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FEDERAL EXECUTION PROTOCOLS:
LESSONS LEARNED IN GRAMMAR AND REVERSE
FEDERALISM

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ABSTRACT

In 2019, the Department of Justice announced that it was ready to restart federal executions and issued a press release outlining how they would proceed. The Press Release dictated that the federal inmates would be injected using a one-drug protocol comprised of the barbiturate pentobarbital. This was a source of controversy as the new federal protocol was not the same protocol used in several states and the federal statute governing executions at the federal level states that federal executions be conducted “in the same manner” as the state in which the execution occurs. This discrepancy sparked litigation in which courts had to determine if the Federal Government was required to use the same method as the state in which the execution occurs, or if the Federal Government was, instead, required to use a particular state’s protocol, which may or may not be in line with what the DOJ promulgated. Or, put simply, what does the word “manner” mean? This Comment reviews the arguments and the outcome of the litigation and offers a substantive analysis of their strengths and weaknesses, as well as considers what insight the abruptly ending litigation provides into the emergence of reverse federalism in the death penalty context.

INTRODUCTION

President Trump was an enthusiastic supporter of the death penalty; he campaigned on the issue in 2016 and invoked it in office to energize his base.¹ Thus, it came as little surprise that President Trump’s Department of Justice (DOJ) announced in 2019 that it was ready to restart federal executions, which had been dormant since 2003.² There was just one catch: how to do it.

The execution method more broadly was not in question. It would be lethal injection, the method every executing state currently uses.³ But what would this look like specifically? President Trump’s DOJ promulgated a one-drug protocol that would end inmates’ lives with an overdose of the barbiturate pentobarbital—the same drug veterinarians use to euthanize pets.⁴

¹ Chip Brownlee, *The Federal Government Plans to Revive the Death Penalty After 16 Years*, SLATE (July 25, 2019), <https://slate.com/news-and-politics/2019/07/justice-department-bill-barr-orders-revival-federal-executions-lethal-injection.html>.

² Press Release, U.S. Dep’t of Just., Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019) (on file with Dep’t of Just.); see *Courts Halt Federal Government Attempt to Resume Executions*, AM. BAR ASS’N (Dec. 1, 2019), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2019/year-end-2019/courts-halt-federal-government-attempt-to-resume-executions/ (noting 16 year hiatus in federal executions).

³ *Courts Halt Federal Government Attempt to Resume Executions*, *supra* note 2.

⁴ Brownlee, *supra* note 1.

Herein lies the problem: the new federal protocol is not the same as the protocol used in several states. Some states do use a one-drug protocol.⁵ Some states do not.⁶ The federal statute governing executions at the federal level states that federal executions be conducted “in the same manner” as the state in which the execution occurs.⁷ This raised the question: does the Federal Government have to use the same method of execution—lethal injection—as the state in which the execution occurs? Or, is the Government required to use a particular state’s protocol, which may or may not be in line with what the DOJ has promulgated? In short, what does the word “manner” mean?

This issue was litigated in federal court and, eventually, ended by the United States Supreme Court which denied certiorari in June 2020.⁸ The United States District Court for the District of Columbia held the DOJ is required to use not only the state’s method of execution, lethal injection, but also its protocol.⁹ That was a problem for the DOJ. But, in April 2020, the U.S. Court of Appeals for the D.C. Circuit ruled the other way.¹⁰ Subsequently, the United States Supreme Court’s denial of certiorari left the Court of Appeals’ decision intact.¹¹ Which court was correct?

Thus far, the issue has received no serious scholarly attention. Perhaps this is a reflection of the litigation being recent and the topic new. Or, perhaps it is a hope amongst academics that the entire issue is an academic exercise and will die its own death during the new presidential administration.

Yet, the question was an important one, since in quick succession, three executions occurred in July 2020 and a fourth in August 2020.¹² It is neither too early nor too late to review the arguments and the outcome of the litigation and offer a substantive analysis of their strengths and weaknesses, as well as consider what insight the abruptly ending litigation provides into the

⁵ Press Release, U.S. Dep’t of Just., *supra* note 2.

⁶ Susie Neilson, *Lethal Injection Drugs’ Efficacy and Availability for Federal Executions*, NPR (July 26, 2019), <https://www.npr.org/2019/07/26/745722219/lethal-injection-drugs-efficacy-and-availability-for-federal-executions>.

⁷ 18 U.S.C. § 3596(a).

⁸ *U.S. Supreme Court Declines to Hear Execution Protocol Case, Removing Barrier to Resumption of Federal Executions*, DEATH PENALTY INFO. CTR. (June 29, 2020), <https://deathpenaltyinfo.org/news/u-s-supreme-court-declines-to-hear-execution-protocol-case-removing-barrier-to-resumption-of-federal-executions>.

⁹ Amy Howe, *In overnight orders, justices allow federal execution to proceed*, SCOTUSBLOG (July 14, 2020), <https://www.scotusblog.com/2020/07/in-overnight-orders-justices-allow-federal-execution-to-proceed/>.

¹⁰ *See id.*

¹¹ *U.S. Supreme Court Declines to Hear Execution Protocol Case, Removing Barrier to Resumption of Federal Executions*, *supra* note 8.

¹² *Id.*

emergence of reverse federalism in the death penalty context. This article aims to do just that.

Part I provides the backdrop for analyzing this issue, explaining the history of the relevant provision, the Federal Death Penalty Act (the “FDPA”) of 1994, and its past use. Part II then explains the litigation, *In Re: Federal Bureau of Prisons’ Execution Protocol Cases*, and provides an in-depth examination of both parties’ arguments. Part III analyzes these arguments and, ultimately, concludes the DOJ has the better of the arguments in this case. If the Federal Government is to have a functioning death penalty at all, it needs to conduct executions. For the reasons discussed below, that requires it to be able to promulgate its own lethal injection protocol, rather than attempt to mirror various state protocols.

I. The Federal Death Penalty Act of 1994

In order to understand the arguments in the federal suit, it is first helpful to understand the provision at stake. This section offers background necessary for that understanding. It begins by providing a history of the federal death penalty—specifically, the Federal Death Penalty Act of 1994—and then tracks how that provision has changed in nearly three decades of existence.

A. Historical Background

First, it is important to understand little history exists about the federal death penalty. About thirty-four federal death sentences and executions were handed down between 1927 and 1972, when every death penalty statute in the country was invalidated in *Furman v. Georgia*.¹³ That is a miniscule number when compared to the number of death sentences handed down in state courts over the years.¹⁴ The federal death penalty statutes were for more uncommon crimes like espionage, terrorism, or aggravated murders committed

¹³ *Federal Executions 1927-1988*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/federal-executions-prior-to-1988> (last visited Oct. 25, 2020); *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (holding that the death penalty is unconstitutional because it constitutes cruel and unusual punishment in violation of the Eighth Amendment).

¹⁴ George Kannar, *Federalizing Death*, 44 BUFF. L. REV. 325, 329 (1996) (discussing how in 1996, the “ten federal capital verdicts obtained since 1998 [were], to put it mildly, vastly outnumbered by those returned during the same period in the states”). Furthermore, the exact number of death sentences handed down at the state level between 1927 and 1972 are hard to come by. The popular databases start counting state-level death sentences far later. For example, the Death Penalty Information Center begins counting death sentences at the state-level in 1977. See *Death Sentencing Graphs By State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/state-death-sentences-by-year> (last visited Oct. 13, 2020).

on federal enclaves, as opposed to the aggravated murders we commonly see prosecuted in the state courts.¹⁵

The federal death penalty then sat dormant from 1972-1988 after being invalidated and not reinstated by new legislation until 1988.¹⁶ Therefore, the modern era of the federal death penalty began in 1988.¹⁷ This sharply contrasts with the states, which began passing new death penalty statutes in the wake of *Furman*, ushering in the modern death penalty era in 1976.¹⁸ In this era—between 1988 and 2019—eighty-one defendants have been sentenced to death under the federal death penalty.¹⁹ Again, this is a much smaller number when compared to the approximate 5,507 death sentences handed down by the states during the same period.²⁰

A similar picture emerges comparing *executions* at the state and federal levels. States have conducted just over 1500 executions in the modern era alone (since 1976).²¹ Meanwhile, the Federal Government, until recently, had conducted three executions during the same time.²² This shows that the federal death penalty is a *rare* death penalty; and, consequently, questions about its application and implementation do not come up often.

However, the federal death penalty's history is fairly old. The first known federal execution was carried out in 1790 under the Crimes Act of 1790, which was passed by the First United States Congress governing federal executions for 150 years.²³ The Crimes Act of 1790 provided that “the manner of inflicting the punishment of death[] shall be by hanging the person convicted by the neck until dead.”²⁴

¹⁵ See, e.g., 18 U.S.C. § 794 (imposing capital punishment for espionage); 18 U.S.C. § 2332 (imposing capital punishment for terrorism); 18 U.S.C. § 930 (imposing capital punishment as provided in 18 U.S.C. § 1111 for aggravated murder committed on federal enclaves).

¹⁶ *Federal Death Penalty Overview*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty> (last visited Oct. 13, 2020).

¹⁷ See *id.*

¹⁸ See Corinna B. Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 47–48 (2007).

¹⁹ *Death Sentences in the United States Since 1977*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year> (last visited on Oct. 26, 2020).

²⁰ *Id.* (tabulating that 8,734 death sentences have been handed down at the state level from 1973-2019).

²¹ *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database> (last visited Oct. 18, 2020).

²² *Courts Halt Federal Government Attempt to Resume Executions*, *supra* note 2.

²³ *History – Historical Federal Executions*, U.S. MARSHALS SERV., <https://www.usmarshals.gov/history/executions.htm> (last visited Oct. 18, 2020).

²⁴ CHARLES C. LITTLE & JAMES BROWN, *THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA FROM THE ORGANIZATION OF THE GOVERNMENT IN 1789, TO MARCH 3, 1845*, at 119 (Richard Peters ed., 1845).

In 1937, Attorney General Homer Cummings acknowledged that more humane methods of execution, such as electrocution or gas, had been developed since the passing of the Crimes Act of 1790 and proposed new legislation²⁵:

The method of imposition of the death sentence imposed by Federal courts is by hanging, which has been the method employed since the beginning of the Government. Many States now use more humane methods of execution, such as electrocution, or gas... [The proposed bill] provides the manner prescribed by the laws of the State within which the sentence is imposed. In the event the State in which sentence is imposed does not inflict the death penalty, the court is to designate some other State in which the sentence is to be executed in the manner prescribed by the laws of that State.²⁶

Therefore, under Attorney General Cummings' proposed legislation, "a sentence of death imposed by a federal court shall be carried out in the same manner in which such sentences are carried out under the laws of the State in which the Federal court held."²⁷ Congress adopted this language and amended the Act of June 1937 to reflect it.²⁸ The new legislative provision also stated that federal officials "may use available State or local facilities and the services of an appropriate State or local official or employ some other person to carry out the sentence."²⁹

The Federal Government carried out executions under the 1937 legislation until 1972, when (as noted above) the death penalty was invalidated nationwide.³⁰ When Congress reinstated the federal death penalty in 1988, it neglected to mention anything about the "method" or "manner" of execution.³¹ By default, the issue was left to agency discretion, and the DOJ promulgated a regulation, 58 Fed. Reg. 4898, in 1993 to address it.³² A year after the federal regulation was released, Congress passed the FDPA of 1994.³³

²⁵ Brief for Appellants at 4–5, *In re Federal Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020) (No. 19-5322).

²⁶ H.R. Rep. No. 75-164, at 1 (1937).

²⁷ *Id.* at 2.

²⁸ Compare *id.*, with Act of June 1937, ch. 367, 50 Stat. 304 (codified as amended at 18 U.S.C. § 542).

²⁹ Act of June 1937, ch. 367, 50 Stat. 304 (codified as amended at 18 U.S.C. § 542).

³⁰ See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

³¹ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4387, 4390.

³² Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4898 (Jan. 19, 1993) (to be codified at 28 C.F.R. pt. 26). The regulation provided that executions carried out by the Federal Government would be conducted "'by a US Marshal' at a 'federal penal or correctional institution,' and 'by intravenous injection of a lethal substance or substances in a quantity sufficient to cause death.'" Brief for Appellants, *supra* note 25, at 6.

³³ Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 18 U.S.C. §§ 3591-3598).

The FDPA³⁴ was part of the Violent Crime Control and Law Enforcement Act of 1994 signed by President Clinton.³⁵ The FDPA specifically addresses the manner in which death sentences are to be executed, providing:

When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.³⁶

In short, the FDPA specifies that death sentences are to be executed in the same “manner” used by the state in which the execution occurs.³⁷ In so doing, the FDPA essentially readopted the framework adopted by the 1937 legislation for executing death sentences at the federal level.³⁸

Until recently, the Federal Government had executed only three inmates since the passing of the FDPA passing: Timothy McVeigh and Juan Garza in 2001 and Louis Jones in 2003.³⁹ All three executions occurred under the Bush Administration at the federal penitentiary in Indiana.⁴⁰ McVeigh, the only terrorist to be executed by the Federal Government, was put to death for killing 168 people in the Oklahoma City bombing.⁴¹ Eight days later, Garza was executed for the murder of one person, as well as ordering the murder of two others in the course of running his drug ring.⁴² Garza became the first inmate executed under the 1988 federal drug kingpin statute.⁴³ Jones was executed in 2003 for the kidnap, rape, and beating to death of a 19-year-old Private stationed at an Air Force base in Texas.⁴⁴ His crime was the more typical,

³⁴ *Id.*

³⁵ Liliana Segura, *With Federal Executions Looming, the Democrats' Death Penalty Legacy is Coming Back to Haunt Us*, INTERCEPT (July 29, 2019), <https://theintercept.com/2019/07/29/death-penalty-federal-executions/>.

³⁶ 18 U.S.C. § 3596(a).

³⁷ *See id.*

³⁸ Brief for Appellants, *supra* note 32.

³⁹ *Id.* at 7.

⁴⁰ *Id.* at 7–8.

⁴¹ Ryan Gorman, *20 years after the Oklahoma City bombing, Timothy McVeigh remains the only terrorist executed by US*, BUS. INSIDER (Apr. 19, 2015), <https://static-ssl.businessinsider.com/20-years-after-the-oklahoma-city-bombing-timothy-mcveigh-remains-the-only-terrorist-executed-by-us-2015-4>.

⁴² *In Death, Garza Seeks Forgiveness*, ABC NEWS (Jan. 7, 2006), <https://abcnews.go.com/US/story?id=92967&page=1>.

⁴³ *Id.*

⁴⁴ *See* Associated Press, *U.S. Executed Gulf War Veteran Who Raped and Killed a Soldier*, N.Y. TIMES (Mar. 19, 2003), <https://www.nytimes.com/2003/03/19/us/us-executes-gulf-war-veteran-who-raped-and-killed-a-soldier.html>.

state-level capital murder; but, having occurred on a federal enclave, it was subject to federal jurisdiction.⁴⁵

After Jones' execution in 2003, the federal death penalty effectively went dormant.⁴⁶ Executions were then bogged down in ongoing litigation and appeals; and, restricted access to lethal injection drugs added practical problems to the list of barriers to carrying out sentences of death.⁴⁷ But presidential politics also played a role.

B. Presidential Politics Stymie, then Restart the Federal Death Penalty

When President Obama took office in 2008, the federal death penalty was already five years into its de facto moratorium.⁴⁸ It languished another six years before 2014 events brought national attention to the death penalty and scrutiny at the federal level. Botched executions at the state level in Ohio, Oklahoma, and Arizona—all in the first eight months of 2014—led President Obama to order the DOJ to review capital punishment in its entirety.⁴⁹ Whether by design or happenstance, the review was not complete by the time President Obama left office.⁵⁰ In the last months of his presidency, President Obama commuted two federal death sentences to life in prison without the possibility of parole.⁵¹ This was the first time a president had spared someone from execution since 2001.⁵²

⁴⁵ See generally *id.* (stating that the federal government handled the prosecution because Private McBride was abducted from a military base).

⁴⁶ See Sarah N. Lynch, *Trump administration asks top court to allow it to resume federal executions*, REUTERS (Dec. 2, 2019), <https://www.reuters.com/article/us-usa-court-deathpenalty/trump-administration-asks-top-court-to-allow-it-to-resume-federal-executions-idUSKBN1Y628Q>.

⁴⁷ Brownlee, *supra* note 1.

⁴⁸ See Lynch, *supra* note 46. While Obama supported the use of the death penalty for the most heinous of crimes, he said he still struggled with the implementation and practice of the death penalty. Steven Mufson & Mark Berman, *Obama calls death penalty 'deeply troubling' but his position hasn't budged*, WASH. POST (Oct. 23, 2015), [_](#) (quoting President Obama who said he has “not been opposed to the death penalty in theory, but in practice it's deeply troubling,” and that “[t]here are certain crimes that are so beyond the pale that I understand society's need to express its outrage.”).

⁴⁹ The Times Editorial Board, Editorial, *Obama missed a chance to help end capital punishment*, L.A. TIMES (Jan. 23, 2017), <https://www.latimes.com/opinion/editorials/la-ed-death-penalty-obama-20170123-story.html>; *Botched Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/botched-executions> (last visited Oct. 17, 2020) (“Botched executions are ‘those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner.’”)

⁵⁰ The Times Editorial Board, *supra* note 49.

⁵¹ Maurice Chammah, *How Obama Disappointed on the Death Penalty*, THE MARSHALL PROJECT (Jan. 18, 2017), <https://www.themarshallproject.org/2017/01/18/how-obama-disappointed-on-the-death-penalty>.

⁵² *Id.*

By 2016, the moratorium on executions was in its thirteenth year.⁵³ But, the death penalty was about to get a boost. President Trump won the 2016 presidential election and took office in January 2017.⁵⁴ In 2019, well into President Trump's term, the DOJ announced the death penalty review was complete and executions could resume.⁵⁵ The moratorium was about to end.

Following its announcement, the DOJ issued an addendum to the 1994 FDPA summarized in a July 25, 2019, press release. "Attorney General William P. Barr has directed the Federal Bureau of Prisons (BOP) to adopt a proposed Addendum to the Federal Execution Protocol – clearing the way for the Federal Government to resume capital punishment after a nearly two-decade lapse," the press release stated.⁵⁶ It continued:

The Federal Execution Protocol Addendum, which closely mirrors protocols utilized by several states, including currently Georgia, Missouri, and Texas, replaces the three-drug protocol previously used in federal executions with a single drug—pentobarbital. Since 2010, 14 states have used pentobarbital in over 200 executions, and federal courts, including the Supreme Court, have repeatedly upheld pentobarbital in executions as consistent with the Eighth Amendment.⁵⁷

It is not clear what Supreme Court case the DOJ's press release referred to, since the Supreme Court had not heard or decided a pentobarbital case on the merits.⁵⁸ But at least the one-drug protocol adopted by the DOJ is widely known to be the most humane protocol possible; thus, *if* the Supreme Court was to consider it, it would certainly be upheld.⁵⁹

In the wake of the 2019 Addendum and press release, five death-row inmates' executions were scheduled: Daniel Lewis Lee, Lezmond Mitchell, Wesley Ira Purkey, Alfred Bourgeois, and Dustin Lee Honken.⁶⁰ All five executions were to take place by the end of 2019.⁶¹ However, none occurred in

⁵³ See *Courts Halt Federal Government Attempt to Resume Executions*, *supra* note 2.

⁵⁴ *Donald Trump*, BALLOTPEdia, https://ballotpedia.org/Donald_Trump (last visited Oct. 15, 2020).

⁵⁵ Brownlee, *supra* note 1 (noting that DOJ announced that the review was complete, but the report was not released).

⁵⁶ Press Release, U.S. Dep't of Just., *supra* note 2.

⁵⁷ *Id.*

⁵⁸ See *Baze v. Rees*, 553 U.S. 35, 56 (2008); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1116 (2019); *Glossip v. Gross*, 675 U.S. 863, 878–79 (2015).

⁵⁹ Brownlee, *supra* note 1; see also *Limitations on Capital Punishment: Methods of Execution*, JUSTIA, <https://law.justia.com/constitution/us/amendment-08/09-methods-of-execution.html#fn-140> (last visited Oct. 17, 2020) (noting that "the Supreme Court has 'never invalidated a State's chosen procedure,'" and the Court has consistently held that it is ultimately a decision left to the states (citing *Baze v. Rees*, 553 U.S. 35, 48 (2008) (plurality opinion))).

⁶⁰ Press Release, U.S. Dep't of Just., *supra* note 2.

⁶¹ *Id.*

2019 because the inmates sued claiming the new protocol was unlawful under the 1994 FDPA.⁶²

The recent litigation considered a number of issues, the most important of which—and the focus of the inquiry here—was: “Whether the Federal Death Penalty Act prohibits the application of a uniform federal protocol implementing lethal injection as the manner of execution, and instead requires adherence to the particular details of state lethal-injection procedures?”⁶³

II. The Litigation

This section now turns to the litigation in *In Re: Federal Bureau of Prisons’ Execution Protocol Cases* itself by providing the litigation history and discussing the courts’ rulings and explanations for those rulings. It then turns to the parties’ arguments laying out each side of the debate.

A. The Litigation History

The first major ruling in the litigation came on November 20, 2019, when Judge Chutkan, U.S. District Court for the District of Columbia, ruled in the inmates’ favor on a motion for preliminary injunction to stop the DOJ from carrying out the scheduled federal executions.⁶⁴ Obviously, winning the suit would do the inmates no good if they were dead—this is where the preliminary injunction came into play.⁶⁵ To award a preliminary injunction, Judge Chutkan had to find that the inmates would not only suffer irreparable harm if the injunction were denied, but also that they were likely to succeed on the merits.⁶⁶ On the latter point, Judge Chutkan concluded that the DOJ had “exceeded its statutory authority in unilaterally establishing a federal execution protocol and that the prisoners were likely to prevail on their claim that the DOJ had unlawfully adopted the protocol.”⁶⁷ Having made the requisite findings, the district court granted the request for a preliminary injunction in the

⁶² See Brief for Plaintiffs-Appellees at 1–2, *In re Federal Bureau of Prisons’ Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020) (No. 19-5322).

⁶³ Statement of Issues to be Raised, *In re Federal Bureau of Prisons’ Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020) (No. 19-5322) (presenting two other questions to be raised: “Whether plaintiff’s alternative statutory challenges to the federal execution protocol can support affirmance of the district court’s preliminary injunction” and “whether the balance of equities further supports vacating the injunction”).

⁶⁴ *In re Federal Bureau of Prisons’ Execution Protocol Cases*, No. 19-mc-145 (D. D.C. Nov. 20, 2019).

⁶⁵ See *Department of Justice Lawyers Ask the U.S. Supreme Court to Intervene After Federal Appeals Court Refuses to Lift Injunction Against Federal Executions*, DEATH PENALTY INFO. CTR. (Dec. 3, 2019), <https://deathpenaltyinfo.org/news/departments-of-justice-lawyers-ask-the-u-s-supreme-court-to-intervene-after-federal-appeals-court-refuses-to-lift-injunction-against-federal-executions>.

⁶⁶ See *id.*

⁶⁷ *Id.*

case, preventing the BOP and the DOJ from executing the inmates before they had fully litigated their claims.⁶⁸

The DOJ immediately filed an emergency application in the D.C. Circuit Court of Appeals asking the Court to vacate or stay the district court's preliminary injunction allowing the DOJ to move forward with the federal executions as scheduled.⁶⁹ On December 2, 2019, the D.C. Circuit Court unanimously declined to lift the injunction via an unsigned, one-page order concluding that the DOJ had failed to show that the injunction was unjustified in their request.⁷⁰

The DOJ then turned to the Supreme Court asking the Court to put the district court's ruling on hold so it could proceed with the scheduled executions.⁷¹ While the DOJ characterized the district court opinion supporting the injunction (particularly the finding that the inmates were likely to win on the merits) as "implausible,"⁷² the Supreme Court declined to intervene. On December 6, 2019, the Court ultimately denied the government's request for an emergency stay or vacatur in an order stating it "expects that the lower court will work with 'appropriate dispatch' to issue a final opinion on the case."⁷³

Oral arguments for this case before the D.C. Circuit Court of Appeals were heard on January 15, 2020.⁷⁴ Ultimately, the three-judge panel upheld the new federal regulations for carrying out the federal death penalty.⁷⁵ The D.C. Circuit issued its decision in April 2020, holding (1) that the "Federal Death Penalty Act does not require [the] Federal Government to follow execution protocols set forth in state execution protocols that are less formal than state statutes and regulations," and (2) that the "Federal Government's lethal injection protocol, and an addendum to it, were exempt from the Administrative Procedure Act's (APA) requirements for notice-and-comment rulemaking."⁷⁶ As a result, the injunction was vacated and the case was remanded back to the District Court.⁷⁷

⁶⁸ *In re Federal Bureau*, No. 19-mc-145.

⁶⁹ *Department of Justice Lawyers Ask the U.S. Supreme Court to Intervene After Federal Appeals Court Refuses to Lift Injunction Against Federal Executions*, *supra* note 65.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Ariane de Vogue & David Shortell, *Supreme Court Blocks Justice Department From Restarting Federal Executions Next Week*, CNN (Dec. 6, 2019), <https://www.cnn.com/2019/12/06/politics/supreme-court-blocks-justice-department-executions/index.html>.

⁷⁴ *In re Federal Bureau of Prisons' Execution Protocol*, 955 F.3d 106 (D.C. Cir. 2020).

⁷⁵ Howe, *supra* note 9.

⁷⁶ *In re Federal Bureau*, 955 F.3d at 106.

⁷⁷ *Id.* at 108; Howe, *supra* note 9.

The United States Supreme Court also denied certiorari at this point.⁷⁸ The Supreme Court's decision to not intervene in the dispute over the new federal execution protocol meant the D.C. Circuit Court of Appeals' decision stayed in place.⁷⁹ The Supreme Court did not provide an explanation for its denial; however, Justice Sotomayor and Justice Ginsberg both noted they would have granted the prisoners' petition.⁸⁰ The DOJ subsequently scheduled four executions: Daniel Lewis Lee, Wesley Purkey, and Dustin Honken were scheduled for July 13, 2020, and, another, Keith Nelson, was scheduled for August 28, 2020.⁸¹

With the federal executions being rescheduled came the mad dash to keep the Federal Government from bringing the federal death penalty and federal executions back from the dead. The case went back and forth between the courts on issues unrelated to the statutory construction litigation as the courts tried to prevent the executions from moving forward.⁸² However, in the end, these were all for not with the main challenge to the 2019 Protocol being resolved.⁸³

On July 14, 2020, the Supreme Court officially "cleared the way for federal executions to resume for the first time in nearly 20 years."⁸⁴ Daniel Lewis

⁷⁸ *U.S. Supreme Court Declines to Hear Execution Protocol Case, Removing Barrier to Resumption of Federal Executions*, *supra* note 8.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Howe, *supra* note 9, for an overview of the procedural history of Daniel Lewis Lee's case. On July 10, 2020, an Indiana federal district court put the execution of Daniel Lewis Lee on hold per the request of the victims' family. However, on July 12, 2020, the 7th Circuit lifted the district court's stay of execution despite the victims' family's pleas. The victims' family then unsuccessfully sought emergency relief from the Supreme Court on Monday, July 13, 2020. Lee also filed a request with the Supreme Court on Monday, July 13, 2020, asking the Court to intervene because the Court would likely grant review to "weigh in on whether the federal government can 'disregard the rights of crime victims from traveling and attending an execution to which they have already been invited.'" Also on Monday, July 13, 2020, Judge Chutkan granted another preliminary injunction based on the likelihood that Lee and the other inmates (with scheduled executions) would succeed on the merits of the following: (1) their Eighth Amendment claim that federal lethal injection protocol presented risk of severe pain and needless suffering; (2) their suggestion of an "alternative protocol using a pre-dose of certain opioid pain medication drugs;" and (3) their suggested "use of firing squad as alternative method of execution." The government responded to Judge Chutkan's order by filing an emergency appeal, which was rejected and, instead, fast-tracked. On Monday, July 13, 2020, the Federal Government argued before the Supreme Court that Judge Chutkan's order "'turn[ed] on a profound misunderstanding of [the Supreme] Court's Eighth Amendment jurisprudence'" and "'would produce the implausible result that huge numbers of recent state executions have violated the Constitution' and 'would convert courts into precisely the kinds of boards of inquiry refereeing battles of the experts [the Supreme] Court has repeatedly made clear they are not.'" The Supreme Court responded to the 8th Amendment claim, noting that it "'faces an exceedingly high bar'" and that the inmates had not shown they would succeed on such a claim. The Supreme Court also stated that it has yet to hold the states' methods of execution as cruel and unusual because, the states, generally, use the *least* painful execution methods available.

⁸³ *See id.*

⁸⁴ *Id.* (indicating that, in a 5-4 vote, the Supreme Court lifted Judge Chutkan's order and allowed the

Lee was executed at an Indiana federal prison just after 8:00 a.m. on July 14, 2020.⁸⁵ The United States Federal Government then moved quickly and executed two more inmates the same week: Wesley Purkey on Thursday, July 16, 2020,⁸⁶ and Dustin Lee Honken on Friday, July 17, 2020.⁸⁷ In a single week, the United States Federal Government matched the total number of federal executions carried out over the past three decades.⁸⁸ The United States Federal Government then quickly surpassed that number by executing a fourth inmate, Lezmond Mitchell (also in the Indiana federal prison), on August 26, 2020.⁸⁹

As Judge Katsas, one of Court of Appeals judges deciding the case, noted: “To me this [litigation] all turns on the meaning of the word ‘manner.’”⁹⁰ Indeed it did; and, the arguments on both sides of the issue are this discussion’s next focus.

B. *The Inmates’ Arguments*

The inmates’ argument was two-pronged with a number of subparts. First, the inmates argued that the 2019 protocol promulgated by the DOJ exceeded its power under the APA.⁹¹ The APA states that reviewing courts “shall hold unlawful and set aside agency action, findings, and conclusions found to be in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights.”⁹² The inmates argued that because the FDPA provided that executions must be conducted in the “manner” prescribed by the state where the execution occurs, the DOJ did not have the authority to promulgate its 2019

executions to proceed, granted the government’s request to lift the stay that Chutkan had imposed, and denied the requests by the victims’ family and Daniel Lewis Lee to postpone Lee’s execution).

⁸⁵ *Id.*

⁸⁶ Scott Neuman & Laurel Wamsley, *Federal Government Executes 2nd Man After Supreme Court Denies Appeals*, NPR (July 16, 2020), <https://www.npr.org/2020/07/16/891738118/supreme-court-clears-way-for-a-2nd-federal-execution> (noting that the Supreme Court denied staying Purkey’s execution).

⁸⁷ Mark Berman, *Justice Dept. carries out third federal execution in four days*, WASH. POST (July 17, 2020), https://www.washingtonpost.com/national/justice-dept-carries-out-third-federal-execution-in-four-days/2020/07/17/5afb3fa-c86f-11ea-8ffe-372be8d82298_story.html.

⁸⁸ *Id.*

⁸⁹ Justin L. Mack, Lauren Castle & Ryan Martin, *‘I have waited 19 years to get justice’: Lezmond Mitchell executed inside federal prison in Terre Haute*, INDYSTAR (Aug. 26, 2020), <https://www.indystar.com/story/news/crime/2020/08/26/lezmond-mitchell-executed-terre-haute/3442929001/> (noting Mitchell was convicted of killing Alyce Slim (63 years old) and her granddaughter, Tiffany Lee (9 years old), in Arizona in 2001 and was the only Native American on death row).

⁹⁰ Jess Bravin, *Judges Scrutinize Federal Death Penalty Law in Condemned Inmates’ Challenge*, WALL STREET J. (Jan. 15, 2020), <https://www.wsj.com/articles/judges-scrutinize-federal-death-penalty-law-in-condemned-inmates-challenge-11579133380>.

⁹¹ Brief for Plaintiffs-Appellees, *supra* note 62 at 18; *In re* Federal Bureau of Prisons’ Execution Protocol Cases, No. 19-mc-145, at 7 (D. D.C. Nov. 20, 2019).

⁹² 5 U.S.C. § 706(2)(C).

protocol in the first place.⁹³ Second, the inmates argued that even if the DOJ had the power to promulgate its own protocol under the APA, its protocol violated the 1994 FDPA and was therefore invalid.⁹⁴ In support of this point, the inmates made arguments based on statutory text, context, history, and purpose behind the text.⁹⁵

1. Textual Argument

The inmates' first main argument was a textual argument. The 1994 FDPA states that when a federal execution is carried out, the execution "shall be...in the *manner* prescribed by the law of the State in which the sentence is imposed."⁹⁶ Additionally, the law provides that

"if the law of the State does not provide for the implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in *manner* prescribed by such law."⁹⁷

The inmates then provided five reasons why statutory text not only supported their position but should have decided the issue.

First, the inmates pointed to the portion of the statutory language quoted above referring to "the law of the State in which the sentence is imposed."⁹⁸ According to the inmates, this language made it clear that the state in which the sentence is imposed must govern the implementation of federal executions.⁹⁹ Additionally, they pointed to the word "shall" in the statute as making the directive to follow the law of the states a requirement.¹⁰⁰ The plain meaning of the statute, inmates argued, required the Federal Government to conduct the execution in the manner prescribed *by that state's law*.¹⁰¹ If that were not the case, they argued, the phrase "the law of the State in which the sentence is imposed" would be completely unnecessary.¹⁰²

Second, the inmates pointed to the portion of the FDPA that tells courts what to do when a federal death sentence is awarded in a state that does not have the death penalty and, thus, has no manner of executions: "the *court*

⁹³ *In re Federal Bureau*, No. 19-mc-145, at 7.

⁹⁴ Brief for Plaintiffs-Appellees, *supra* note 62, at 18.

⁹⁵ *Id.*

⁹⁶ 18 U.S.C. § 3596(a) (emphasis added).

⁹⁷ *Id.* (emphasis added).

⁹⁸ *Id.*; Brief for Plaintiffs-Appellees, *supra* note 62, at 18.

⁹⁹ *See id.* at 18–19.

¹⁰⁰ 18 U.S.C. § 3596(a); Brief for Plaintiffs-Appellees, *supra* note 62, at 18–19.

¹⁰¹ 18 U.S.C. § 3596(a); Brief for Plaintiffs-Appellees, *supra* note 62, at 18–19.

¹⁰² Brief for Plaintiffs-Appellees, *supra* note 62, at 19.

shall designate another State.”¹⁰³ The inmates argued that if the Federal Government could promulgate its own protocol, then this portion of the FDPA would make no sense.¹⁰⁴ According to the inmates, it would never be left to a court to decide which state’s laws to apply because the DOJ is always supplying its own.¹⁰⁵

Third, the inmates pointed to the ordinary meaning of the word “implementation” as it appears in the FDPA, which, according to the dictionary, means “the process of making something active or effective.”¹⁰⁶ Thus, the inmates claimed that the “manner” of execution is not just the execution method, but also the particular *process* the State uses.¹⁰⁷ Since the FDPA mandates that the “implementation of the sentence” occur “in the manner prescribed by the law of the State in which the sentence is imposed,”¹⁰⁸ adopting the State’s execution method and then using the Federal Government’s process—its protocol—made no sense.¹⁰⁹ Additionally, the inmates pointed out that the government recognized the difference between an execution “method” and the State’s “implementation” of that execution method in the earlier regulation that it promulgated in 1993.¹¹⁰ The inmates argued this recognition amounts to a concession that the two are different and that the FDPA’s use of the word “implementation” means what it says—the procedures by which a method of execution is implemented.¹¹¹

Fourth, the inmates pointed to the ordinary meaning of the term “manner” as it appears in the FDPA, which, according to the dictionary, means a “mode of procedure or way of acting.”¹¹² They argued that a “mode of procedure” does not just mean an execution method.¹¹³ It means how the method is implemented, which, again, the inmates argued, clearly binds the DOJ to the procedures and protocols of the states, rather than allowing it to promulgate a uniform procedure of its own.¹¹⁴

Fifth, and finally, the inmates pointed to the FDPA’s “neighboring language.”¹¹⁵ They noted that the FDPA also has provisions detailing when the

¹⁰³ 18 U.S.C. § 3596(a); Brief for Plaintiffs-Appellees, *supra* note 62, at 19.

¹⁰⁴ Brief for Plaintiffs-Appellees, *supra* note 62, at 19.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 20.

¹⁰⁷ *Id.* at 20–21.

¹⁰⁸ 18 U.S.C. § 3596(a).

¹⁰⁹ Brief for Plaintiffs-Appellees, *supra* note 62, at 20.

¹¹⁰ *Id.* at 21.

¹¹¹ *Id.* at 21–22.

¹¹² *Id.* at 22.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

death penalty is authorized at the federal level, one of which is the “[h]einous, cruel, or depraved *manner* of committing offense.”¹¹⁶ The inmates argued that it is “implausible” that Congress would use the word “manner” to mean two different things within the same statute, particularly in light of the fact that the Supreme Court has determined that identical words appearing within the same statute are assumed to mean the same thing.¹¹⁷ Recognizing this, the inmates argued that “manner” in the FDPA’s substantive sections refers “not simply [to] the *method* of inflicting death—such as gunfire or stabbing,” but also to “whether the *circumstances* involve torture or serious physical abuse.”¹¹⁸ In short, “manner” not only refers to the method of death, but also to the particular circumstances in which it occurs; and that textual reference makes it even more implausible that “manner” in the execution context means only the execution method, rather than its particular circumstances.¹¹⁹

2. *Legislative History and Context Argument*

The inmates’ second main argument was a historical and contextual one.¹²⁰ They argued that the history of and context behind the Federal Death Penalty Act prohibits the Federal Government from creating a single, uniform set of procedures.¹²¹ They began by discussing the Congressional mandate of a uniform approach to federal executions prior to 1937 and then walked through the enactment of the 1937 Act, the 1937 Act’s repeal in 1984, and the final DOJ rule issued in 1993 that “fill[ed] the gap created by the repeal of the 1937 Act,” and established the distinct procedures guiding federal executions.¹²² The inmates argued that this lead-up to the 1994 FDPA passage indicated that the DOJ and the Marshals were aware the statute does not permit the Government to create and use its own execution procedures in federal death penalty cases.¹²³ In fact, the inmates pointed out that the DOJ had unsuccessfully appealed to Congress on nine occasions asking to amend the FDPA to allow for the BOP to execute individuals “pursuant to uniform regulations.”¹²⁴ On each occasion, Congress denied the DOJ’s recommendation of an amendment “‘of the legislation’ to allow ‘the execution of capital sentences’ to be ‘carried out by Federal officials pursuant to uniform regulations issued by the Attorney General’” and refused to enact *any* bills that would

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 23.

¹¹⁸ *Id.* at 22–23.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 23.

¹²¹ *Id.*

¹²² *Id.* at 23–24.

¹²³ *Id.* at 24–25.

¹²⁴ *Id.* at 25.

afford the DOJ the power to develop its own federal execution protocols that would supersede state procedures.¹²⁵ Congress' denial shows that the FDPA is interpreted as "foreclosing uniform federal execution procedures."¹²⁶ Additionally, the United States Supreme Court has stated that when Congress has previously rejected proposed amendments, courts should be "wary of holding that the unamended text accomplishes what the rejected proposals [seek] to achieve."¹²⁷

3. *Excess of Authority Argument*

The inmates next main argument was an excess of authority argument.¹²⁸ The inmates asserted that by attempting to implement a single, uniform protocol for federal executions, the 2019 protocol violated the FDPA in its entirety and the Federal Government exceeded its authority.¹²⁹ The inmates argued the FDPA required the sentencing court to designate another state's law when the state in which the death sentence was imposed does not have the death penalty on its books.¹³⁰ The 2019 Addendum completely "disregard[ed] the last sentence in § 3596 (a)" and wrongly vests this power in the Executive Branch.¹³¹

An additional point the inmates mentioned was that the protocol promulgated by the DOJ fails to comport with *any* of the states where the inmates are to be executed.¹³² The inmates in the litigation were sentenced in Indiana, Arkansas, Missouri, and Texas.¹³³ Indiana and Arkansas use the three-drug lethal injection protocol.¹³⁴ Furthermore, Texas, Missouri, and Indiana all mandate physician involvement in executions, whereas the DOJ protocol does not mandate any physician involvement in federal executions.¹³⁵ However, the inmates pointed out that the 2019 Protocol does not provide for *any* of these state execution methods.¹³⁶ Instead, the 2019 Protocol requires federal executions be administered using pentobarbital—a single drug protocol.¹³⁷

¹²⁵ *Id.* at 24–25.

¹²⁶ *Id.* at 25.

¹²⁷ *Id.*

¹²⁸ *Id.* at 34.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 34–35.

¹³⁴ *Id.*

¹³⁵ *Id.* at 35.

¹³⁶ *Id.*

¹³⁷ *Id.* The Inmates also briefly cover what they term a "threshold issue:" The 2019 Protocol directly

C. *The Government's Arguments*

The Government argued that the application of the 2019 Protocol to the four joined plaintiffs did not conflict with the Federal Death Penalty Act of 1994.¹³⁸ Furthermore, the Federal Government stated that the 2019 Protocol was valid because “manner” means “method” and it was complying with the FDPA by using the *method* of execution on the books of states involved.¹³⁹ To support its argument, the Government looked to statutory construction, history, and interpretation and discussed the absurd results that would have come from the district court’s reading of the FDPA, had the court’s determination stood.¹⁴⁰

1. *Statutory construction, language, and legislative history argument*

The Government’s first main argument was one of statutory construction and legislative history.¹⁴¹ First, the Government looked to the plain meaning of “manner.”¹⁴² The Government defined “manner” as: “characteristic or customary mode of acting,” “a mode of procedure or way of acting,” and “a way, technique, or process of or for doing something.”¹⁴³ The Government pointed out that many English speakers and even the Supreme Court use the words “manner” and “method” interchangeably.¹⁴⁴ Further, there is indication that the Supreme Court agrees with this argument: Justice Alito acknowledged that “‘there [was] strong evidence’ that the district court’s position [was] ‘not supported...by the ordinary meaning’ of the statutory text.”¹⁴⁵

Second, the Government turned to the statutory history and language of the relevant text.¹⁴⁶ The Government traced the statutory history back to the Crimes Act of 1790, which read that “the manner of inflicting the punishment of death, shall be hanging the person convicted by the neck until dead.”¹⁴⁷ It

contradicts the language of the Federal Death Penalty Act of 1994, by wrongly vesting power to the Bureau of Prisons, as opposed to the U.S. Marshals Service. They offer three points to support this argument. However, this paper will not cover this issue in depth because it is not the issue stated on appeal. *Id.* at 37.

¹³⁸ See Brief for Appellants, *supra* note 25, at 15.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 27.

¹⁴¹ *Id.* at 20.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing cases like *Baze v. Rees* and *Bucklew v. Presythe* to illustrate instances when the Supreme Court of the United States used the words “manner” and “method” interchangeably).

¹⁴⁵ *Id.* (quoting *Barr v. Roane*, No. 19A615, 2019 WL 6649067, at *1 (U.S. Dec. 6, 2019)).

¹⁴⁶ *Id.* at 20–21.

¹⁴⁷ *Id.* at 21.

is clear, here, the “manner” of execution is the same as the “method” of execution: hanging.¹⁴⁸

The Government then discussed how Congress replaced the word “hanging” with “the manner prescribed by the laws of the State within which the sentence is imposed” in the 1937 Act.¹⁴⁹ This also shows synonymy of “manner” and “method” of execution.¹⁵⁰ Later, as mentioned in Part I, the Attorney General noted that the states were using the more “humane methods” of execution: electrocution and gas.¹⁵¹ He then proposed that a federal death sentence should be carried out “in the same manner in which such sentences are carried out under the laws of the State in which the Federal court held.”¹⁵² The Government used this to bolster the argument that the words “manner” and “method” are synonymous.¹⁵³ The Government also cited *Andres v. United States*, where the Supreme Court interpreted the 1937 Act as equating “method” with “manner.”¹⁵⁴ Furthermore, both 58 Fed. Reg. 4898, issued in 1993, and the Federal Death Penalty Act of 1994 used the 1937 Act’s same language: “the manner prescribed by the laws of the State within which the sentence is imposed.”¹⁵⁵

Third, the Government pointed out that when Congress enacted the FDPA, not only did it give no indication it was changing the operative language, but there was no attempt made to “depart[] from the two-centuries-old understanding of ‘manner’ in this context.”¹⁵⁶ When a “word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it” if there is no indication of the contrary.¹⁵⁷ In other words, if a word has been read or interpreted in a particular way in the past, then, when that identical language is used in subsequent legislation, it should be read as having the same meaning as it did in the original legislation. Therefore, when the Federal Government implemented the FDPA, it kept the historical reading and understanding of “manner” as a synonym for “method,” as it should have.¹⁵⁸

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 21–22.

¹⁵¹ *Id.* at 31.

¹⁵² *Id.* at 8 (quoting H.R. Rep. No. 75-164, at 2 (1937)).

¹⁵³ *Id.* at 28.

¹⁵⁴ *Id.* at 31 (nothing that, in *Andres*, the Court iterated that the 1937 Act’s usage of the “manner” and “method of inflicting the death penalty” in Hawaii was “death by hanging.”).

¹⁵⁵ *Id.* at 9–10 (comparing language from 18 U.S.C. § 3596 and Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4898 (Jan. 19, 1993)).

¹⁵⁶ *Id.* at 32.

¹⁵⁷ *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) (quoting *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018)).

¹⁵⁸ Brief for Appellants, *supra* note 25, at 32–33.

Fourth, the Government looked at state death penalty statutes as examples of “manner” operating as “method of execution.”¹⁵⁹ In Missouri, the 1988 statute specifies that the “manner of inflicting punishment of death shall be by the administration of lethal gas or . . . lethal injection.”¹⁶⁰ In California, the 1992 enacted legislation states that an individual who is sentenced to death and to be executed can “elect to have the punishment imposed by lethal gas or lethal injection,” but “if either manner of execution . . . is held invalid, the punishment of death shall be imposed by the alternative means” unless there is a provision providing otherwise.¹⁶¹

Fifth, the Government pointed out that Congress also used “may” in Section 3597 of the FDPA.¹⁶² Section 3597 states that the Federal Government “‘may use appropriate State or local facilities for the purpose’ and ‘may use the services of an appropriate State or local official’ in conducting federal executions.”¹⁶³ “May” is a permissive word—things appearing in this section are not requirements.¹⁶⁴ Contrastingly, Congress uses “shall” in Section 3596 of the FDPA: The “federal officials ‘shall’ implement the death sentence in the ‘manner prescribed by the law of the State.’”¹⁶⁵ “Shall” makes everything appearing in this section a requirement.¹⁶⁶ The government used this contrasting language to highlight the district court’s flawed reasoning: “If Section 3596 *required* the Federal Government to use state facilities and personnel in accordance with state procedures, then Congress would have had little reason to provide *discretion* to use State facilities and personnel conferred in Section 3597.”¹⁶⁷

The Government noted that a number of lower courts have actually recognized the Federal Government’s power to establish its own execution protocols under the guidance of the FDPA.¹⁶⁸ For example, in *United States v. Bourgeois*, the Fifth Circuit acknowledged the Federal Government’s authority to “designate the place of execution and the substances to comprise [the] lethal injection.”¹⁶⁹ Additionally, in *United States v. Fell*, the district court explained that if the “‘manner or execution’—there, lethal injection—is

¹⁵⁹ *Id.* at 24–25.

¹⁶⁰ *Id.* at 24.

¹⁶¹ *Id.*

¹⁶² *Id.* at 25–26.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 26.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *United States v. Bourgeois*, 423 F.3d. 501, 509 (5th Cir. 2005).

‘consistent with state practice,’ DOJ may ‘adopt regulations as to specific manner of execution.’”¹⁷⁰

2. *Answer to Inmates’ Claims*

In addition to its statutory language arguments, the Government addressed the district court’s conclusions and why the court was incorrect.¹⁷¹ The Government asserted that the district court read the Federal Death Penalty Act in a way that was counterintuitive and irreconcilable with the statutory and legislative history, and would have ultimately lead to absurd results.¹⁷²

First, the Government noted that the district court misplaced “weight” on part of the FDPA’s legislative history.¹⁷³ The district court based its conclusion partly on the lack of Congressional enactments of legislation after the FDPA went into effect.¹⁷⁴ The Government argued that relying on post-enactment legislative history and failed legislative proposals is extremely problematic, since reliance on post-enactment legislation history has not been deemed a “legitimate tool of statutory interpretation”—but, instead, the exact opposite.¹⁷⁵ And, as the Supreme Court has also stated, failed legislative proposals are “a particularly dangerous ground on which to rest an interpretation of a prior statute.”¹⁷⁶

Second, the Government argued that the district court not only incorrectly relied on failed post-enactment proposals, but it also completely misinterpreted those proposals.¹⁷⁷ The Government concluded that the bills cited enabled the Federal Government to move forward by issuing the 2019 Protocol, as well as empowered the Attorney General to use any method of execution regardless of what is on the states’ books.¹⁷⁸ Furthermore, no matter what the district court tried to infer from Congress’ refusal to adopt the post-enactment proposals, there was no support for the determination that the FDPA prohibits the Federal Government from using an execution method that “adheres to the

¹⁷⁰ United States v. Fell, No. 5:01-cr-12-01, 2018 U.S. Dist. LEXIS 228376, at *13 (D. Vt. Aug. 7, 2018).

¹⁷¹ Brief for Appellants, *supra* note 25, at 30, 32.

¹⁷² *Id.* at 27–28.

¹⁷³ *Id.* at 32.

¹⁷⁴ *Id.* at 30.

¹⁷⁵ *Id.* at 31.

¹⁷⁶ *Id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See id.* (“under the FDPA ‘some persons convicted of the same capital crime...would be executed in different ways—some by electrocution, some in the gas chamber, and ... [some] by firing squad.’” (quoting *Hearing Before the Subcomm. On Crime of the H. Comm. On the Judiciary on H.R. 1241, H.R. 1533, H.R. 1552, H.R. 2359, and H.R. 2360, 104th Cong. 2 (1995)* (opening statement of Chairman McCollum))).

relevant state's manner of execution," since every state that has the death penalty on its books authorizes lethal injection as an execution method.¹⁷⁹

Third, the Government argued that the district court reading would have undoubtedly prevented implementation of the death penalty and produced absurd results that "defy common sense and [could] not reflect Congress's design" – a sentiment shared by multiple Justices on the United States Supreme Court.¹⁸⁰ Essentially, the district court's judgment would have barred the Federal Government from ever administering the FDPA, because it determined that Section 3596 requires federal compliance with the "procedural details" of each individual state's law, down to the smallest details.¹⁸¹ The Government reasoned that that interpretation would command the Federal Government to "comply[] with every single state procedural requirement, regardless of whether the requirement is embodied in a state statute, regulation, policy manual, or unwritten practice."¹⁸² Requiring the Federal Government to follow every small detail of every states' execution protocol to a "T" would give states the functional equivalent of a "veto."¹⁸³ Subsequently, the Federal Government reasoned that state hostility towards the death penalty (at any level) would have been allowed to play a major role in its administration of the death penalty and would have prevented the Federal Government from executing individuals in many, if not a majority, of federal death penalty cases.¹⁸⁴

Fourth, the Government briefly touched on how the district court's holding would be impossible to follow because of the conditions surrounding death penalty statutes in states.¹⁸⁵ For example, some states have "secret" death penalty protocols and drug sources, while others are simply unwilling to reveal their protocols and drug sources to the Federal Government.¹⁸⁶

¹⁷⁹ *Id.* at 32.

¹⁸⁰ *Id.* at 27 (quoting *Barr v. Roane*, 140 S.Ct. 353, 353 (2019) (Alito, J., concurring) ("[T]he District Court's interpretation would lead to results that Congress is unlikely to have intended.")).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 28.

¹⁸⁴ *See id.* at 28–29. Justice Alito noted in *Glossip v. Gross* that the Supreme Court has held the death penalty as constitutional and noted, "Those who oppose the death penalty are free to try to persuade legislatures to abolish the death penalty. Some of those efforts have been successful. They're free to ask this court to overrule it. But, until that occurs, is it appropriate for the judiciary to countenance what amounts to a guerilla war against the death penalty, which consists of efforts to make it impossible for the states to obtain drugs that could be used to carry out capital punishment with little, if any, pain?" Kim Bellware, *Justice Alito Blasts Death Penalty Abolitionists for 'Guerilla War'*, HUFFPOST (Apr. 29, 2015), https://www.huffpost.com/entry/alito-death-penalty-guerrilla-war_n_7175718.

¹⁸⁵ Brief for Appellants, *supra* note 25, at 29.

¹⁸⁶ The Federal Government makes a less palatable argument here. It asserts that states are often even more unwilling to execute an individual on the Federal Government's behalf. The government then goes on to make a brief Supremacy Clause argument stating that neither the FDPA text or history suggests that

Fifth, and finally, the Government noted that the district court's reasoning would have "frustrate[d] the implementation of the FDPA by precluding federal officials from selecting *more* humane lethal-injection protocols than those used by states."¹⁸⁷ The BOP chose pentobarbital because it is more humane than other drug protocols on some states' books.¹⁸⁸ In fact, Justice Sotomayor wrote in her dissent in *Zagorski v. Parker* that "pentobarbital 'does not carry the risks' of pain associate with other drugs."¹⁸⁹ Therefore, if the district court's reading had been followed, the Federal Government would have been forced to follow more painful state execution protocols—an outcome even inmates have opposed.¹⁹⁰ In fact, the Government mentioned the Ohio three-drug sequence protocol, which includes a drug Supreme Court Justices have described as the equivalent of being burned at the stake.¹⁹¹

3. Consistency argument

The Government's last main argument focused on how the district court failed to identify any material inconsistencies between the 2019 Protocol and the FDPA.¹⁹² In fact, the Government asserted that since the district court ultimately failed to identify material inconsistencies between the 2019 Protocol and the FDPA, the 2019 Federal Protocol is consistent with the Federal Death Penalty Act of 1994.¹⁹³ The only inconsistency the district court identified between the two was that the Federal Death Penalty Act of 1994 allows "some states [to] 'establish specific and varied safeguards on how the intravenous catheter is to be inserted,'" while the 2019 Protocol allows this aspect to be "determined 'based on the training, experience, or recommendation of execution personnel.'"¹⁹⁴ The Government stated, in reality, this "difference" is not a difference at all, but rather an indication that the 2019 Protocol enables the adoption of state catheter insertion procedures.¹⁹⁵

The Government did include what it considered the "most notable procedural inconsistency," which the district court mentioned but did not rely on: Texas and Missouri use the single-drug protocol, while Arkansas and Indiana use a three-drug protocol.¹⁹⁶ In the past, inmates have actually argued for the

Congress meant to enable the states or permit them to ignore the Federal Government's authority. *Id.* at 28.

¹⁸⁷ *Id.* at 29.

¹⁸⁸ *Id.* at 29–30.

¹⁸⁹ *Id.* at 30 (citing *Zagorski v. Parker*, 139 S. Ct. 11, 11–12 (2018)).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 32.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 33.

omission of the three-drug protocol because of how much more painful it is compared to the single-drug protocol the 2019 Protocol adopts.¹⁹⁷ The Government noted that the reason why the district court did not rely on this is because the FDPA could not “plausibly be read to empower death-row inmates to pick and choose their preferred features of state lethal-injection procedure.”¹⁹⁸ The Government did acknowledge the discrepancies (things like the use of sedatives and physician involvement) the inmates point out in their brief.¹⁹⁹ However, the Government disposed of these by saying there was nothing in the 2019 Protocol prohibiting such procedures use in the course of a federal execution.²⁰⁰ The Government concluded this ultimately rendered the district court’s injunction “overbroad at best.”²⁰¹

III. Did the Appellate Court Get It Right?

Having set the stage, this Part provides a normative analysis of the issue. It begins by examining the parties’ arguments more closely and explains why the Government correctly prevailed in this case. It then considers the litigation’s implications had the Court ruled in favor of the inmates and outlines the contributions the case makes to the death penalty discussion—specifically, reverse federalism.

A. *Who should have “won”?*

Which side had the better argument in *In Re: Federal Bureau of Prisons’ Execution Protocol Cases*? As Judge Katsas said, it all came down to how one reads the word “manner.”²⁰² This paper takes the position that the Government had the better argument. Here’s why.

First, the Federal Government should not have been required to adhere to every single detail of a state’s execution protocol. If the court had ruled in favor of the inmates and determined that the Federal Death Penalty of 1994 prohibits the application of a uniform federal protocol implementing lethal injection as the *manner* of execution and required adherence to the particular details of state lethal injection procedures, then the court would have forced the Federal Government to strictly follow state execution procedures. And, if not strict adherence then, at a minimum, the courts and the DOJ would have been forced to engage in line-drawing and constantly asking, “How much is enough?” For example, if a state execution protocol required a physician be

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Bravin, *supra* note 90.

present, or, even more extreme, that a certain gauge needle be used in the federal execution, the Federal Government would have then been required to both have a physician present and use the same gauge needle to administer the execution. This would have been extremely burdensome, if not impossible, and would have undoubtedly led to litigation at every step of the process—something courts are generally determined to avoid. Furthermore, the Federal Government should not have been required to strictly adhere to the protocol details of, potentially, every one of the fifty states (if every state, hypothetically, had the death penalty on the table). Additionally, keeping the district court’s ruling in place would have afforded the states the power to bar the Federal Government from carrying out any federal executions—an outcome the Government correctly asserted could not have possibly been Congress’s intent.²⁰³ Thus, I agree with the D.C. Circuit Court of Appeals: this is a strong and valid argument for the Federal Government.

Next, the Government’s statutory interpretation argument was persuasive because the Government supported the interchangeable use of the two words in the death penalty and execution context with extensive analyses of the plain meaning and the historical use of the words, along with citations to Supreme Court cases.²⁰⁴ “Manner” is defined as “a characteristic or customary mode of acting” or a “mode of procedure or way of acting,” while “method” is a “way, technique, or process of or for doing something.”²⁰⁵ They made a good point: English speakers could (and do) use these words interchangeably.²⁰⁶ Even more convincingly, the Government pointed to case precedent that uses the phrases “modes of execution” and “methods of execution” interchangeably, as well as case precedent that uses the words “means,” “mode,” “method,” and “manner” to refer to the mechanisms of inflicting death.²⁰⁷ Furthermore, the Government cited to *Andres v. United States*, where the United States Supreme Court read the 1937 Act “to equate ‘the manner’ of execution with ‘the method’ of execution,” and explained that under the 1937 Act’s “‘manner’ provision, the ‘method of inflicting the death penalty’ in Hawaii was ‘death by hanging.’”²⁰⁸ The Court never held these terms to mean the “precise protocol,” for which the inmates advocated.²⁰⁹

Finally, the Government’s policy arguments were persuasive because the single-drug protocol using pentobarbital is the most “humane” execution by

²⁰³ Brief for Appellants, *supra* note 25, at 27.

²⁰⁴ *Id.* at 20.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 22 (citing *Andres v. United States*, 333 U.S. 740, 745 (1948)).

²⁰⁹ *See id.* at 22, 33.

lethal injection option.²¹⁰ The use of pentobarbital, a barbiturate,²¹¹ is actually far less painful than the three-drug cocktail employed in two dozen states.²¹² Barbiturates target the central nervous system and are essentially pain relievers.²¹³ It does not cause pain; therefore, you cannot have a painful execution—unless, of course, the individual inserting the IV messes up (a possibility since doctor oversight is not required).²¹⁴ The injection of pentobarbital shuts down the individual’s central nervous system and is supposed to “eliminate the potential for the silent agony caused by the muscle paralysis and subsequent potassium chloride injection” of the three-drug protocol.²¹⁵ The three-drug protocol is far more painful because the second and third drugs are just that—painful. So, if the first drug is incorrectly administered, an execution following this protocol becomes torturous.²¹⁶ Thus, the mere lack of pain caused by the use of the single-drug protocol is more humane. The Government was trying to engage in the best possible practice.

However, the Government’s argument that many death penalty states have out of date and secret execution protocols was not persuasive and deserves pushback.²¹⁷ The Government asserted that many states have secret/blocked protocols, making it impossible for the Federal Government to bend to the states’ lethal injection or execution protocols and procedures.²¹⁸ State secrecy has not been used against other executioners, which, historically, have been quite willing to share their execution procedures and details with other executing states.²¹⁹ Thus, why the states wouldn’t share with the Federal Government is unclear—they are on the same side. However, the other arguments were persuasive enough to win the day.

²¹⁰ See Press Release, U.S. Dep’t of Just., *supra* note 2.

²¹¹ John P. Cunha, *Pentobarbital*, RXLIST, https://www.rxlist.com/consumer_pentobarbital_nembutal/drugs-condition.htm (last visited Oct. 26, 2020).

²¹² Neilson, *supra* note 6.

²¹³ Charles P. Davis, *Barbiturates*, MEDICINET (Nov. 25, 2019), https://www.medicinenet.com/barbiturates-oral/article.htm#what_are_barbiturates. Pentobarbital is often used to euthanize pets. Josiah Bates, *Why the Justice Department’s Plan to Use a Single Drug Lethal Injection is Controversial*, TIME (July 29, 2019), <https://time.com/5636513/pentobarbital-executions-justice-department/>.

²¹⁴ See Neilson, *supra* note 6; see also Adam Pinkser, *Medical Expert Criticizes Federal Government’s Lethal Injection Protocol*, IND. PUB. MEDIA (Sept. 25, 2020), <https://indianapublicmedia.org/news/medical-expert-criticizes-federal-governments-lethal-injection-protocol.php>.

²¹⁵ Neilson, *supra* note 6.

²¹⁶ See *id.*

²¹⁷ See Brief for Appellants, *supra* note 25, at 29.

²¹⁸ *Id.*

²¹⁹ See, e.g., ROBIN KONRAD, DEATH PENALTY INFO. CTR., BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 45 (Robert Dunham & Ngozi Ndulue eds., 2018), <https://files.deathpenaltyinfo.org/documents/pdf/SecrecyReport-2.f1560295685.pdf> (noting sharing of information and execution drugs between state departments of corrections).

B. What if the Inmates had won?

If the inmates had won the litigation, all federal executions would have been required to follow the various state protocols as discussed above. The main concern would have been subjecting federal executions to state-level problems. This would have turned out poorly for the people being executed, especially if the state in which the execution is carried out uses the three-drug protocol. It is important to note that many states currently use the pentobarbital, one-drug protocol method, and that pentobarbital is *extremely* hard to come by.²²⁰ This forces the states to become “resourceful.” Texas, for example, keeps pentobarbital past its shelf life since the drug is almost impossible to obtain.²²¹ And, while this is concerning, this is not the issue on appeal.

C. What contributions does this case make to the death penalty discussion?

At first glance, it is tempting to view the *In Re: Federal Bureau of Prisons’ Execution Protocol Cases* as just another case study in the wonders of statutory construction. Yet, upon closer inspection, the case offers insight beyond simple squabble over the meaning of statutory text. The litigation here was the first and only litigation exploring the Federal Government’s relationship to the states in the realm of executions.²²² Perhaps this case can tell us something about federalism in the death penalty context. And, messy as this litigation was, it established the independence of the federal death penalty system.²²³ While death penalty decisions were historically left to the states, that is no longer the case. In this sense, “reverse federalism” has emerged—not only can the states make their own way on issues of state regulations, but the Federal Government can now make its own way on the issue as well, *even as it executes in a certain state for crimes committed there*.

In some sense, the Federal Government has always ascribed to “reverse federalism.” While it has long been able to prosecute under the death penalty,

²²⁰ Josh Sanburn, *The Hidden Hand Squeezing Texas’ Supply of Execution Drugs*, TIME (Aug. 7, 2013), <https://nation.time.com/2013/08/07/the-hidden-hand-squeezing-texas-supply-of-execution-drugs/>.

²²¹ Jolie McCullough, *How many doses of lethal injection drugs does Texas have?*, TEX. TRIB. (Sept. 8, 2020), <https://apps.texastribune.org/execution-drugs/> (“Texas has been able to keep an adequate supply on hand, but part of that is because the state has repeatedly extended the expiration date of doses in stock — retesting the potency levels as the expiration date nears and then relabeling them.”); Jolie McCullough, *Will Texas have to push back the expiration dates on its lethal injection drugs?*, TEX. TRIB. (May 17, 2018), <https://www.texastribune.org/2018/05/17/texas-lethal-injection-drugs-are-set-expire-upcoming-executions/> (“The current beyond-use dates, however, don’t necessarily mean the state won’t carry out the executions. Both batches of pentobarbital the state has now have seemingly had their beyond-use date extended in the past.”); Neilson, *supra* note 6 (noting federal execution methods).

²²² See *In re Fed. Bureau of Prisons’ Execution Protocol Cases*, 955 F.3d 106, 108 (D.C. Cir. 2020).

²²³ See Howe, *supra* note 9.

even in states that do not have it,²²⁴ it was always assumed that the Federal Government would execute individuals following state protocol. However, the 2019 Protocol litigation *further* empowered the Federal Government in the death penalty context, raising its independence to a whole new level.²²⁵ The Federal Government now has even more freedom, such as promulgating its own execution protocols.

This freedom, in turn, allows the Federal Government to be a “leader” of an unusual sort. We tend to think of the states as the lead innovators in the “federal experiment.” As Justice Brandeis famously wrote, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risking the rest of the country.”²²⁶ We traditionally think of the Federal Government as imposing rules upon the nation as a whole.²²⁷ The Federal Government is, in the typical story, the antithesis of a “laboratory” of experiment that allows the states to watch, learn, and ignore if they choose.²²⁸ However, in the execution context, a sense of “reverse federalism” has blossomed. The *Federal* Government can now “experiment” in the realm of executions as well, meaning that it can put its vast resources and expertise to work in coming up with its *own* execution protocol. Thus, it is possible this litigation opens the door to a new era of executions—one where the Federal Government leads by example and states follow not because they must, but because they can.

CONCLUSION

In Re: Federal Bureau of Prisons’ Execution Protocol Cases litigation was a “deep-dive” vocabulary discussion.²²⁹ The death penalty and executions at the state and federal levels are, without a doubt, polarizing topics. As a result of the polarizing nature of this power afforded to the states, and now the Federal Government, “blind justice” is next to impossible. This was evident in

²²⁴ The prosecution of the Boston Marathon Bomber is a salient example of this. See Michael Balsamo, Alanna D. Richer & Michael Rosenfield, *Feds to Seek Death Sentence for Boston Bomber Tsarnaev*, NBC BOSTON (Aug. 20, 2020), <https://www.nbcboston.com/news/local/feds-to-seek-death-sentence-for-boston-bomber-tsarnaev/2181138/>.

²²⁵ See Press Release, U.S. Dep’t of Just., *supra* note 2.

²²⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

²²⁷ See *Federalism*, CORNELL UNIV. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/federalism> (last visited Oct. 14, 2020).

²²⁸ See *New State Ice Co.*, 285 U.S. at 311.

²²⁹ Kristine Phillips, *DOJ says it has authority to carry out federal executions regardless of state rules*, USA TODAY (Jan. 15, 2020), <https://www.usatoday.com/story/news/politics/2020/01/15/death-penalty-doj-seeks-resume-federal-executions/4459191002/>.

the proceedings, briefings, and judgments surrounding this case.²³⁰ In fact, the district court ultimately failed to answer the question: “Whether the Federal Death Penalty Act prohibits the application of a uniform federal protocol implementing lethal injection as the manner of execution, and instead required adherence to the particular details of state lethal injection procedures.”²³¹ Instead, the district court answered the question: “Can the Federal Government execute individuals?” If the judge’s order had stood, it would have “hobble[d] federal attempts to carry out executions.”²³² That was not the issue at bar.

Upon further analysis, this litigation was more than an exercise in statutory construction. It symbolizes a move towards “reverse federalism,” which enables the Federal Government to promulgate its own death penalty protocol regardless of where the states stand on the death penalty or the details of the states’ protocols. As a result, the states are no longer alone in serving as “laboratories of experiment.”²³³ The Federal Government, in *In re Federal Bureau of Prisons’ Execution Protocol Cases*, also became a “laboratory of experiment” serving as an example for states in the death penalty context.²³⁴

²³⁰ See Brief for Appellants, *supra* note 25 at 1; see also Brief for Plaintiffs-Appellees, *supra* note 62, at 1.

²³¹ See *In re Federal Bureau of Prisons’ Execution Protocol Cases*, No. 19-mc-145 (D. D.C. Nov. 20, 2019).

²³² See Mark Berman & Ann E. Marimow, *Trump administration’s plans to resume federal executions debated at Appeals court*, WASH. POST (Jan. 15, 2020), https://www.washingtonpost.com/local/legal-issues/trump-administrations-plans-to-resume-federal-executions-return-to-court/2020/01/14/205e3ff2-3326-11ea-91fd-82d4e04a3fac_story.html.

²³³ *New State Ice Co.*, 285 U.S. at 311 (referencing states as laboratories for novel social and economic experiments).

²³⁴ See *id.* (referencing states as laboratories for novel social and economic experiments).

