GIVING TEETH TO REFUSAL RIGHTS IN THE INTERSTATE AGREEMENT ON DETAINERS AFTER *UNITED STATES V. PLEAU*

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I. INTRODUCTION

On September 20, 2010, Jason Pleau robbed and murdered a gas station manager in Woonsocket, Rhode Island, as the manager approached a local bank to deposit $12,542.[1] Three days later, Pleau was captured in New York,[2] and after he was charged with the death of the manager, Pleau agreed with Rhode Island authorities to a term of life imprisonment without the possibility of parole.[3] That would have appeared to be the end of the matter, but for two years, Pleau's custody was the subject of a tug-of-war between Governor Lincoln Chafee of Rhode Island and the United States Department of Justice.

Rhode Island abolished the death penalty in 1852, and the last man to be executed by the state was hanged in 1845.[4] While Rhode Island would not put Pleau to death, the federal government made it clear they were prepared to seek just that result. Two months after Pleau's arrest, the Department of Justice indicated that it intended to use its power under 18 U.S.C. § 3591(a),[5] which gave prosecutors the authority to seek the death penalty for violations of federal statutes resulting in death.[6] In November, the United States lodged a detainer with Rhode Island

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1. Indictment, United States v. Pleau, 2011 WL 2605301 (D.R.I. 2011) (No. 10CR00184), 2010 WL 7326847, at *3.

2. Nancy Krause, *2 arrested in Woonsocket bank murder*, WPRI.COM (Oct. 8, 2010, 6:46 PM), http://www.wpri.com/dpp/news/local_news/blackstone/woonsocket-citizens-bank-shooting-jason-pleau-arrested.

3. Ian MacDougall, *R.I. murder suspect offers to plead guilty*, BOSTON.COM (June 25, 2011), http://www.boston.com/news/local/rhode_island/articles/2011/06/25/ri_murder_suspect_offers_to_plead_guilty/.

4. S. Res. 371, 2011 Leg. Sess. (R.I. 2011) (requesting that the governor pardon the last man to be executed by the state, John Gordon, and referring to the event as a "black mark on our great state's judicial history").

5. 18 U.S.C. § 3591(a). The statute directs the finder of fact to consider the policy grounds laid out in 18 U.S.C. § 3592, which include both mitigating and aggravating factors in considering a death sentence. These include, among aggravating factors, that "[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person." 18 U.S.C. § 3592.

6. *See* Notice of Intention to Seek the Death Penalty As to Defendant Jason W. Pleau, United States v. Pleau, 2011 WL 2605301 (D.R.I. 2011) (No. 10-00184-S), *available at* http://www.justice.gov/usao/ri/news/2012/june2012/Pleau%20Notice.pdf (noting Pleau's long criminal history, including multiple acts of robbery and assault over a 14-year period, his lack of remorse, and the low potential for rehabilitation, all considered aggravating factors under 18 U.S.C. § 3592).

authorities against Pleau, attempting to gain custody for violations of several federal statutes so that he may be tried in federal court.[7] By lodging a detainer, the federal government invoked the statutory provisions under the Interstate Agreement on Detainers Act (IAD).[8] The IAD, enacted in 1970, was an attempt to streamline the process of prisoner transfer between member states, and end the abuses of the detainer system. The Act also afforded governors an opportunity to deny transfer requests by other member states.[9] As the United States is a "member state" under the agreement, Gov. Chafee did just that, citing his and his state's opposition to the death penalty and his unwillingness to "expose" a citizen of the state to death.[10]

Not to be discouraged by Gov. Chafee's denial of a traditional written request, the federal government then petitioned for Pleau's presence in federal court through a writ of habeas corpus *ad prosequendum*.[11] May the federal government, after being first denied a transfer request by the terms of the IAD, turn to a federal writ to command it? The district court said yes, granting the writ and arguing that Gov. Chafee could not disobey the command to produce Pleau even if he had correctly exercised his right under the IAD.[12] His refusal to adhere to the federal writ and transfer Pleau was trumped by the Supremacy Clause,[13] the Court stated: "[T]he proviso . . . allowing a governor 30 days to refuse a request for temporary custody under the [IAD] does not, and could not, confer upon a governor the authority to dishonor a federal court's writ of habeas corpus *ad prosequendum*."[14] The First Circuit, rehearing the case *en banc* after originally overturning the lower court,[15] affirmed in *United States v. Pleau*.[16] The circuit court again argued that the Supremacy Clause demanded the result: "State interposition to defeat federal authority vanished with the Civil War."[17]

This Note first argues that the First Circuit misinterpreted the Interstate Agreement on Detainers by allowing the federal government to ignore Gov.

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7. *See* United States v. Pleau, No. 10–184–1 S, 2011 WL 2605301, at *1 (D.R.I. 2011) (Mr. Pleau was indicted by a federal grand jury for violations of the Hobbs Act, 18 U.S.C. 1951(a), for conspiracy to commit robbery affecting commerce, in addition to violations of 18 U.S.C. §§ 924(c)(1)(A) and (j) for possessing, using, carrying, and discharging a firearm in relation to a crime of violence with death resulting.).

8. Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397 (1970) (codified at 18 U.S.C. App. 2 § 2 (1976)).

9. 18 U.S.C App. 2 §2 ("[T]here shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.").

10. Brief for Amicus Curiae Governor Lincoln D. Chafee In Support of Defendant-Appellant/Petitioner, United States v. Pleau, 680 F.3d 1 (1st Cir. 2012) (Nos. 11-1175 & 11-1782) (Gov. Chaffee announced his decision in an official statement: "Despite the horrific nature of this crime . . . the State of Rhode Island would not impose the death penalty. In light of this longstanding policy, I cannot in good conscience voluntarily expose a Rhode Island citizen to a potential death penalty prosecution," (*Id.* at Exhibit 2)).

11. 28 U.S.C. § 2241(c)(5) (2008).

12. *Pleau*, 2011 WL 2605301 at *4.

13. U.S. CONST. art. VI, cl. 2 (providing that enactments of Congress are "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

14. *Pleau*, 2011 WL 2605301 at *2-3.

15. United States v. Pleau, 663 F.3d 542 (1st Cir. 2012).

16. 680 F.3d 1 (1st Cir. 2012), *cert. denied*, 2013 WL 141175.

17. *Id.* at 6.

Chafee's denial of a prisoner transfer in *Pleau* and misapplying Supreme Court precedent set in *United States v. Mauro*. Congress should respond by expressly disallowing the use of writs of habeas corpus *ad prosequendum* by federal prosecutors once a detainer has been filed and the provisions of the IAD control. Part II of this Note provides a brief overview of the detainer system, writs of habeas corpus *ad prosequendum* and the ultimate enactment of the Interstate Agreement on Detainers by Congress. Part III analyzes a line of cases interpreting the IAD, with particular focus on the Supreme Court's decision in *United States v. Mauro*. Part IV analyzes the First Circuit's recent holding in *Pleau*. This Note concludes by suggesting that Congress amend the IAD to strengthen the provisions that have been undermined by several circuit courts and bring the IAD into conformity with its original policy considerations.

II. DETAINERS AND WRITS OF HABEAS CORPUS

Since the enactment of the IAD in 1970, jurisdictions have traditionally had two means of transferring prisoners for prosecution or questioning when they are detained in another jurisdiction—the detainer system governed by provisions of the IAD, or the writs of habeas corpus *ad prosequendum*. This Part briefly overviews the history and function of these devices before turning to the IAD.

A. The Writ of Habeas Corpus Ad Prosequendum

When Gov. Chafee denied the federal government's written request for Jason Pleau, the Department of Justice fell back on a traditional means of compelling prisoner production by requesting a court-ordered writ of habeas corpus *ad prosequendum*. The federal government has long relied on this writ to compel production of a prisoner held in another jurisdiction—both state and federal—for questioning or trial, the detainer system notwithstanding.[18] The *ad prosequendum* should be distinguished from the traditional habeas corpus writ, known as the writ of habeas corpus *ab subjiciendum*, which allows prisoners to challenge the cause of their incarceration.[19] The traditional writ of habeas corpus was granted to the federal courts in Section 14 of the First Judiciary Act of 1789,[20] and all current variations have stemmed from this original legislation. The current *ad prosequendum* writ is codified at 28 U.S.C. § 2241(c)(5), which provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [i]t is necessary to bring him into court to testify or for trial."[21] The Supreme Court expanded the writ's use in *Carbo v.*

18. *See* William L. Golden, Note, *The Interrelationship Between Habeas Corpus* Ad Prosequendum, *The Interstate Agreement on Detainers, and The Speedy Trial Act of 1974:* United States v. Mauro, 40 U. PITT. L. REV. 285, 286 (1979). The writ is only available for state-to-federal or federal-to-federal jurisdictional transfers. *See infra*, note 35 and accompanying text.

19. For a brief history of the traditional writ, *see* United States v. Hayman, 342 U.S. 205, 210 (1952) (noting "the most celebrated writ in English law").

20. 1 Stat. 73 (1789).

21. 28 U.S.C. § 2241 (2008).

United States [22] by differentiating it from the *ad subjiciendum* writ and allowing cross-jurisdictional use,[23] "[r]ecognizing that the effective administration of criminal justice required [the Court's] decision."[24]

Despite the analysis by the district and circuit courts in *Pleau*, courts and commentators have debated the ultimate source of power—if any—underlying the writ. In the Second Circuit's decision in *United States v. Mauro*,[25] Justice Mansfield wrote in dissent, "I have no doubt that if a state institution refused to obey a federal writ of habeas corpus *ad prosequendum* properly issued pursuant to §2241 and thus provoked a federal-state confrontation, the writ would be held enforceable against the institution under the Supremacy Clause."[26] Indeed, there have been instances where states have refused to honor the writ, as Gov. Chafee attempted; the circuits have previously agreed that compliance was a matter of comity.[27] In *United Sates v. Perez*,[28] for example, a prisoner in Arkansas complained that state officials could not deny a federal writ, citing state statutes which appeared to support him for authority.[29] The Seventh Circuit pointed to the permissive nature of the statutes, though, stating "where the body of the accused is in manual possession of one sovereign, surrender can be obtained by another such sovereign only by consent of the first or by force. The latter is unthinkable."[30]

The Supreme Court similarly has not resolved the question in the way suggested by Justice Mansfield in *Mauro*, also suggesting compliance with the writ is a matter of comity.[31] In *Ponzi v. Fessenden*,[32] the Supreme Court stated the system of dual sovereignty requires "a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure."[33] But *Ponzi* did not ultimately

22. Carbo v. United States, 364 U.S. 611 (1961) (holding that there were no territorial limitations on the authority of a federal district court in California to issue writ under the habeas statute commanding New York City prison officials to transfer petitioner to California for trial on an indictment pending in California court).

23. *Id.* The Court overturned a previous precedent in holding this. *See* Ahrens v. Clark, 335 U.S. 188 (1948) ("[I]t was the accepted view that a prisoner must be within the territorial jurisdiction of the District Court in order to obtain from it a writ of habeas corpus.").

24. *Id.* at 612.

25. 544 F.2d 588 (2d Cir. 1978).

26. *Id.* at 596 (Mansfield, J., dissenting).

27. *See, e.g.*, United States v. Cartano, 420 F.2d 362, 364 (1st Cir. 1969) ("On February 18, 1969, the government obtained a writ of habeas corpus ad prosequendum in an effort to bring defendant to trial. The writ was returned unsatisfied on March 6, 1969, because defendant was under treatment in the North Carolina prison mental hospital."); United States v. Oliver, 523 F.2d 253, 258-59 (2d Cir. 1975) (noting that, in its efforts to obtain a prisoner for trial, "principles of comity come into play and . . . that an Assistant United States Attorney . . . need not bring to bear all possible federal power.").

28. 398 F.2d 658 (7th Cir. 1968).

29. *Id.* at 660 ("Assistant United States Attorney Richard F. James in his affidavit described two telephone conversations early in November 1965 with the Warden of the Arkansas Penitentiary (in his efforts to secure appellant's presence for trial in the District Court in December 1965) in which the Warden specifically stated that the Arkansas authorities would not comply with such a writ.").

30. *Id.* (citing Strand v. Schmittroth, 251 F.2d 590, 599 (9th Cir. 1957)).

31. The majority in *Mauro* did not find Justice Mansfield's reasoning persuasive. *See Mauro*, 544 F.2d at 592 ("While 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." (citing U.S. v. Oliver, 523 F.2d 253, 258 (2d Cir. 1975))).

32. 258 U.S. 254 (1922).

33. *Id.* at 259.

address whether the Supremacy Clause would force state compliance with an *ad prosequendum* writ. One commentator forcefully argued that it does:

> Where there is state imprisonment and a pending federal prosecution there is, clearly, no place for the principle of "comity." Federal law authorizes the writ of habeas corpus ad prosequendum, and the Supreme Court of the United States has held, in *Carbo v. United States*, that this power is not confined within the borders of the issuing judicial district. In the *Carbo* case there was consent by the State of New York, the imprisoning state. Thus the decision does not consider or reject the authority holding that such consent is necessary before the writ of habeas corpus can issue. However, that authority is erroneous, since the statutory writ is the supreme law of the land and the imprisoning state has no choice but to yield the prisoner, anything in its law to the contrary notwithstanding.[34]

It would ultimately be this understanding of the writ that prevailed in the First Circuit in *Pleau*.

B. The Detainer System

While the federal government has had the *ad prosequendum* writ at their disposal, states have long relied on the informal detainer system to help produce prisoners for trial.[35] While the IAD itself does not include a definition of "detainer," the Senate Report recommending the agreement's adoption defined a detainer as "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction."[36] Unlike the *ad prosequendum* writs used by the federal government, though, it is not a command to produce a prisoner for trial. Indeed states had no recourse once a detainer was filed, and often detainers were not acted on by the jurisdictions lodging them.[37] Detainers thus were simply an informal means of

34. Paul M. Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U. CIN. L. REV. 179, 191-92 (1966).

35. While the writ of habeas corpus *ad prosequendum* is available to state courts as a means of extradition, the detainer system, now governed by the IAD, is the primary system of extradition among states today. State courts still reserve the right to issue the *ad prosequendum* writ, and courts have held, citing *Mauro*, that the writ's issuance does not invoke the speedy trial provisions of the IAD. *See* State v. Williams, 573 N.W.2d 106, 111 (Neb. 1997) ("In Nebraska, writs of habeas corpus ad prosequendum have been and continue to be a traditional way of securing the presence of a prisoner located in another jurisdiction.").

36. S. REP. NO. 1357, at 2 (1970). *See also* Report of the Joint Committee on Detainers, Handbook on Interstate Crime Control (The Council of State Governments, 1949) at 85 (defining a detainer as "a warrant filed against a person already in custody with the purpose of insuring that, after the prisoner has completed his present term, he will be available to authority which has placed the detainer").

37. *See* Golden, *supra* note 18, at 289.

putting a hosting jurisdiction on notice that the prisoner in their custody was wanted elsewhere for questioning or prosecution.[38]

It was common practice for prosecutors to file a detainer automatically upon learning that the person in question was incarcerated in another state, and often detainers were filed simply to punish prisoners. Because detainers are not generally acted upon immediately,[39] they often have adverse effects on prisoners and the rehabilitative efforts of the prison system.[40] Prisoners with detainers lodged against them are often placed in high security because they are thought of as a high risk for escape.[41] Access to rehabilitative programs is thus circumvented, including education and job training programs.[42] Parole is frequently denied and chances to serve out multiple sentences concurrently are foreclosed.[43] Detainees often cannot prepare adequate defense as witnesses die, disappear, or simply forget the details of events long past.[44]

Despite these negative effects on prisoners, until the passage of the IAD, a prisoner was helpless to clear detainers lodged against him:

> [A] prisoner's demand to be tried pursuant to a detainer on charges outstanding in a jurisdiction other than the one in which he was incarcerated was of no legal effect, because an inmate could not compel the state in which he was serving a sentence to transfer him to a state which had lodged a detainer. Likewise, it was practically impossible for the state which had lodged the detainer to obtain custody of the inmate prior to the completion of his sentence in the confining state; the

38. *Id.* ("Often a detainer merely consists of an informal written communication forwarded to a penal institution by a parole board, prosecutor, or law enforcement official of another jurisdiction for the purpose of questioning the detainee-prisoner.").

39. This is unlike the writs of habeas corpus *ad prosequendum*, discussed *supra* in Part II. *See* Golden, *supra* note 18, at 289.

40. *See, e.g.*, Pitts v. North Carolina, 395 F.2d 182, 187 (4th Cir. 1968) ("Detainers . . . often produce serious adverse side-effects. The very informality is one source of difficulty. Requests . . . may be filed groundlessly, or even in bad faith, as suspected by the appellant in this case. . . . As often happens, the result of the then unestablished charge . . . was that the detainee was seriously hampered in his quest for a parole or communication.").

41. James V. Bennett, *The Last Full Ounce*, 23 FED. PROBATION 20, 21 (1959).

42. *Id.*

43. *Id.* The denial of parole was often a matter of policy, and was not statutorily based. *See* Donald E. Shelton, *Unconstitutional Uncertainty: A Study of the Use of Detainers,* 1 PROSPECTUS 119, 120 (1968) ("Merely by the *allegation* of an offense the prosecutor has in effect tried, convicted, and sentenced the defendant to additional time in prison."). The effect of these sanctions on prisoners who were served with detainers was an additional problem. *See* Bennett, *supra* note 41, at 22 ("The strain of having to serve a sentence with the uncertain prospect of being taken into custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination toward self-improvement.").

44. *See* Smith v. Hooey, 393 U.S. 374, 380 (1969) ("[A] man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.").

> necessary procedures were cumbersome and expensive and thus were seldom invoked.[45]

In 1948 the Joint Committee on Detainers was formed, and the group[46] issued a report to put a spotlight on these issues and recommended a set of changes.[47] The changes that were suggested served as the framework for the IAD. A central goal was the prompt disposition of detainers filed against prisoners.[48] The quicker the charges underpinning the detainers could be resolved, the quicker the prisoner could again take advantage of educational and occupational training available to him. Drafts of the proposal were reviewed and approved by a conference sponsored by the American Correctional Association, the Council of State Governments, the National Probation and Parole Association, and the New York Joint Legislative Committee on Interstate Cooperation.[49] The legislation languished, though, having failed to pass in the Senate in 1968 after being introduced five years earlier in the House. A year later, in 1969, the Supreme Court spoke directly to the abuses and effects of the detainer system in *Smith v. Hooey*.[50] It imposed a "diligent, good-faith effort" on states to bring a prisoner to trial.[51] The Court did not suggest what exactly would constitute such an effort by the States.

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45. Bernard J. Fried, *The Interstate Agreement on Detainers and the Federal Government*, 6 HOFSTRA L. REV. 493, 497 (Spring 1978).

46. *See* LESLIE W. ABRAMSON, CRIMINAL DETAINERS 91-92 (1979) (The group was "composed of representatives from an Association of Administrators of the Interstate Compact for the Supervision of Parolees and Probationers, the National Association of Attorneys General, the Section on Criminal Law of the American Bar Association, the American Prison Association, and the National Conference of Commissioners on Uniform State Laws.").

47. *United States v. Mauro*, 436 U.S. 340, 349 (1978).

48. The suggestions were as follows:

1. Every effort should be made to accomplish the disposition of detainers as promptly as possible.
2. There should be assurance that any prisoner released to stand trial in another jurisdiction will be returned to the institution from which he was released.
3. Prison and parole authorities should take prompt action to settle detainers which have been filed by them.
4. No prisoner should be penalized because of a detainer pending against him unless a thorough investigation of the detainer has been made and it has been found valid.
5. All jurisdictions should observe the principles of interstate comity in the settlement of detainers, and each should bear its own proper burden of the expenses and effort involved in disposing of the charges and settling detainers. Bennett, *supra* note 41, at 22.

49. *Mauro*, 436 U.S. at 343.

50. 393 U.S. 374, 579 (1969) ("[T]he Sixth Amendment right to a speedy trial may not be dispensed with so lightly . . . . Upon the petitioner's demand, [a state has] a constitutional duty to make a diligent, good-faith effort to bring him [to] trial."). The legislative history of the IAD explicitly mentions this case. *See* H. Rpt. 91-1018, at 1-2, 1970.

51. *Hooey*, 393 U.S. at 383. The Court cited Klopfer v. North Carolina, 386 U.S. 213 (1967), which held that, "by virtue of the Fourteenth Amendment, the Six Amendment right to a speedy trial is enforceable against the States as 'one of the most basic rights preserved by our Constitution.'" *Id.* at 374-75. *Hooey* extended this right to prisoners in the custody of a separate jurisdiction.

C. The Interstate Agreement on Detainers

The enactment of the Interstate Agreement on Detainers by the federal government provided a statutory framework for the Court's decree in *Hooey*.[52] Congress added the District of Columbia and the United States into the IAD in 1970.[53] In addition to the United States, 48 states are currently members of the IAD.[54] The compact's purpose was two-fold: Congress sought to streamline what was an inconsistent and inefficient approach to inter-jurisdictional rendition[55] and to prevent the consequences of the detainer system discussed above. [56] It would allow an inmate to "force the expeditious disposition of outstanding detainers and their underlying charges. Similarly prosecutors can more easily obtain prisoners for trial; judges and prison and parole authorities can more rationally administer punishment and rehabilitation."[57]

Articles III and IV of the IAD are its operative provisions. Article III provides a process for a prisoner to dispose of detainers filed against him.[58] A prisoner is to be

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52. While there is no doubt that the IAD was rehabilitative in purpose, *see supra* note 48, there are suggestions that, because of the timing of the passage of the IAD, that Congress was more concerned with state cases being dismissed after *Hooey*. *See* Fried, *supra* note 45, at 500-01 ("This conclusion is buttressed by the failure of the legislative history to discuss expected use of the Agreement by the United States as a 'Receiving State' to obtain sentenced state prisoners. . . [when] the federal government[] . . . had available to it the writ.").

53. *Mauro*, 436 U.S. at 343. The Agreement was a "congressionally sanctioned interstate compact." Cuyler v. Adams, 449 U.S. 433, 433 (1981). "[W]here Congress has authorized the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation, Congress' consent transforms the States' agreement into federal law under the Compact Clause. . . . " *Id.* at 434. The Court stated that Congress gave its consent to the IAD in advance with the Crime Control Consent Act of 1934. *Id.*

54. George L. Blum, Annotation, *Construction and Application of Article III of Interstate Agreement on Detainers (IAD)—Issues Related to "Speedy Trial" Requirement, and Construction of Essential Terms*, 70 A.L.R. 6th 361 (2011). Neither Louisiana nor Mississippi has implemented the IAD. *See, e.g.*, State v. McCarter, 469 So. 2d 277, 285 (La. Ct. App. 1985); Gardner v. State, 57 So. 3d 688, 689 (Miss. Ct. App. 2011).

55. *See, e.g.*, Kentucky v. Dennison, 65 U.S. 66, 107-08 (1860) (holding that Congress could not compel a governor to perform a Constitutional obligation to extradite).

56. 18 U.S.C. app. 2 § 2 (1976). Art. I states:

> The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

57. United States v. Ford, 550 F.2d 732, 741 (2d Cir. 1977), *aff'd* 436 U.S. 340 (1978).

58. 18 U.S.C. app. 2 § 2 (1976). Art. III(a) states:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate

promptly informed when a detainer is lodged against him, providing him with information as to the source and contents of the detainer and informing him of his right to request disposition of the charges.[59] Article IV gives member states[60] a process for requesting states to extradite a prisoner for pending charges.[61] The IAD outlines a two-step process for prosecutors. First, the receiving state must lodge a detainer with the custodial (or sending) state.[62] Second, once a detainer has been lodged, the prosecutor presents a "request for temporary custody."[63]

The IAD's provisions have strict mandates and penalties for violations. The IAD mandates that trial commence within 120 days of the prisoner's arrival in the receiving state.[64] In addition, the charges that underpin the detainer must be resolved before the prisoner is transferred back to the sending state.[65] The IAD provides stiff penalties for those who do not follow these guidelines; Article IV(e) states that a court "shall"[66] enter an order dismissing any charges with prejudice.[67]

At issue in *Pleau* is language in Article IV(a) providing that 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."[68] The legislative history of the IAD, though sparse, suggests that governors had this right before the passage of the IAD, and that the language was inserted into the statute to merely confirm that the right was retained.[69] The plain text of the traditional writ and the

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court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint . . . .

59. United v. Mauro, 436 U.S. 340, 352-53 (1978).

60. In *Mauro*, the Supreme Court stated that the federal government, by passing the Interstate Agreement on Detainers Act, joined as a member state. 436 U.S. at 355 ("Congress did enact the Agreement into law in its entirety, and it placed no qualification upon the membership of the United States.").

61. 18 U.S.C. app. 2 § 2 (1976). Art. IV(a) states:

> The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: And provided further, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

62. 18 U.S.C. app. § 2 art. IV (1976). A prisoner is sent from a *sending* or *custodial* state to a *receiving* state, who lodged the detainer and seeks to obtain the prisoner to bring him to court.

63. *See id.* § 2 art. IV (1976).

64. *See id.* § 2 art. IV(c) (1976).

65. *See id.* § 2 art. IV(e) (1976).

66. A continuance may be granted "for good cause shown in open court" with either the prisoner or his attorney present. 18 U.S.C. app. § 2 art. IV(c).

67. *See id.* § 2 art. IV(e) (1976).

68. *See id.* § 2 art. IV(a) (1976). "The possibility [of governors rejecting extradition requests] 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, *Suggested State Legislation Program for 1957*, at 79 (1956).

69. *See* United States v. Mauro, 436 U.S. 340, 363 n.28 (1978); Ponzi v. Fessenden, 258 U.S. 254, 260 (1922) (holding that a state *may* waive "its strict right to exclusive custody of [the prisoner]"). *But see* Abramson, *supra* note 46, at 96 ("To equate the writ with a detainer under the IAD would implicitly repeal or modify the writ, by adding requirements such as the governor of the confining state being able to refuse the

IAD provide some guidance to the problem presented to courts. The IAD speaks of "written request for temporary custody or availability" when it affords governors the right to deny those requests. This seems like a logical result: a request implies a chance that it may be denied. The traditional writ, on the other hand, "commands" the presence of the prisoner in federal court.[70] The stark contrast between these two words—"request" and "command"—seems to suggest that the writ is not clearly covered by the statute.[71] It is this language which the Supreme Court grappled with in *United States v. Mauro*. Was the writ simply a "written request" or was it something more?

III. UNITED STATES V. MAURO

In 1978, the Supreme Court in *Mauro* stated that it "granted certiorari . . . to consider whether the [IAD] governs the use of writ of habeas corpus *ad prosequendum* by the United States to obtain state prisoners."[72] The Supreme Court combined two cases for review: *United States v. Mauro*[73] and *United States v. Ford*.[74] In *Mauro*, two prisoners were ordered by a district court to be produced by writs of habeas corpus *ad prosequendum* to federal authorities for criminal conspiracy charges.[75] At the time the writs were issued, the pair was incarcerated in a New York state prison.[76] After they were arraigned in federal court, the judge, noting overcrowded federal prisons, directed that they be returned to state authorities until their trial.[77] Under the terms of the IAD, this would result in the dismissal of the conspiracy charge.[78] The District Court granted a motion to dismiss, finding that the IAD and its punitive sections governed the writs of habeas corpus ad prosequendum.[79] The Second Circuit affirmed, holding that the writ was a detainer that entitled the prisoner to the protections of the IAD.[80]

In *Ford*, federal prosecutors lodged a detainer with state authorities in Massachusetts, and then issued a writ of habeas corpus *ad prosequendum*

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request within thirty days of its receipt."). For the United States, the term "Governor" means the Attorney General of the United States. 18 U.S.C. app. 2 § 3 (1976).

70. *Mauro*, 436 U.S. at 366 (Rehnquist, J., dissenting).

71. A request is merely "[a]n instance of asking for something, esp. in a polite or formal manner; a petition or expression of wish." *Request Definition*, OED ONLINE, http://www.oed.com.proxy.library.nd.edu/view/Entry/163240?rskey=Z3Wqx5&result=1&isAdvanced=false (last visited Mar. 10, 2013). To command means to "order, enjoin, bid with authority or influence." *Command Definition*, OED ONLINE, http://www.oed.com.proxy.library.nd.edu/view/Entry/36949?rskey=Dz1QqB&result=2&isAdvanced=false (last visited Mar. 10, 2013).

72. *Mauro*, 436 U.S. at 349.

73. United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), *rev'd*, 436 U.S. 340 (1978).

74. United States v. Ford, 550 F.2d 732 (2d Cir. 1977), *aff'd*, 436 U.S. 340 (1978).

75. *Mauro*, 436 F.2d at 344.

76. *Id.*

77. *Id.*

78. 18 U.S.C. app. 2 § 2 art. IV(e) (1976).

79. *Mauro*, 436 U.S. at 345.

80. *Id.*

demanding the prisoner's appearance in federal jurisdiction.[81] The prisoner was returned to Massachusetts before the charges were resolved, and after multiple trial delays, he was convicted.[82] The District Court denied his motions for dismissal for multiple violations of the IAD,[83] but the Second Circuit overturned.[84] The Second Circuit held this was clearly a situation in which the rules of the IAD applied, as once a detainer was lodged in Massachusetts, the writ of habeas corpus *ad prosequendum* constituted a "written request for . . . custody. . . ."[85] As such, the court ordered the conviction overturned, and remanded for the dismissal of the indictment with prejudice.[86]

The Supreme Court held that the writ of habeas corpus *ad prosequendum* "is not a detainer within the meaning of the [IAD]," but that "the United States is bound by the [IAD] when it activates its provisions by [*first*] filing a detainer against a state prisoner and then obtains his custody by means of a writ of habeas corpus *ad prosequendum*."[87] The *ad prosequendum* writ would not, alone, invoke the protections of the IAD:

> [T]he issuance of *ad prosequendum* writs by federal courts has a long history, dating back to the first Judiciary Act. We can therefore assume that Congress was well aware of the use of such writs by the Federal Government to obtain state prisoners and that when it used the word 'detainer,' it meant something quite different from a writ of habeas corpus *ad prosequendum*.[88]

The remedial measures of the IAD, the Court ruled, take place only once a detainer has been lodged—the writ acts as a "request for custody" under Article IV, but not as a detainer itself.[89] Thus, the defendant in *Ford* was protected by the IAD's remedial provisions but the defendants in *Mauro* were not.

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81. *Id.* at 346.

82. *Id.*

83. Ford argued that the guarantees of Article IV(c) and Article IV(e) were violated, which require that all charges be resolved before the return of the prisoner to the sending jurisdiction and a speedy trial. *Id.* at 348. Article IV(c), 18 U.S.C. app. 2, provides that: "In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." Article IV(e), 18 U.S.C. app 2, similarly provides: "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

84. *Mauro*, 436 U.S. at 348.

85. *Id.*

86. *Id.*

87. *Id.* at 349.

88. *Id.* at 360.

89. Several circuit courts had already made this determination prior to the Second Circuit's decision in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976) (holding that a writ of habeas corpus was a detainer within the meaning of the IAD). *See, e.g.*, United States v. Keenan, 557 F.2d 912 (1st Cir. 1977) ("The differences between a detainer and a writ of habeas corpus ad prosequendum, in purpose, legal basis, and historical context, are so fundamental as to constitute each a separate, distinct avenue for obtaining custody of

The Court rejected the Government's argument that, because the United States already had an effective means of obtaining prisoners before the enactment of the IAD, Congress intended for the United States to only join as a sending, but not receiving state.[90] "Although the United States perhaps did not gain as much from its entry into the Agreement as did some other states, the fact remains that Congress did enact the Agreement into law in its entirety. . . ."[91] The Court reasoned that, because writs of habeas corpus *ad prosequendum* issued by a federal court are acted upon immediately, enactment of the IAD would have been superfluous.[92] Detainers, though, were often lodged informally, on the initiative of a prosecutor or police officer (as opposed to federal judge) and the "very informality is one source of the difficulty."[93] Thus, once a detainer is lodged, as it was in *Ford*, the negative effects were fully implicated, and the provisions of the IAD took effect to protect against them.

The government argued that because the IAD allowed for governors of states to reject requests for temporary custody, writs of habeas corpus *ad prosequendum* could not be covered under the agreement. Since the writ was a federal court order, allowing a State to refuse its command would violate the Supremacy Clause.[94] The Court rejected this argument:

> We are unimpressed. The proviso of Art. IV(a) does not purport to augment the State's authority to dishonor such a writ. As the history of the provision makes clear, it was meant to do no more than preserve previously existing rights of the sending States, not to expand them. If a State has never had authority to dishonor an *ad prosequendum* writ issued by a federal court, then this provision could not be read as providing such authority. Accordingly, we do not view the provision as being inconsistent with the inclusion of writs of habeas corpus ad prosequendum within the meaning of "written requests."[95]

The Court pointed out that despite the availability of writs of habeas corpus, the Government still used detainers. Furthermore, typically federal courts issued 5,000

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prisoners for federal prosecution."); United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977); Ridgeway v. United States, 558 F.2d 357 (6th Cir. 1977). *But see* United States v. Sorrell, 562 F.2d 227 (3d Cir. 1977) (en banc) (following the Second Circuit's determination).

90. *Mauro*, 436 U.S. at 353-54.

91. *Id.* at 355-56.

92. *Id.* at 360 ("We can therefore assume that Congress was well aware of the use of such writs by the Federal Government to obtain state prisoners and that when it used the word 'detainer,' it meant something quite different from a writ of habeas corpus ad prosequendum."). *See also supra,* notes 18-28 and accompanying text.

93. *Id.* at 358 n.25 (quoting Pitts v. North Carolina, 395 F.2d 182 (4th Cir. 1968)).

94. *Id.* at 363. *See also id.* at 366-67 (Rehnquist, J., dissenting) ("The Agreement speaks only of 'requests' for custody. In the writ in the instant case, on the other hand, the warden . . . was 'HEREBY COMMANDED' [to produce the defendant] . . . . [The] warden would no doubt be surprised to hear that the United States had only 'requested' the custody of his prisoner.").

95. *Id.* at 363.

writs each year, 3,000 of which are in cases where detainers had already been lodged.[96]

In dissent, Justice Rehnquist argued that Congress did not intend to include the use of these writs within the meaning of the IAD, "and thereby make new and different conditions flow from its use."[97] The writ of habeas corpus was a command, and this was plainly at odds with the language of the IAD, which contemplated "requests." He suggested that the legislative history showed that the IAD was merely one of many ways that the federal government could obtain prisoners.[98] Justice Rehnquist further accused the majority of "simply picking and choosing" which provisions it will apply to the United States:

> The Court responds that this provision [allowing governors to refuse requests for extradition under the IAD] was meant to do no more than preserve existing rights, and if the States did not have the rights to refuse writs, then this provision cannot be read as providing such authority. But that is no response at all.... [I]f, as the Court admits, this statutory provision was intended only to "preserve" a Governor's right to refuse a "request," then the only logical and consistent inference therefrom is that the term "request" does not include writs of habeas corpus, which cannot be refused.[99]

Until *United States v. Pleau* the argument over this clause was purely academic.

A. The Circuit Courts After Mauro

Circuit courts have not consistently applied the Supreme Court's holding in *Mauro*. In *United States v. Scheer*,[100] the Second Circuit held that the IAD binds the federal government to its provisions once a detainer has been filed, regardless of whether a writ has subsequently been filed.[101] The Ninth Circuit came to a similar conclusion in *Bloomgarden v. Bureau of Prisons*,[102] stating that "[t]he IAD applies when the United States or a state 'activates its provisions by filing a detainer against a state prisoner and then obtains his custody by means of a writ of habeas

96. *Id.* at 364 n.29 ("They serve to put a state prison officials on notice that the Federal Government has charges pending against a prisoner, even though his immediate prosecution may not be contemplated, and that he should not be released without the Government's being notified.").

97. *Id.* at 367. *See also* Golden, *supra* note 18, at 297-98 (arguing that Congress did not likely consider the effect of the IAD on the writs of habeas corpus statute, and that the majority's solution was grounded in policy rather than statutory construction).

98. *Mauro*, 436 U.S. at 367 ("The agreement also provides *a* method whereby prosecuting authorities may secure prisoners serving sentences in other jurisdictions for trial before the expiration of their sentences and before the passage of time has dulled the memory or made witness unavailable.").

99. *Id.* at 368.

100. 729 F.2d 164, 170 (2d Cir. 1984).

101. *Id.* (holding that a contrary ruling would "be treating the federal government's participation in the IAD[] on a different footing than that of the States" and that "the historic power of the writ seems unavailing once the [federal] government elects to file a detainer in the course of obtaining a state prisoner's presence for disposition of federal charges").

102. 426 Fed. App'x 487 (9th Cir. 2011).

corpus *ad prosequendum*.'"[103] Not all circuits have treated the writ's interaction with the IAD in this way, though. The Third,[104] Fourth,[105] and Tenth[106] Circuits adopted the view that governors have no right, otherwise provided in Article IV(a), to decline *ad prosequendum* writs. These circuits found their support in *Mauro* as well:

> Prior to the enactment of the Interstate Agreement on Detainers Act, the Court [in *Mauro*] observed, a state clearly was forbidden by the Supremacy Clause from disobeying a federal writ of habeas corpus ad prosequendum. The Court then held that Congress, in passing the Act, did not intend to confer on the states any power to resist a federal court order that they did not previously possess.[107]

It is with these inconsistencies in the circuits that the First Circuit approached the case of Jason Pleau.

IV. UNITED STATES V. PLEAU

When Gov. Chafee denied the request of the federal government, he forced the First Circuit to grapple with this question. After the request was denied, the Government filed a petition for a writ of habeas corpus *ad prosequendum*. It was, as the First Circuit suggests, attempting to turn a "request into a command."[108] It might appear that after the Supreme Court's ruling in *Mauro* this may be an easy case: the federal government had filed a detainer, invoking the rights afforded to prisoners (and, in this case, Gov. Chafee) that the IAD provided. "The clear message of these cases [interpreting the IAD] to federal prosecutors is that they should not file a detainer against a state inmate if they want to avoid the application of the IAD."[109] The district court disagreed, following the path of the Third, Fourth, and Tenth Circuits. The IAD "does not, and could not, confer upon a governor the authority to dishonor a federal court's writ of habeas corpus *ad prosequendum*."[110]

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103. *Id.* at 489 (quoting *Mauro*, 436 U.S. at 349).

104. United States v. Graham, 622 F.2d 57, 59 (3d Cir. 1980) (holding that a governor cannot decline to obey the writ, even if a detainer has been lodged).

105. United States v. Bryant, 612 F.2d 799, 802 (4th Cir. 1979) (holding that Article IV(a) "does not apply to a request in the form of a federal writ of habeas corpus *ad prosequendum* that follows a detainer").

106. Trafny v. United States, 311 Fed. App'x 92, 95-96 (10th Cir. 2009) (unpublished) (holding that a prisoner cannot petition a governor for relief under the IAD when the federal government issues a writ after first having lodged a detainer, citing the Supremacy Clause).

107. *Graham*, 622 F.2d at 59; *see also Bryant*, 612 F.2d at 802; *Trafny*, 311 Fed. App'x at 92.

108. *Pleau*, 680 F.3d at 4-5 (1st Cir. 2012) (Nos. 11-1175 & 11-1782).

109. Abramson, *supra* note 46, at 97.

110. United States v. Pleau, No. 10–184–1 S.2011, 2011 WL 2605301, at *1 (D.R.I. June 30, 2011) (citing United States v. Kenaan, 557 F.2d 912 (1st Cir. 1977), for the proposition that in the "unlikely event of such a confrontation [between a state and the federal government], we are confident that the writ would be held [enforceable]").

A. First Circuit

The First Circuit affirmed on appeal.[111] The court stipulated that "a state's refusal to honor a federal court writ is surely a matter of importance; and, if they could, states would certainly mount more such challenges."[112] The court purported to answer two questions on review: whether the federal government could turn a "request into a command" once the initial request had been denied per the provisions of the IAD, and whether in such a case the habeas statute compels production or whether compliance is "merely a matter of comity."[113] In *Mauro*, the First Circuit stated, the Supreme Court held that the "consent reservation [of governors] merely preserved for holding states any pre-existing authority they had to refuse requests," and did not cripple the traditional writ.[114] While states had traditionally been able to refuse requests from other states, the same could not be said about federal intervention into state prisons:

> That 'a state has never had authority to dishonor an *ad prosequendum* writ issued by a federal court' is patent. Under the Supremacy Clause, the habeas statute – like any other valid federal measure – overrides any contrary position or preference of the state, a principle regularly and famously reaffirmed in civil rights cases . . . .[115]

The majority argued that the Supremacy Clause only works in one direction, and that is in favor of the federal government. The court further stated, "that there is an overriding federal interest in prosecuting defendants indicted on federal crimes needs no citation . . . ."[116] The Court argued that, were the governor and Pleau to prevail, the use of the "efficient detainer system [would be] badly compromised" and the "state prison would become a refuge against federal charges."[117]

Pleau and Gov. Chafee argued that the decision to extradite was one of comity, pointing to a history of federal cases.[118] However, the majority held that "these cases misread a 1922 Supreme Court case, *Ponzi v. Fessenden*," which dealt with the question as to whether the federal government could refuse, as a matter of comity, to extradite a prisoner to a state.[119] "None of these circuit cases cited by Pleau and the governor presented *a litigated controversy between the United States*

111. *Pleau*, 680 F.3d at 8.

112. *Id.* at 4.

113. *Id.* at 5 ("This is the way the Supreme Court structured the issues in *United States v. Mauro*, which resolves the first question and frames the second in a way that clearly dictates the answer.").

114. *Id.*; *see also id.* at 6 n.2 ("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.").

115. *Id.* at 6.

116. *Id.* at 7.

117. *Id.* at 7-8.

118. *Id.* at 19 (citing McDonald v. Ciccone, 409 F.2d 28, 30 (8th Cir. 1969), Stamphill v. Johnston, 136 F.2d 291, 292 (9th Cir. 1943) and Lunsford v. Hudspeth, 126 F.2d 653, 655 (10th Cir. 1942)).

119. *Id.* at 6.

and a state over the enforcement of a federal writ."[120] The majority argued it had Supreme Court precedent on its side in deciding this case, declaring that *"Mauro* forbids" any other result.[121]

Two justices dissented from the majority's ruling. They argued that the majority was mistaken in several matters: it failed to follow the express provisions of the IAD, it misconstrued the Supreme Court's opinion in *Mauro*, and it ignored an order by the Supreme Court to "not order relief inconsistent with [the] express terms of a compact."[122] "The IAD's plain language and history make clear that the United States is bound by *all* of its provisions."[123] The dissent argued that the majority makes a Supremacy Clause issue when there is none—both the IAD and the writ statutes are *federal* statutes, and there is "no dispute that the United States is a party to the IAD."[124]

The dissent argued that the real question was whether the IAD conflicted with provisions of the habeas corpus statute such that the *ad prosequendum* writ took precedence:

That question [whether the IAD conflicts with the federal writ] is answered by reading both federal laws and by determining, in the first place, whether there is any conflict that arises from reading the plain language of each statute. . . . [T]here is nothing in the habeas corpus statute as presently articulated, or any of its predecessors going back to the Judiciary Act, that supercedes [sic], contravenes, or downgrades provisions of the IAD *vis-à-vis* the habeas corpus legislation.[125]

The dissent argued that the majority misread *Mauro's* construction of the statute. "Since treating an *ad prosequendum* writ as a request did not expand States' rights in any way, it could not have implicated the Supremacy Clause in any way."[126] *If* there was no previously existing right, as the *Mauro* Court argued, then Article IV(a) did not create it, the dissent argues. But the governors' right was *preserved and retained* in the enactment of the IAD. "This is a case in which a State governor exercised a right *expressly* given to him by *federal law.*"[127] In any case, the dissent chided the majority for using the "overbearingness of a sledgehammer" on a Supremacy Clause issue; jurisprudence, they argued, required a "light

120. *Id.* (noting that all of the opinions relied on by Pleau and Governor Chafee were "odd situations" that "had nothing to do with a federal court's order to a state").

121. *Id.* at 8.

122. *See id.* (Torruella, C.J., dissenting).

123. *Id.* (Torruella, C.J., dissenting).

124. *Id.* (Torruella, C.J., dissenting); *see also id.* at 8 n.8 ("There should thus be no question that in entering into the IAD as an equal 'State,' the United States was, for purposes of the subject matter of the IAD, relinquishing any superior sovereign rights that may have preexisted the Agreement.").

125. *Id.* at 11.

126. *Id.* at 17. "The United States's interpretation of Article IV(a), as adopted by the majority, would balkanize that provision [allowing for governors to refuse requests]. According to that view, the Government would be bound by Mauro as to what is meant by "written request for temporary custody" once a detainer has been filed with the state authorities, but would be free to disregard those other parts of Article IV(a) that it now finds inconvenient to follow." *Id.* at 18.

127. *Id.* at 11 n.12.

touch."[128] "The majority opinion interjects a modicum of unnecessary federal arrogance," they argued, "one which unfortunately permeates this entire controversy when it states that '[t]he Supremacy Clause operates in only one direction.'"[129]

V. DISCUSSION

The First Circuit's holding further added to the chaos among the circuits regarding this issue. The Supreme Court's decision would seem to make the First Circuit's job an easy one: it held that writs of habeas corpus *ad prosequendum* are "written requests" within the meaning of the statute.[130] Thus, when the federal government files a detainer, invoking the protections of the IAD for prisoners, subsequent use of the writ is governed by those provisions, including those provisions allowing governor disapproval of extradition requests.[131] But in the Third, Fourth, Tenth, and now First Circuits, the Government can now simply skirt the IAD's protective provisions by requesting an *ad prosequendum* writ even after a detainer has been filed. There is no support for this conclusion in *Mauro.* These circuits point to language couched in conditionals: *if* the states never had such authority, then the governor refusal clauses did not provide them. It did not resolve the question of that authority, but clearly held that the writ was a "written request" which indeed could be denied.[132]

There is some support for this analysis in the text of the traditional writ,[133] but the result of these circuit decisions is incompatible with the original objectives of the legislation: an efficient, predictable system that affords prisoners protections that the old detainer system did not provide, while giving jurisdictions a means of effectively transferring those prisoners. By its use of the *ad prosequendum* writ, the United States takes advantage of the efficient system created by the IAD, while providing no protections for prisoners who may otherwise want to petition their governor to intervene on their behalf.[134] In a case like Jason Pleau's, this can mean the difference between life and death. As noted by the dissent in *Pleau*, the Supremacy Clause has no place when governors are afforded a right by a federal law, which the IAD became when Congress enacted it in 1970.[135]

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128. *Id.* at 12 ("We further digress to interject that the crimes Pleau is alleged to have committed—armed robbery and murder of a private citizen on the way to making a deposit in the bank—are quintessential state crimes, and betray on their face no hint of any uniquely federal interest.").

129. *Id.* at 12 n.17.

130. *Mauro*, 436 U.S. 340, 363 (1978) ("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 . . . .").

131. *Id.* at 364 (stating that the United States cannot "gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action").

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

133. *See supra* note 70 and accompanying text.

134. *Mauro,* 436 U.S. at 364; *see also United States v. Keenan*, 557 F.2d 912, 916 (Article IV(a) must "not be made 'meaningless,' which could occur if federal authorities were to employ the writ as merely a means of circumventing the strictures of the Agreement.").

135. The majority in *Pleau* refer to the civil rights cases. *See supra* note 103. There is some difference between those cases and Jason Pleau's. In the former, the federal government intervened to afford protections

Policy dictates this result as well. Traditionally, the decision to extradite a prisoner was at the discretion of the governor of the hosting jurisdiction. When the IAD was enacted, it "preserved" and "retained" this right, a provision that was rooted in public policy concerns.[136] There could hardly be a more apt case than the one before the First Circuit: a governor refusing to extradite a prisoner to a death penalty jurisdiction, the United States, citing his state's objection to the punishment. In this regard, the First Circuit eliminates both Gov. Chafee's statutory right and Rhode Island's legislated choice. Prisoners who are currently imprisoned in states which outlaw the death penalty, but which are in circuits that allow the *ad prosequendum* writ to override sections of the IAD, are at risk of being put to death by the United States when it seeks that result.[137] This creates an inconsistent system in place of the uniformity sought by the IAD.

The federal government has not relinquished its rights to use the traditional *ad prosequendum* writ by the terms of the IAD. It simply must not file a detainer first. As noted by Justice Rehnquist's dissent in *Mauro*, prisoners are protected by the Speedy Trial Act of 1974, which includes prisoner transfer provisions, when this writ is invoked outside of the context of the IAD.[138] But this again creates an inconsistent statutory scheme. "[D]ifferent consequences may result from the mere fact of whether or not a detainer has been lodged before an *ad prosequendum* writ is issued."[139] Federal prosecutors in some circuits may elect to file a writ to avoid the provisions of the IAD, and prisoners will be afforded different rights in those states than in those where the circuits have aligned themselves with *Mauro*. Previous commentators have suggested that, at a minimum, the two acts be brought into conformity "for purposes of efficient criminal administration."[140]

Congress should take one step further to resolve the system created by the various circuits by amending the IAD to make explicit the effect of 28 U.S.C. §2241(c)(5). The Supreme Court recently denied review of Jason Pleau's case in the First Circuit, leaving the various circuits' interpretation intact.[141] Congress should respond by foreclosing the use of writs of habeas corpus *ad prosequendum* to produce prisoners once governors have foreclosed the opportunities via Article

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to a class of people being denied them; in the latter, the state has attempted to protect its citizen from the federal government. See Michael J.Z. Mannheimer, *The (Very) Unusual Case of Jason Pleau*, PRAWFSBLAWG (April 12, 2012), available at http://prawfsblawg.blogs.com/prawfsblawg/2012/04/the-very-unusual-case-of-jason-pleau.html.

136. *See supra* note 48.

137. Brief of Amici Curiae Rhode Island ACLU et al. at 20-21, *Pleau v. United States* (2012), (No. 12-223), 2013 WL 141175. For a critical look at the decision to implicate the Hobbs Act in this case, see Mannheimer, *supra* note 135 ("I doubt many people realize how broad the federal Hobbs Act is. Apparently, anyone who robs any commercial establishment violates the Act. Moreover, even if one forcibly steals the proceeds of a commercial establishment, one has likely violated the Act.").

138. *Mauro*, 436 U.S. at 368 ("[T]o the extent any of the concerns expressed by the Court relate to the possibility of pretrial delay, the Speedy Trial Act of 1974. . . must lessen if not totally dissipate those concerns.") (Rehnquist, J., dissenting).

139. *See* Golden, *supra* note 18, at 300 (discussing the inconsistent statutory scheme).

140. *See* Golden, *supra* note 18, at 300-01 ("That different consequences should result from the mere fact of whether or not a detainer has previously been lodged before an *ad prosequendum* writ is issued appears dubious and undesirable.").

141. *Pleau*, 680 F.3d 1, *cert. denied*, 133 S.Ct. 931 (Mem.) (2013).

IV(a) of the IAD (that is, once a detainer has been filed). It seems clear that Congress did not anticipate the clash between federal and state authority that may result from the passage of the Interstate Agreement on Detainers.[142] But it is clear that the passage of the IAD was predicated on an inefficient and unfair system; it provided certainty as to how a prisoner could serve out his sentence and cooperation between member states. Whatever certainty and cooperation that was provided by the IAD to jurisdictions and prisoners has been slowly chipped away by various circuit courts.[143] If indeed more states pass legislation outlawing death penalty legislation, the decisions of the First, Third, Fourth and Tenth Circuits could impose the prerogative of federal prosecutors in those states.

VI. CONCLUSION

The First Circuit in *Pleau* added to the confusion among circuits in its interpretation of the Interstate Agreement on Detainers. Congress enacted the IAD in light of serious issues plaguing the detainer system, issues particularly problematic for prisoners but also for jurisdictions that could not easily reach prisoners held in other states. What it did not anticipate, and what has subsequently been at issue, is the IAD's intersection with the writ of habeas corpus *ad prosequendum*. The Supreme Court seemed to answer this question in *Mauro* and created a system where federal prosecutors had a choice: file a detainer, and be bound by the provisions of the IAD, or petition for a writ. The First Circuit has allowed the Government to bypass this choice altogether and thus has weakened the IAD. In several circuits, *Mauro*'s holding prevails, but prisoners in several other circuits cannot consistently count on the protections provided by the agreement. Congress should amend the IAD to make clear what the circuits have muddled in Supremacy Clause jurisprudence: that a "written request" includes the federal writs, and that governors will always retain the right to withhold their prisoners from extradition. This is particularly important in federal-state clashes such as Jason Pleau's, where the life of the defendant may be on the line.

142. *See* Golden, *supra* note 18, at 300 ("These inconsistences can only be attributed to the lack of foresight on the part of Congress which necessitated the enactment of detainer legislation in a piecemeal fashion.").

143. *See* Daniel Genet, *Courts v. Governors: Prisoners Torn Between States: Who Should Determine Their Fate?* 16 PACE L. REV. 155, 159 (1995) ("Without certainty, prisoners frequently do not take advantage of institutional opportunities, and therefore, behavioral problems result.").