *ad prosequendum* after lodging detainer), *United States v. Scheer*, 729 F.2d 164, 165 (2d Cir. 1984) (stating government filed detainer then writ *ad prosequendum*), and *United States v. Bryant*, 612 F.2d 799, 801 (4th Cir. 1979) (explaining writ *ad prosequendum* obtained without any other written request).

117. Compare *United States v. Pleau*, 680 F.3d 1, 7-8 (1st Cir. 2012) (en banc) (expressing concern over limiting federal prosecutorial ability), *cert. denied*, 133 S. Ct. 930 (2013), and *cert. denied*, 133 S. Ct. 931 (2013), with *id.* at 16 (Torruella, J., dissenting) (arguing prioritizing prosecutorial freedom violates principles of federalism), and *Scheer*, 729 F.2d at 170 (upholding IAD under federalism rationale).

118. See *Pleau*, 680 F.3d at 3 (characterizing IAD request as more convenient than writ *ad prosequendum*); see also *United States v. Mauro*, 436 U.S. 340, 361 (1978) (holding government not bound by IAD when obtaining writ *ad prosequendum* alone).

while also increasing the burden on an already strained federal judiciary.¹¹⁹ Federal prosecutors’ own conduct, however, undercuts this argument.¹²⁰ Prior to *Mauro* the circuit courts were split over whether a post-detainer writ *ad prosequendum* constituted a written request, which suggests that federal prosecutors regularly obtained writs *ad prosequendum* after lodging a detainer.¹²¹ If federal prosecutors can regularly lodge a detainer and obtain a writ *ad prosequendum*, they can presumably do the later alone.¹²²

The consequences of negating the gubernatorial-consent provision, however, cannot be so easily dismissed.¹²³ Allowing the federal government to flout the terms of an interstate compact that it voluntarily made with the states not only undermines the integrity of the IAD, but also throws into question the validity of all interstate compacts to which the federal government is a party.¹²⁴ Moreover, placing the federal government “on a different footing” than the states disrupts the constitutional distribution of power between the states and federal government that forms the basis of our federal system.¹²⁵ The mere implication that the federal government is not equally bound to the U.S. Constitution as the states is cause for concern.¹²⁶ Given the comparatively slight cost to the government from a practical perspective, future courts addressing this issue should preserve the principles of federalism at stake by upholding a governor’s right under the IAD to deny the federal government custody of a state prisoner when it chooses to employ detainers and the IAD.¹²⁷

IV. CONCLUSION

The conflict between the overlapping functions of the IAD and the writ *ad prosequendum* presents a narrow procedural issue that carries significant implications for the administration of criminal justice and federalism.

119. See *Pleau*, 680 F.3d at 3 (implying obtaining writ *ad prosequendum* inconvenient).

120. See *supra* note 116 (listing cases in which government lodged detainer and obtained writ *ad prosequendum*).

121. See *Mauro*, 436 U.S. at 349 & n.14 (noting circuit split over equivalence of writ *ad prosequendum* and detainer); see also *supra* note 116 (noting cases in which government filed detainer and writ *ad prosequendum*).

122. See *Mauro*, 436 U.S. at 362 (establishing government free to obtain custody with writ *ad prosequendum* alone).

123. See *United States v. Pleau*, 680 F.3d 1, 18 (1st Cir. 2012) (en banc) (Torruella, J., dissenting) (“The 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.”), *cert. denied*, 133 S. Ct. 930 (2013), and *cert. denied*, 133 S. Ct. 931 (2013); *United States v. Scheer*, 729 F.2d 164, 170 (2d Cir. 1984) (upholding IAD to preserve balance between federal and state power).

124. See *Pleau*, 680 F.3d at 18 (Torruella, J., dissenting) (fearing consequences of majority’s holding).

125. See *Scheer*, 729 F.2d at 170 (cautioning against treating federal government differently than states); see also *supra* note 37 (explaining entering interstate compact equivalent to forfeiting sovereignty).

126. See *Scheer*, 729 F.2d at 170 (asserting necessity of treating federal government equally to states).

127. See *Pleau*, 680 F.3d at 8-22 (arguing IAD should be upheld when writ *ad prosequendum* functions as written request).

Although *Pleau* forecloses any further challenges to the federal prosecutions under the IAD in the First Circuit, the potential for further conflict unquestionably remains, particularly in the Second Circuit where all three of the states that compose the federal jurisdiction have abolished the death penalty and *Scheer* is controlling authority. Even in the absence of further federal challenges, Governor Chafee's use of the gubernatorial-consent provision may spur other governors to deny state requests made under the IAD. States will most likely continue to employ the IAD as a means of frustrating the death penalty so long as the country remains divided over capital punishment, and until the Supreme Court resolves the latent circuit split over the IAD and writ *ad prosequendum*, uncertainty will surround these procedural mechanisms.

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