APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 15, 2020

Decided April 7, 2020

No. 19-5322

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES,

JAMES H. ROANE, JR., ET AL.,
Appellees,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
Appellants.

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-mc-00145)

Melissa N. Patterson, Attorney, U.S. Department of Justice, argued the cause for appellants. With her on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Jessie K. Liu*, U.S. Attorney, *Hashim M. Mooppan*, Deputy Assistant Attorney General, *Paul R. Perkins*, Special Counsel, and *Mark*

B. Stern, Attorney.

Catherine E. Stetson argued the cause for appellees. With her on the brief were *Sundeep Iyer*, *Pieter Van Tol*, *Joshua M. Koppel*, *Arin Smith*, *Jon Jeffress*, *Alan E. Schoenfeld*, *Stephanie Simon*, and *Shawn Nolan*, Assistant Federal Public Defender.

Before: TATEL, KATSAS, and RAO, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

Concurring opinion filed by *Circuit Judge* KATSAS.

Concurring opinion filed by *Circuit Judge* RAO.

Dissenting opinion filed by *Circuit Judge* TATEL.

PER CURIAM: The Federal Death Penalty Act of 1994 (FDPA) requires federal executions to be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). It is common ground that this provision requires the federal government to adhere at least to a State's choice among execution methods such as hanging, electrocution, or lethal injection. The district court held that the FDPA also requires the federal government to follow all the subsidiary details set forth in state execution protocols—such as, in the case of lethal injection, the method of inserting an intravenous catheter. On that basis, the court preliminarily enjoined four federal executions.

Each member of the panel takes a different view of what the FDPA requires. Because two of us believe that the district court misconstrued the FDPA, we vacate the preliminary injunction.

I

A

On three different occasions, Congress has addressed the "manner" of implementing the death penalty for federal capital offenses. In the Crimes Act of 1790, the First Congress specified that "the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until dead." Crimes Act of 1790, ch. 9, § 33, 1 Stat. 112, 119. This provision governed federal executions for over 140 years.

In 1937, Congress changed this rule to make the "manner" of federal executions follow state law. Specifically, Congress provided:

> The manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed. The United States marshal charged with the execution of the sentence may use available State or local facilities and the services of an appropriate State or local official or employ some other person for such purpose .... If the laws of the State within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof.

An Act To Provide for the Manner of Inflicting the Punishment of Death, Pub. L. No. 75-156, 50 Stat. 304 (1937). Congress repealed this provision in 1984,

see Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1987, but left intact the underlying capital offenses. Accordingly, federal law still authorized the death penalty, but no federal statute specified how it would be carried out.

To fill this gap, the Attorney General promulgated a 1993 regulation titled "Implementation of Death Sentences in Federal Cases." 58 Fed. Reg. 4898, 4901–02 (Jan. 19, 1993). It provides that, unless a court orders otherwise, the "method of execution" of a federal death sentence shall be "[b]y intravenous injection of a lethal substance or substances in a quantity sufficient to cause death, such substance or substances to be determined by the Director of the Federal Bureau of Prisons." 28 C.F.R. § 26.3(a)(4) (2019). The regulation also addresses various other matters including the time and place of execution, when the prisoner must be notified of the execution, and who may attend it. *Id.* §§ 26.3–26.5.

Congress enacted the FDPA in 1994. Under the FDPA, as under the 1937 statute, the "manner" of implementing federal death sentences turns on state law. In pertinent part, the FDPA provides that a United States marshal

> 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.

18 U.S.C. § 3596(a). The FDPA also provides that a marshal overseeing an execution "may use appropriate State or local facilities" and "may use the services of an appropriate State or local official." *Id.* § 3597(a).

B

At various times since 2001, the Department of Justice has developed protocols setting forth the precise details for carrying out federal executions. One such protocol was adopted in 2004 and updated in 2019. As updated, the protocol "provides specific time related checklists for pre-execution, execution, and post execution procedures, as well as detailed procedures related to the execution process, command center operations, contingency planning, news media procedures, and handling stays, commutations and other delays." App. 24. This 50-page document addresses, among other things, witnesses for the execution, the prisoner's final meal and final statement, strapping the prisoner to the gurney, opening and closing the drapes to the execution chamber, injecting the lethal substances, and disposing of the prisoner's body and property.

For the three federal executions conducted between 2001 and 2003, the Bureau of Prisons used a combination of three lethal substances—sodium thiopental, a barbiturate that "induces a deep, comalike unconsciousness when given in the amounts used for lethal injection," *Baze v. Rees*, 553

U.S. 35, 44 (2008) (plurality opinion); pancuronium bromide, which stops breathing; and potassium chloride, which induces cardiac arrest. None of the three prisoners challenged these procedures. In 2008, the Bureau memorialized its use of the three substances in an addendum to its 2004 execution protocol, and the Supreme Court held that Kentucky's use of the same three substances for executions did not violate the Eighth Amendment, *see id.* at 44, 63; *id.* at 94 (Thomas, J., concurring in judgment). But by 2011, a "practical obstacle" to using sodium thiopental had emerged, "as anti-death penalty advocates pressured pharmaceutical companies to refuse to supply the drug" for executions. *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015).

The Bureau then explored the possible use of other lethal substances. Its personnel visited state execution sites and evaluated their protocols. BOP also consulted with medical experts, reviewed assessments of difficult executions, and studied relevant judicial decisions. It considered several options, including three-drug protocols using other barbiturates, three-drug protocols using weaker sedatives, and one-drug protocols.

After extensive study, the Bureau recommended use of a single barbiturate—pentobarbital—to carry out federal executions. It noted that many recent state executions had used pentobarbital without difficulty and that courts repeatedly have upheld the constitutionality of its use for executions. Further, BOP had located a "viable source" for obtaining it. App. 15, 19.

For these reasons, the Bureau proposed a two-page addendum to its main execution protocol. The United States Marshals Service concurred in the proposal. On July 24, 2019, the Attorney General approved the addendum and directed the Bureau to adopt it. BOP did so the next day. This 2019 addendum makes pentobarbital the sole lethal substance to be used in federal executions. The addendum also specifies procedural details such as dosage, identification of appropriate injection sites, and the number of backup syringes.

C

This appeal arises from several consolidated cases in which twelve death-row inmates challenge the federal execution protocol. The first of these cases was filed in 2005, by three inmates who are not parties to this appeal. With the government's consent, the district court stayed their executions pending the decision in *Hill v. McDonough*, 547 U.S. 573 (2006). The government subsequently requested that the case be stayed pending the decision in *Baze*. With no objection from the inmates, the district court granted the request. In 2011, the government announced that it lacked the substances necessary to implement its execution protocol. From then through 2019, the consolidated cases were stayed, and the government submitted status reports explaining that its revision of the protocol was ongoing. During that time, one of the plaintiffs involved in this appeal—Alfred Bourgeois—filed a complaint challenging the unrevised protocol. On the parties' joint motion, that lawsuit was stayed pending the revision.

On July 25, 2019, the Department of Justice informed the district court that it had adopted a revised protocol providing for the use of pentobarbital. That same day, DOJ set execution dates for the four plaintiffs involved in this appeal: Daniel Lee, Wesley Purkey, Dustin Honken, and Bourgeois. Each of them moved for a preliminary injunction. Collectively, they claimed that the 2019 protocol and addendum violate the FDPA, the Administrative Procedure Act, the Federal Food, Drug, and Cosmetic Act, the Controlled Substances Act, and the First, Fifth, Sixth, and Eighth Amendments to the Constitution.

On November 20, 2019, the district court issued a preliminary injunction prohibiting the government from executing any of the four plaintiffs. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 1:19-mc-145, 2019 WL 6691814 (D.D.C. Nov. 20, 2019). The court held that the plaintiffs were likely to succeed on the merits of their claim "that the 2019 Protocol exceeds statutory authority." *Id.* at *7. In particular, the court concluded that "the FDPA gives decision-making authority regarding 'implementation'" of federal death sentences to states. *Id.* at *4. Thus, "insofar as the 2019 Protocol creates a single implementation procedure it is not authorized by the FDPA." *Id.* at *7. The court reasoned that the requirement to conduct executions "in the manner prescribed" by state law likely applies both to the selection of an execution method, such as lethal injection, and to "additional procedural details" such as the precise procedures for "how the intravenous catheter is to be inserted." *Id.*

at *4, *6. The court did not address whether the plaintiffs were likely to succeed on their various other claims. The court further held that the balance of equities and the public interest favored a preliminary injunction. *Id.* at *7.

The government filed an interlocutory appeal under 28 U.S.C. § 1292(a)(1) and moved this Court immediately to stay or vacate the injunction. Without addressing the merits, we concluded that the motion did not meet "the stringent requirements for a stay pending appeal." Order at 1, *Roane v. Barr*, No. 19-5322 (D.C. Cir. Dec. 2, 2019).

The government applied to the Supreme Court for an emergency stay or vacatur of the preliminary injunction. The Court denied the application but directed us to decide the government's appeal "with appropriate dispatch." *Barr v. Roane*, 140 S. Ct. 353 (2019 mem.). Three justices explained their view that the government was "very likely" to succeed on appeal. *Id.* (statement of Alito, J.).

We then ordered expedited briefing and argument on the government's appeal.

II

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). A party "seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in

his favor, and that an injunction is in the public interest." *Id.* at 20. On appeal, we review the district court's legal conclusions *de novo* and its weighing of the four relevant factors for abuse of discretion. *Abdullah v. Obama*, 753 F.3d 193, 197–98 (D.C. Cir. 2014).

In reviewing a district court's conclusion as to likelihood of success, "[t]here are occasions … when it is appropriate to proceed further and address the merits" directly. *Munaf v. Geren*, 553 U.S. 674, 689–92 (2008); *see also Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017). For several reasons, we exercise our discretion to resolve the merits of plaintiffs' primary FDPA claim. This claim is a purely legal one, which the parties have briefed thoroughly. At oral argument, the parties agreed that we should decide it now. Finally, assessing only the likelihood of success would invite further litigation and delays on remand, which would hardly constitute appropriate dispatch.

The plaintiffs press two distinct claims under the FDPA. The first, on which the district court found they were likely to succeed, involves the requirement to implement federal executions in the manner provided by state law. As explained in separate opinions that follow, Judge Katsas and Judge Rao both reject that claim on the merits. Judge Katsas concludes that the FDPA regulates only the top-line choice among execution methods, such as the choice to use lethal injection instead of hanging or electrocution. Judge Rao concludes that the FDPA also requires the federal government to follow execution procedures set forth in state statutes and

regulations, but not execution procedures set forth in less formal state execution protocols. Judge Rao further concludes that the federal protocol allows the federal government to depart from its procedures as necessary to conform to state statutes and regulations. On either of their views, the plaintiffs' primary FDPA claim is without merit. Accordingly, the preliminary injunction must be vacated, and judgment for the government must be entered on this claim.

Alternatively, the plaintiffs contend that the federal protocol and addendum reflect an unlawful transfer of authority from the United States Marshals Service to the Federal Bureau of Prisons. The district court did not address this claim, but the plaintiffs press it as an alternative basis for affirmance, and both parties ask us to resolve it. A court has discretion to consider alternative grounds for affirmance resting on purely legal arguments. *See*, *e.g.*, *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017). And as noted above, in addressing likelihood of success on the merits, a court has discretion to decide the claim. Two of us address the alternative FDPA claim here. As explained in their separate opinions, Judge Katsas would reject the claim on the merits, and Judge Rao would hold that it was forfeited.

The government also asks us to decide whether its protocol and addendum violate the notice-and-comment requirement of the Administrative Procedure Act. The district court did not reach that issue, and the plaintiffs urge us not to reach it. Judge Katsas and Judge Rao resolve the notice-and-

comment claim because, on their view, it involves purely legal questions intertwined with the merits of the FDPA issues at the center of this appeal. On the merits, Judge Katsas and Judge Rao conclude that the 2019 protocol and addendum are rules of agency organization, procedure, or practice exempt from the APA's requirements for notice-and-comment rulemaking. Judgment for the government must be entered on this claim.

Finally, the government asks us to reject the plaintiffs' claims under the Food, Drug, and Cosmetic Act and the Controlled Substances Act. We decline to do so because those claims were neither addressed by the district court nor fully briefed in this Court. We do share the government's concern about further delay from multiple rounds of litigation. But the government did not seek immediate resolution of all the plaintiffs' claims, including the constitutional claims and the claim that the protocol and addendum are arbitrary and capricious under the APA. Thus, regardless of our disposition, several claims would remain open on remand.

III

The Court vacates the preliminary injunction and remands the case to the district court for further proceedings consistent with this opinion. For the reasons given in his separate opinion, Judge Tatel dissents.

So ordered.

KATSAS, *Circuit Judge*, concurring: The principal question in this appeal is what constitutes a "manner" of execution within the meaning of the Federal Death Penalty Act (FDPA). The government says that "manner" here means "method," such that the FDPA regulates only the top-line choice among execution methods such as hanging, electrocution, or lethal injection. The plaintiffs, the district court, and Judge Tatel say that "manner" encompasses any state execution procedure, down to the level of how intravenous catheters are inserted. Judge Rao agrees, at least if the procedure is set forth in a state statute or regulation.

In my view, the government is correct. The FDPA's text, structure, and history show that "manner" refers only to the method of execution. Moreover, the federal execution protocol does not violate the FDPA by transferring authority from the United States Marshals Service to the Federal Bureau of Prisons. Furthermore, the protocol did not need to be promulgated through notice-and-comment rulemaking. For these reasons, I would vacate the preliminary injunction and remand the case with instructions to enter judgment for the government on the plaintiffs' FDPA and notice-and-comment claims. Finally, apart from the merits, I would vacate the preliminary injunction because the balance of equities tips decidedly in favor of the government.

I

A

The FDPA requires federal executions to be implemented "in the manner prescribed by the law of

the State in which the sentence is imposed." 18 U.S.C. § 3596(a). This appeal turns on the level of detail at which that provision operates. Does it cover the use of lethal injection rather than other execution methods such as hanging or electrocution? The selection of a lethal substance or substances? How much of the substance to inject, and how many syringes to use for the injections? How many intravenous lines to insert, and where to insert them? Who should insert the lines? In modern execution practice, governments address such issues systematically and in advance of any execution. At the federal level, they are addressed by the FDPA, Department of Justice regulations, the federal execution protocol, and the protocol addendum. Likewise, at the state level, they are addressed in comparable detail by state statutes, regulations, and execution protocols.

The government contends that the "manner" of execution regulated by the FDPA is simply the method or mode of execution—the top-line choice among mechanisms of fatality such as hanging, firing squad, electrocution, lethal gas, or lethal injection. Under that interpretation, the federal protocol is clearly consistent with the FDPA: Every state that authorizes capital punishment uses lethal injection "as the exclusive or primary means of implementing the death penalty." *Baze v. Rees*, 553 U.S. 35, 42 (2008) (plurality opinion). The federal regulations likewise designate lethal injection as the means for implementing capital punishment, 28 C.F.R. § 26.3(a)(4), and the federal protocol establishes procedures for these injections.

The district court and the plaintiffs read the FDPA much more broadly. According to the district court, the FDPA covers not only the method of execution but also "additional procedural details such as the substance to be injected or the safeguards taken during the injection." *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 1:19-mc-145, 2019 WL 6691814, at *4 (D.D.C. Nov. 20, 2019). These "additional procedural details" include even provisions on "how the intravenous catheter is to be inserted." *See id.* at *6. As an example, the district court cited state protocol provisions requiring the catheter to be inserted by "medically trained" personnel, *id.* at *6 n.6, whereas the federal protocol requires the method of insertion to be determined based on "a recommendation from qualified personnel" or "the training and experience of personnel" on the execution team, App. 75. The plaintiffs largely embrace the district court's position, though they seek to carve out exceptions for *de minimis* deviations from state procedures, as well as for procedures insufficiently related to implementation of the death sentence.

1

In my view, the government is correct. All indicators of the FDPA's meaning—statutory text, history, context, and design—point to the same conclusion. The FDPA requires federal executions to follow the method of execution provided by the law of the state in which the sentence is imposed, but it does not require federal executions to follow the "additional procedural details" invoked by the district court.

The district court began its analysis quite properly, by addressing the plain meaning of the critical word "manner." The court recognized that the government's position would be correct if the FDPA had addressed the "method" rather than the "manner" of execution, because the word "method" bears "particular meaning in the death penalty context"—*i.e.*, it denotes the top-line choice among mechanisms of death such as hanging, electrocution, or lethal injection. *In re Execution Protocol Cases*, 2019 WL 6691814, at *4. But, the district court reasoned, "manner" is broader than "method" because one dictionary defines "manner" as "a mode of procedure or way of acting." *Id.* (quotation marks omitted). This analysis overlooks other definitions, as well as the need to consider statutory history and context, *see*, *e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668–69 (2007); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000). Other dictionaries indicate that "manner" is synonymous with "method" as well as "mode." *See*, *e.g.*, *Manner*, Black's Law Dictionary (6th ed. 1990) ("A way, mode, method of doing anything, or mode of proceeding in any case or situation."). And history strongly indicates that, in the specific context of capital punishment, all three terms refer only to the top-line choice. This is reflected in practices and usages throughout American history.

First, consider hanging. In 1790, the First Congress enacted a bill providing that "the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until

dead." Crimes Act of 1790, ch. 9, § 33, 1 Stat. 112, 119. Congress thus described "hanging" as "the" unitary "manner" of imposing capital punishment, without undertaking to specify subsidiary details such as the length of the rope, how it would be fastened around the neck, or the training of the hangman. This approach followed the law of England, where one common form of capital punishment was to be "hanged by the neck till dead." 4 W. Blackstone, *Commentaries on the Laws of England* 370 (1769). Blackstone further stated that a "sheriff cannot alter *the manner* of the execution by substituting one death for another," for "even the king cannot change the punishment of the law, by altering the hanging or burning into beheading." *Id.* at 397–98 (emphasis added). This makes clear that hanging itself was considered a "manner" of execution, as distinct from burning or beheading. But no evidence suggests that the sheriff (or the king) could not improvise "procedural details" such as the length of the rope.

In using "manner" to mean "method," the First Congress followed common historical usage. *See*, *e.g.*, 1 J. Ash, *The New and Complete Dictionary of the English Language* (2d ed. 1795) (defining "manner" as "[a] form, a method"); 2 S. Johnson, *A Dictionary of the English Language* (1755) ("Form; method."). The use of hanging as "the manner" of carrying out federal executions remained unchanged from 1790 until 1937. During that time, no federal officials undertook to regulate its "procedural details." And during much of that time, hanging "was virtually never questioned," even though a rope too long could

produce a beheading, while a rope too short could produce a prolonged death by suffocation. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019) (quotation marks omitted).[1]

Consider also practices and usages with respect to the firing squad, another common method of execution into the 1800s. In *Wilkerson v. Utah*, 99 U.S. 130 (1878), the Supreme Court held that the use of a firing squad for executions does not violate the Eighth Amendment. The statute at issue provided for "death by being shot, hung, or beheaded," and the court imposed a sentence requiring that the defendant be "shot until … dead." *Id.* at 131–32 (quotation marks omitted). The legislature did not undertake to regulate subsidiary "procedural details" such as, in the case of a firing squad, the kind or number of guns, the type of ammunition, where the shooters would aim, or how far away they would stand. Nor did the sentencing court specify any of those details. And although such details might have affected the likelihood of unnecessary suffering during the execution, the Court never suggested that the Eighth Amendment claim turned on any of them.

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[1] Judge Rao seeks to downplay the Crimes Act of 1790 as merely reflecting usage "on a single occasion." *Post*, at 19. But that statute governed "the manner" of conducting federal executions for 147 years, and it is a direct predecessor of the FDPA provision at issue here. It is obviously central to the question presented. Judge Rao notes that section 13 of the Crimes Act of 1790 set forth different, more detailed "manners" of committing the offense of maiming. *Id.* at 14. True enough, but the FDPA traces back to section 33 of the Act, which, in the specific context of executions, used "manner" to refer only to the top-line choice of method.

To the contrary, it surveyed various rules and customs on whether death sentences would be carried out "by shooting or hanging." *See id.* at 132–36. Moreover, it described the governing statute as addressing "the manner" of execution, *id.* at 136, and it used the words "manner," "method," and "mode" interchangeably, *see*, *e.g.*, *id.* at 134 ("shooting or hanging is the method"); *id.* at 137 (sentence "let him be hanged by the neck" addresses "the mode of execution" (quotation marks omitted)).

The history of electrocution follows much the same pattern. Introduced in 1888, it soon became "the predominant mode of execution for nearly a century," *Baze*, 553 U.S. at 42 (plurality opinion), and the Supreme Court promptly upheld it as constitutional, *In re Kemmler*, 136 U.S. 436 (1890). As *Kemmler* recounted, electrocution came to replace hanging because it was thought to be a more humane "manner" or "method" or "mode" of execution—terms the Court again used interchangeably. *See id.* at 442–47. Moreover, the underlying legal and policy debates were framed as a unitary choice between hanging and electrocution, and the reformers never undertook to prescribe subsidiary "procedural details" such as how strong an electric current would be used, where electrodes would be attached, how the electric chair would be tested, or who would train the electrocutioner. *See id.* at 444.[2]

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[2] Judge Rao highlights the Court's statement that electrocution was painless when performed "in the manner contemplated by the [New York] statute." *Post*, at 15; *see Kemmler*, 136 U.S. at 443–44. Here is the key statutory provision, quoted in its entirety: "The punishment of death

In sum, here is what a reasonably informed English speaker would have known as of 1937: For over 140 years, Congress had designated hanging as "the manner of inflicting the punishment of death" for federal capital sentences. English law likewise had described "hanging" as a permissible "manner" of executing a death sentence. "Manner" and "method" often were used interchangeably, including by the Supreme Court in assessing alternative execution methods such as hanging, firing squad, or electrocution. And nobody focused on subsidiary procedural details in the legal or policy debates over these various execution methods.

The 1937 Act did not disturb this settled understanding about the "manner" of executing capital punishment. To the contrary, although Congress changed the governing rule, it preserved the underlying semantic understanding. Whereas the Crimes Act of 1790 had identified hanging as "the manner of inflicting the punishment of death," 1 Stat. at 119, the 1937 Act provided a different rule for "[t]he manner of inflicting the punishment of

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must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead." Ch. 489, Laws of the State of New York § 505 (June 4, 1888), *quoted in Kemmler*, 136 U.S. at 444–45. The statute thus required nothing more than electrocution. Judge Rao briefly notes other statutory details governing the timing, location, and witnesses of the execution. *Post*, at 16 n.9. They would have had no conceivable bearing on the painlessness of electrocution, and they were irrelevant to the one "manner" question that the Court framed, discussed, and decided—the unitary choice between electrocution and hanging.

death"—*i.e.*, use "the manner prescribed by the laws of the State within which the sentence is imposed." An Act To Provide for the Manner of Inflicting the Punishment of Death, Pub. L. No. 75-156, 50 Stat. 304 (1937). Congress's decision to carry forward the legally operative text—regarding "the manner of inflicting the punishment of death"—also carried forward the prevailing understanding about what constituted a "manner" of execution. The reason for this is the settled canon of construction, framed by Justice Frankfurter and routinely applied since, that "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). *See*, *e.g.*, *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019); *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019); *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018).[3]

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[3] Judge Rao seeks to downplay this canon in contending that Congress's usage in 1790 ought not matter much. She says that to maintain consistent usage of "manner" in successor statutes is to confuse the word's abstract "sense," which must remain fixed, with its concrete "reference," which can evolve. *Post*, at 19–20. She bases this view on a law-review article that seeks to link originalism to the theory of proper names espoused by the philosopher Gottlob Frege, in pursuit of a "middle ground" between the interpretive approaches of Justice Scalia and Justice Stevens. Green, *Originalism and the Sense-Reference Distinction*, 50 St. Louis U. L.J. 555, 558 (2006). Put aside the fact that leading philosophers hotly debate whether proper names even have a "sense" apart from their "reference." *See, e.g.*, S. Kripke, *Naming and Necessity* 22–70 (1980). Put aside the fact that no Supreme Court Justice or opinion has adopted Professor Green's account of how legal text is "partially living

Likewise, the FDPA carried forward the relevant language and "old soil" from the 1937 Act. In fact, the statutes are virtually identical in all relevant respects. Both statutes provide for implementation of federal death sentences in the "manner" provided by state law. *Compare* 18 U.S.C. § 3596(a) (United States marshal "shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed"), *with* 50 Stat. at 304 ("The manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed."). Both statutes permit, but do not require, the use of state facilities for federal executions. *Compare* 18 U.S.C. § 3597(a) ("A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General."), *with* 50

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and partially dead." Green, supra, at 559. Put aside the fact that, in my view, Justice Scalia was right that legal text has "a fixed meaning, which does not change." A. Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* 188 (E. Whelan & C. Scalia eds., 2017). Even on Professor Green's account, the reference to a top-line execution method in the Crimes Act of 1790 has significant interpretive weight in construing that statute (and its successors) over time. See Green, supra, at 560 ("While the framers are fallible regarding the reference of their [legal] language, they are still extremely useful guides."). Thus, even accepting Professor Green's theory, Judge Rao errs by failing to give substantial weight to how Congress used "manner" in the Crimes Act of 1790.

Stat. at 304 ("The United States marshal charged with execution of the sentence may use available State or local facilities and the services of an appropriate State or local official or employ some other person for such purpose, and pay the cost thereof in an amount approved by the Attorney General."). And for convictions in states with no death penalty, both statutes require conformity to the "manner" of execution in some other state designated by the sentencing judge. *Compare* 18 U.S.C. § 3596(a) ("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."), *with* 50 Stat. at 304 ("If the laws of the State within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof."). This wholesale copying surely indicates the preservation—not abrogation—of previously settled understandings.

Nothing in 1994 usage compels a different understanding. To the contrary, at that time, many state statutes continued to describe the "manner" of execution as a top-line choice among methods such as electrocution, lethal gas, or lethal injection. *See*, *e.g.*, Cal. Penal Code § 3604(a), (d) (1994) ("manner of execution" is either by "lethal gas" or "intravenous injection of a substance or substances in a lethal

quantity sufficient to cause death"); La. Rev. Stat. Ann. § 15:569 (1994) ("manner of execution" is either "electrocution," defined as "causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death," or "lethal injection," defined as "the intravenous injection of a substance or substances in a lethal quantity into the body of a person convicted"); Mo. Rev. Stat. § 546.720 (1994) ("The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection."); Vt. Stat. Ann. tit. 13, § 7106 (1994) ("Manner of execution" is "causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death"). A handful of state statutes went one small step further, by using "manner" to refer to types of lethal substances. But none of them required the use of any particular substance, much less even more granular details. *See* Colo. Rev. Stat. § 16-11-401 (1994) ("The manner of inflicting the punishment of death shall be by the administration of a lethal injection," defined as "continuous intravenous injection of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death."); Md. Code Ann., Crimes and Punishments § 71(a) (1994) ("The manner of inflicting the punishment of death shall be the continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent.");[4] Miss. Code Ann. § 99-19-51 (1994)

[4] Three other states used a similar formulation. *See* N.H. Rev.

(similar to Maryland, but with alternative provision that "the manner of inflicting the punishment of death shall be by lethal gas"); Okla. Stat. tit. 22, § 1014 (1994) ("Manner of inflicting punishment of death" is either "continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent," or "electrocution" or "firing squad").[5]

As of 1994, Supreme Court decisions reflected similar understandings. Between 1937 and 1994, the Court became much more active in policing capital punishment. But the Court never retreated from its holdings that the firing squad and electrocution are constitutional methods of execution. Likewise, the Court had not yet approved granular, post-habeas challenges to the specific details of an execution. To the contrary, in *Gomez v. United States District Court*, 503 U.S. 653 (1992) (per curiam), the Court summarily rejected a claim that "execution by lethal gas" violated the Eighth Amendment, and it did so because the claim had not been properly channeled through the federal habeas statute. *Id.* at 653–54. The Court's first, tentative approval of claims challenging procedural details such as the method of "venous access" did not come until a decade after the

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Stat. Ann. § 630:5, XIII (1994); N.M. Stat. § 31-14-11 (1994); S.D. Codified Laws § 23A-27A-32 (1994).

[5] Despite this occasional, slightly broader usage of "manner" in state statutes, the traditional usage remained common, and no state statute even remotely addressed items such as the details of catheter insertion. In any event, the obvious model for the FDPA was the 1937 federal statute, so it is by far the most important data point.

FDPA was enacted, *Nelson v. Campbell*, 541 U.S. 637 (2004), and its wholesale approval of post-habeas challenges to the details of lethal-injection protocols did not come until even later, *Hill v. McDonough*, 547 U.S. 573 (2006).[6]

In sum, practices and usages in 1994 mirrored those in 1937: Inquiries into the manner or method of execution focused on the choice between say, lethal gas or lethal injection—not the choice of specific lethal agents or procedures for releasing the gas or inserting the catheter. In common understanding, what mattered was the top-line choice.

Within the FDPA itself, statutory context reinforces this understanding. The FDPA states that the marshal responsible for supervising a federal execution "may use appropriate State or local facilities" and "may use the services of an appropriate State or local official." 18 U.S.C. § 3597(a). These grants of authority would be unnecessary if section 3596(a), the "manner" provision directly at issue, independently required the use of all state execution procedures. After all, states conduct executions in designated state facilities. *See*, *e.g.*, Ind. Code § 35-38-6-5 (2019) ("inside the walls of the state prison"); Mo. Rev. Stat. § 546.720 (2019) ("within the walls of a correctional

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[6] Judge Rao cites a handful of judicial opinions loosely using the word "manner" to refer to subsidiary execution details. *Post*, at 4–5 & n.2. Three of them post-date *Nelson* and *Hill*—the first Supreme Court decisions to suggest that such details might have any legal relevance. Two others are either lower-court decisions or dissents. None involves a statutory usage of "manner."

facility of the department of corrections"); Tex. Dep't of Crim. Justice, *Execution Procedure* § III.B (2019) (Huntsville Unit). Thus, if section 3596 required use of state facilities, section 3597 accomplished nothing by permitting their use. Of course, interpretations that create surplusage are disfavored. *See*, *e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). The plaintiffs respond that section 3597 creates a "limited exception to Section 3596, permitting (but not requiring) the Government to use its own facilities." Appellees' Br. 30 n.6. But that makes section 3597 even stranger, for providing that the federal government "may" use "State" facilities would be a remarkably clumsy way of permitting the federal government to use *federal* facilities.

Finally, consider statutory design. In "ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Here, the plaintiffs' interpretation of "manner" would frustrate a principal objective of the Federal *Death Penalty* Act—to provide for an administrable scheme of capital punishment. As Justice Alito explained, the plaintiffs' interpretation "would require the BOP to follow procedures that have been attacked as less safe than the ones the BOP has devised (after extensive study); it would demand that the BOP pointlessly copy minor details of a State's protocol; and it could well make it impossible to carry out executions of prisoners sentenced in some States." *Barr v. Roane*, 140 S. Ct. 353, 353 (2019) (statement

of Alito, J.). The plaintiffs dismiss these points as mere policy arguments, but they are more than that.

The FDPA was enacted as Title VI of the Violent Crime Control and Law Enforcement Act of 1994. *See* Pub. L. No. 103-322, § 60001, 108 Stat. 1796, 1959. These statutes sought to ensure a workable and expanded system of capital punishment. The larger statute created more than two dozen new capital offenses. *See* DOJ, *Criminal Resource Manual* § 69 (2020). And the FDPA established procedures to ensure the fair administration of capital punishment—by specifying aggravating circumstances that a jury must find in order to render the defendant eligible for the death penalty, 18 U.S.C. § 3592(b)–(d); by allowing a jury to consider any mitigating circumstances, *id.* § 3592(a); and by requiring separate guilt and sentencing determinations, *id.* § 3593. These provisions cured potential Eighth Amendment problems, *see*, *e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 361–63 (1988) (aggravating factors); *Eddings v. Oklahoma*, 455 U.S. 104, 110–12 (1982) (mitigating factors); *Gregg v. Georgia*, 428 U.S. 153, 190–92 (1976) (plurality opinion) (separate sentencing hearing), to ensure that the scheme would be usable. Finally, the FDPA contains one provision specifically designed to prevent the choices of an individual state from effectively nullifying the federal death penalty. It provides: "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 …." 18 U.S.C. § 3596(a).

The plaintiffs do not dispute that this scheme would be upset if individual states could effectively obstruct the federal death penalty. Yet their interpretation would make such obstruction likely. For example, states could block federal death sentences by refusing to disclose their full execution protocols. Some might do so because of moratoria on the use of capital punishment, like those ordered by the governors of California and Pennsylvania.[7] Other states simply may wish not to assist in the enforcement of federal law. *See*, *e.g.*, *Printz v. United States*, 521 U.S. 898, 923 (1997). And state statutes may prohibit disclosure of state execution protocols. *See*, *e.g.*, Ark. Code Ann. § 5-4-617(i)(1) (2019). The plaintiffs' only response is that the federal government obtained several state protocols in developing its own 2019 protocol. Yet while about thirty states authorize capital punishment, the federal government was able to obtain only five actual state protocols, plus a "summary" of the others provided by a private advocacy group. App. 10.

Adherence to the minutiae of state execution protocols is not only pointless, but practically impossible. State protocols are as detailed as the federal one—from Arkansas's color-coding to ensure that three lethal agents are properly separated among nine syringes, *Arkansas Lethal Injection*

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[7] *See* Calif. Exec. Order No. N-09-19 (Mar. 13, 2019); *Governor Tom Wolf Announces a Moratorium on the Death Penalty in Pennsylvania*, Office of the Pa. Gov. (Feb. 13, 2015), https://www.governor.pa.gov/newsroom/moratorium-on-the-death-penalty-in-pennsylvania.

Procedure, Attachment C, § III.5.a (Aug. 6, 2015), to Indiana's seventeen-step "procedure for venous cut down," Ind. Dep't of Corr., *Facility Directive ISP 06-26: Execution of Death Sentence*, Appendix A (Jan. 22, 2014). Conducting a single execution under the federal protocol requires extensive preparation by a trained execution team of over 40 individuals, as well as further support from 250 more individuals at the federal execution facility in Terre Haute, Indiana. App. 93–94. Simultaneously managing the same logistical challenges under a few dozen state protocols—all different—would be all but impossible.

The plaintiffs offer two limiting principles to mitigate this problem, but neither would work. First, they suggest a *de minimis* exception to the otherwise unyielding requirement to follow state procedures. But that would invite endless litigation over which requirements are *de minimis*. Must the federal government follow state provisions regarding the number of backup syringes? *Compare* App. 75 (two sets under federal protocol), *with* Mo. Dep't of Corr., *Preparation and Administration of Chemicals for Lethal Injection* §§ B, E (one set under Missouri protocol). The type of catheters used? The selection of execution personnel? The training of those personnel? The same problem inheres in the plaintiffs' related suggestion that some protocol details might not relate sufficiently to "implementation" of the sentence. Would that exception cover rules for how long the inmate must remain strapped to the gurney? App. 40 (under federal protocol, between 30 minutes and three hours). Rules about whom the inmate may have

present? Rules about the inmate's final meal or final statement? Rules about opening and closing the execution chamber's drapes? All such questions would be raised at the last minute—likely producing stays, temporary restraining orders, preliminary injunctions, and interlocutory appeals like this one, which will delay lawful executions for months if not years. In sum, the plaintiffs' interpretation would make the federal death penalty virtually un-administrable.[8]

2

The plaintiffs' further counterarguments are unavailing. First, the plaintiffs highlight the statutory text immediately surrounding "manner"—the language stating that a United States marshal "shall supervise implementation" of a death sentence in the manner prescribed by state law. 18 U.S.C. § 3596(a). The plaintiffs contend that "implementation" of a death sentence refers to the entire process for carrying it out, not just the use of a top-line execution method. But the only implementing detail that must follow state law is the

[8] Judge Rao correctly notes that bargains reflected in statutory text must be enforced as against generalized appeals to statutory purpose. *Post*, at 22–24. But statutory purpose, as reflected in "the language and design of the statute as a whole," can help determine textual meaning or resolve textual ambiguity. *See*, *e.g.*, *K Mart*, 486 U.S. at 291. Judge Rao does not dispute that one significant purpose of the FDPA is to ensure an administrable system of capital punishment, and her own analysis thus properly considers whether the plaintiffs' proposed construction would raise "practical, and perhaps insurmountable, difficulties to the implementation of federal death sentences." *Post*, at 12–13.

"manner" of carrying out the execution—which begs the question of what that term does and does not encompass.

The plaintiffs next invoke a different FDPA provision defining aggravating circumstances to include cases where "[t]he defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim." 18 U.S.C. § 3592(c)(6). They reason that this FDPA provision uses "manner" broadly, so other FDPA provisions must do likewise. But the presumption of consistent usage "readily yields to context, especially when" the term at issue "takes on distinct characters in distinct statutory provisions." *Return Mail, Inc. v. USPS*, 139 S. Ct. 1853, 1863 (2019) (quotation marks omitted). That qualification perfectly fits this case, for each FDPA provision has its own history. As explained above, the provision regarding the "manner" of executing a death sentence traces back to the Crimes Act of 1790. In contrast, section 3592(c)(6) was copied nearly verbatim from the Anti-Drug Abuse Act of 1988, *see* Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4392, which in turn responded to a Supreme Court decision allowing consideration of a "heinous, atrocious, or cruel" aggravating factor only as narrowed to require "torture or serious physical abuse," *Cartwright*, 486 U.S. at 363–65 (quotation marks omitted). Because section 3592(c)(6) carries its own "old soil," the presumption of consistent usage must yield to context.

Finally, the plaintiffs stress that between 1995 and 2008, Congress failed to enact some nine bills

that would have allowed federal capital punishment to be implemented in a manner independent of state law. But "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quotation marks omitted). The plaintiffs highlight DOJ statements that the FDPA imperiled its 1993 regulation, which establishes lethal injection as the sole method for federal executions. But those statements were made when some states still provided for electrocution "as the sole method of execution." *See Baze*, 553 U.S. at 42–43 n.1 (plurality opinion). In 2009, Nebraska became the last death-penalty state to authorize lethal injection as a permissible execution method. *See* Act of May 28, 2009, L.B. 36, 2009 Neb. Laws 52. After that, attempts to amend the FDPA ceased, as did DOJ's support for them. So, DOJ's current interpretation of the FDPA to encompass methods of execution, but not subsidiary procedural details, has been consistent.

3

Judge Rao takes a different approach advocated by none of the parties. In her view, the word "manner" is flexible enough, considered in isolation, to refer either to the top-line method of execution or to the full panoply of execution procedures. *Post*, at 1–6. So far, so good. She then reasons that, by requiring federal executions to be conducted "in the manner prescribed by the law of the State in which the sentence is imposed," Congress specified "the level of generality" for interpreting the word

"manner." *Id.* at 1. She thus concludes that Congress used "manner" in its broad sense, so as to include all execution procedures—no matter how picayune—that are "prescribed by the law of the State." *Id.* at 22. For Judge Rao, as it turns out, the key to this case is not the word "manner," but the phrase "prescribed by the law of the State."

This account runs contrary to established rules of grammar and statutory interpretation. As a matter of grammar, the participial phrase "prescribed by the law of the State" functions as an adjective and modifies the noun "manner." By using the adjective to construe the noun broadly, Judge Rao overlooks "the ordinary understanding of how adjectives work." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018). "Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality." *Id.* They ordinarily do not expand the meaning of the noun they modify. Thus, "critical habitat" must first be "habitat." *See id.* Likewise, "full costs" must first be "costs." *See Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 878–79 (2019). And here, whatever is "prescribed by the law of the State" must first be a "manner" of execution. In short, the limiting adjective provides no basis for interpreting the noun broadly.

To be sure, adjectival phrases can clarify the meaning of ambiguous nouns by ruling out certain possibilities through context. For example, in the abstract, the noun "check" might refer to "an inspection, an impeding of someone else's progress, a restaurant bill, a commercial instrument, a patterned square on a fabric, or a distinctive mark-

off." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 70 (2012). But when "check" is combined with the adjectival phrase "made payable to the IRS," we know that the noun refers only to a commercial instrument. In this example, the phrase "made payable to the IRS" clarifies the meaning of "check" because it is consistent with only one possible understanding of it.

The FDPA does not work like that. Divorced from its statutory history, the noun "manner" could mean either the top-line execution method or all state execution procedures. But the adjectival phrase "prescribed by the law of the State" cannot resolve this ambiguity, because it is perfectly consistent with *both* meanings. On the one hand, states use their laws to prescribe the top-line method of execution. On the other hand, they also use their laws to specify additional procedural details. So the adjectival phrase "prescribed by the law of the State" tells us nothing about the meaning of the noun "manner"—and certainly does not undermine a historical understanding of that term dating back to our country's founding.[9]

Judge Rao stresses the assertedly limited scope of her reading of the FDPA. She interprets the phrase "prescribed by the law of the State" to mean

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[9] To make the adjectival reference to state law narrow the noun "manner," Judge Rao must retreat to the position that "manner," construed *without* reference to the adjectival phrase, "is broad enough to encompass execution procedures at every level of generality." *Post*, at 9 n.5. As explained above, that position cannot be reconciled with historical usages and understandings tracing back to the First Congress.

execution procedures set forth only in state "statutes and regulations carrying the force of law," but not in less formal state execution protocols. *Post*, at 6. And that interpretation, she concludes, "mitigates many of the concerns raised by the district court's broad reading" of the FDPA. *Id.* at 26. All of this is a good reason for rejecting an interpretation of the FDPA that encompasses procedural details set forth only in state execution protocols. But it is not a good reason for rejecting the historical understanding of "manner," which creates no practical concerns about administrability.

Judge Rao also understates the practical difficulties with her proposed interpretation. For one thing, state statutes and regulations do contain many granular details. Consider just the four state death-penalty statutes before us in this case. The Arkansas statute requires that catheters be "sterilized and prepared in a manner that is safe." Ark. Code Ann. § 5-4-617(f) (2019). The Indiana statute excludes lawyers from the persons who "may be present at the execution." Ind. Code § 35-38-6-6(a) (2019). The Missouri statute requires the execution chamber to be "suitable and efficient." Mo. Rev. Stat. § 546.720.1 (2019). And the Texas statute prohibits the infliction of any "unnecessary pain" on the condemned prisoner. Tex. Code Crim. Proc. Ann. art. 43.24 (2019). Assimilating the various state statutes and regulations will present significant logistical challenges. And, of course, these various provisions will provide ample opportunity for last-minute stay litigation.

Moreover, the line between "formal" regulations

"carrying the force of law" and "informal policy or protocol," *post*, at 6–8, will be another fertile source of litigation. At the state level, how "formal" is formal enough? Even at the federal level, the question of which regulations have the force of law has been "the source of much scholarly and judicial debate." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). Yet now, courts will be forced to confront every variation of that question arising out of the administrative law of some thirty states. What if a state administrative procedure act permits rulemaking through processes less formal than notice-and-comment? What if a warden may change protocol procedures unilaterally, but only under limited circumstances? What if a state court moves the goalposts with an unexpected interpretation of the governing rules? Litigation over such matters will foreclose any realistic possibility for the prompt execution of federal death sentences.[10]

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For all these reasons, I would hold that the FDPA

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[10] To be clear, I agree with Judge Rao that the FDPA's reference to "law of the State" covers only state statutes and binding regulations. *Post*, at 6–8. I also agree with Judge Rao that because the state protocols in this case "do not appear to have the binding force of law, they cannot be deemed part of the 'law of the State.'" *Id.* at 28 n.15. Accordingly, those propositions constitute holdings of this Court. *See Marks v. United States*, 430 U.S. 188, 193–94 (1977). But I do not share Judge Rao's optimism that a "law of the State" limitation, imposed on an otherwise unbounded interpretation of "manner," will avoid "practical, and perhaps insurmountable, difficulties to the implementation of federal death sentences." *Post*, at 12–13.

requires the federal government to follow state law regarding only the method of execution and does not regulate the various subsidiary details cited by the plaintiffs and the district court. On that interpretation, the plaintiffs' primary FDPA claim is without merit.

B

In the alternative, the plaintiffs contend that the 2019 protocol violates the FDPA by impermissibly shifting authority from the United States Marshals Service to the Federal Bureau of Prisons. The plaintiffs rest this argument on FDPA provisions requiring a United States marshal to "supervise implementation" of the death sentence. 18 U.S.C. § 3596(a); *see also id.* § 3597(a). The district court did not reach this argument, but the parties have briefed it and the plaintiffs urge it as an alternative ground for affirmance.

The execution protocol does not strip the Marshals Service of the power to supervise executions. To the contrary, it requires a "United States Marshal designated by the Director of the USMS" to oversee the execution and to direct which other personnel may be present at it. App. 30. The "execution process," which starts at least thirty minutes before the actual execution, cannot begin without the marshal's approval. App. 40. The same is true for the execution itself. App. 44, 68. Individuals administering the lethal agents are "acting at the direction of the United States Marshal." App. 74. And once the execution is complete, the marshal must notify the court that its sentence has been

carried out. App. 44–45. The protocol thus tasks the USMS with supervising executions.

In any event, federal law vests all powers of DOJ components in the Attorney General and permits him to reassign powers among the components. "All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General." 28 U.S.C. § 509. The Marshals Service is "a bureau within the Department of Justice under the authority and direction of the Attorney General." *Id.* § 561(a). Its powers are thus ultimately vested in the Attorney General. Moreover, the Attorney General may delegate his powers to "any other officer, employee, or agency of the Department of Justice." *Id.* § 510. Together, these provisions permit the Attorney General to reassign duties from the Marshals Service to the Bureau of Prisons.

The plaintiffs invoke *United States v. Giordano*, 416 U.S. 505 (1974). There, the Supreme Court held that a statute "expressly" limiting the Attorney General's power to delegate wiretap authority to a handful of enumerated officials qualified his general authority to reassign DOJ functions. *Id.* at 514. But the FDPA contains no such language expressly prohibiting the Attorney General from deciding or delegating matters relating to executions. For these reasons, the protocol allocates duties consistent with the FDPA, so the plaintiffs' alternative FDPA

argument is also without merit.[11]

C

The federal protocol is both a procedural rule and a general policy statement exempted from the notice-and-comment requirements of the Administrative Procedure Act. *See* 5 U.S.C. § 553(b)(3)(A).

"The critical feature of a procedural rule is that it covers agency actions that do not themselves alter the rights or interests of parties." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (quotation marks omitted). The federal protocol does not alter the plaintiffs' rights or interests, which were all but extinguished when juries convicted and sentenced them to death. Moreover, pre-existing law establishes lethal injection as the method of

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[11] Judge Rao contends that the plaintiffs forfeited this argument by not raising it below. *Post*, at 32. But plaintiff Lee, in support of his motion for a preliminary injunction, identified eight provisions in the execution protocol that he says impermissibly granted authority to the Bureau of Prisons. *See* Lee Mot. for Prelim. Inj., *In re Execution Protocol Cases*, No. 1:19-mc-145 (D.D.C.), ECF Doc. 13-1, at 10–12. Lee argued that each of the provisions is "[c]ontrary to Section 3596 of [the] FDPA, which only refers to the U.S. Marshal supervising implementation." *Id.* Moreover, the government did not argue for a forfeiture, and thus "forfeited [the] forfeiture argument here." *Solomon v. Vilsack*, 763 F.3d 1, 13 (D.C. Cir. 2014). And for several reasons, it would make good sense for us to excuse any forfeiture: The plaintiffs' alternative FDPA claim turns on purely legal questions, it was fully briefed on appeal, both parties ask us to decide it, the Supreme Court has asked us to proceed with appropriate dispatch, and this claim, even if not pursued in the preliminary-injunction motions, would remain live on remand.

execution, 28 C.F.R. § 26.3(a)(4), and the protocol simply sets forth procedures for carrying out the injections.

The execution protocol is also a general statement of agency policy. In defining this category, "[o]ne line of analysis considers the effects of an agency's action, inquiring whether the agency has (1) impose[d] any rights and obligations, or (2) genuinely [left] the agency and its decisionmakers free to exercise discretion." *Clarian Health West, LLC v. Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017) (quotation marks omitted). A second line "looks to the agency's expressed intentions, including consideration of three factors: (1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency." *Id.* (quotation marks omitted). Here, the protocol contains no rights-creating language. Just the opposite, it states that "[t]his manual explains internal government procedures and does not create any legally enforceable rights or obligations." App. 24. Likewise, the protocol explicitly permits "deviation[s]" and "adjustment[s]" upon a determination "by the Director of the BOP or the Warden" that the deviation is "required," thus preserving a healthy measure of agency discretion. *Id.* Finally, the protocol was published in neither the Code of Federal Regulations nor the Federal Register.

For these reasons, the federal protocol was not subject to notice-and-comment requirements, and the

plaintiffs' contrary claim is without merit.[12]

II

Wholly apart from the merits, I would reverse the preliminary injunction because the balance of harms and the public interest strongly favor the government. The party seeking a preliminary injunction "must establish" not only a likelihood of success on the merits, but also "that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008); *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). And appellate courts may reverse preliminary injunctions where, apart from the merits, the district court's equitable balancing constituted an abuse of discretion. *See NRDC*, 555 U.S. at 24–26, 32.

In this case, the district court failed to recognize the important governmental and public interest in the timely implementation of capital punishment. The court concluded that any "potential harm to the government caused by a delayed execution is not substantial." *In re Execution Protocol Cases*, 2019 WL 6691814, at *7. In contrast, the Supreme Court frequently has explained that "both the [government] and the victims of crime have an important interest

[12] Given the flexibility built into the federal protocol, I agree with Judge Rao that it may be adjusted to conform to state law to whatever extent the FDPA may require. *Post*, at 29–30. That saves the protocol itself from attack under Judge Rao's construction of the FDPA. But, as explained above, it opens the door to a wide range of challenges to federal executions under the minutiae of state execution statutes and regulations.

in the timely enforcement of a [death] sentence," which is frustrated by decades of litigation-driven delay. *Bucklew*, 139 S. Ct. at 1133 (quotation marks omitted). Indeed, "when lengthy federal proceedings have run their course"—as is the case here—"finality acquires an added moral dimension." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). "Only with an assurance of real finality can the State execute its moral judgment in a case." *Id.* And "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id.* "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty.'" *Id.* (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)).

These interests are magnified by the heinous nature of the offenses committed by the appellees—all of whom murdered children—as well as the decades of delay to date.

In 1999, an Arkansas jury convicted Daniel Lee of three counts of murder in aid of racketeering. The murders were committed in 1996, during a robbery to fund a white supremacist organization. *United States v. Lee*, 374 F.3d 637, 641 (8th Cir. 2004). After overpowering a couple and their eight-year-old daughter in their home, Lee and a confederate "shot the three victims with a stun gun, placed plastic bags over their heads, and sealed the bags with duct tape." *Id.* at 641–42. They then drove the family to a bayou, taped rocks to their bodies, and threw them into the water to suffocate or drown. *Id.* at 642. The Eighth Circuit affirmed Lee's death sentence on

direct review, *id.*, and thrice denied him collateral relief, *Lee v. United States*, No. 19-3576 (8th Cir. Jan. 7, 2020); *United States v. Lee*, 792 F.3d 1021 (8th Cir. 2015); *United States v. Lee*, 715 F.3d 215 (8th Cir. 2013). Nonetheless, Lee continues to pursue a fourth round of collateral review. *Lee v. United States*, No. 2:19-cv-00468 (S.D. Ind. Dec. 5, 2019), *preliminary injunction vacated by Lee v. Watson*, No. 19-3399 (7th Cir. Dec. 6, 2019).

In 2003, a Missouri jury convicted Wesley Purkey of the kidnapping, rape, and murder of sixteen-year-old Jennifer Long in 1998. *United States v. Purkey*, 428 F.3d 738, 744–45 (8th Cir. 2005). After killing the girl, Purkey dismembered her body with a chainsaw and burned her remains. *Id.* at 745. The jury found nine aggravating factors, including that Purkey had previously bludgeoned a woman to death with a hammer. *Id.* at 746. The Eighth Circuit affirmed Purkey's death sentence on direct review, *id.* at 744, and later denied him collateral relief, *Purkey v. United States*, 729 F.3d 860 (8th Cir. 2013).

In 2004, an Iowa jury convicted Dustin Honken of murdering five individuals in 1999, including two witnesses to his drug trafficking and two young children. *United States v. Honken*, 541 F.3d 1146, 1148 (8th Cir. 2008). Honken and an accomplice kidnapped one witness, the witness's girlfriend, and her six- and ten-year-old daughters. Honken murdered all four execution-style, by shooting each in the head. *Id.* at 1149–51. Four months later, Honken murdered another prospective witness against him. *Id.* at 1148, 1151. Then, while in prison awaiting trial, he made plans to murder additional

witnesses. *Id.* at 1150–51. Because Iowa has no death penalty, the district court ordered Honken to be executed in the manner provided by Indiana law. The Eighth Circuit affirmed the death sentence on direct appeal, *id.* at 1148, and then declined to set it aside on collateral review, *see Honken v. United States*, 42 F. Supp. 3d 937, 1196–97 (N.D. Iowa 2013), *certificate of appealability denied*, No. 14-1329 (8th Cir. May 2, 2014).

In 2004, a Texas jury convicted Alfred Bourgeois of murdering his two-year-old daughter in 2002. *United States v. Bourgeois*, 423 F.3d 501, 503 (5th Cir. 2005). Before the murder, Bourgeois "systematically abused and tortured" the child—he punched her in the face, whipped her with an electrical cord, hit her head with a plastic bat so many times that it "was swollen like a football," and later bragged to a fellow inmate that the "f—ing baby's head got as big as a watermelon." *Id.* He bit her, scratched her, and burned the bottom of her feet with a cigarette lighter. When others tried to clean the sores, Bourgeois "would stop them and jam his dirty thumb into the wounds, then force [her] to walk" on them. *Id.* After her training potty tipped over, Bourgeois repeatedly slammed the back of her head into a window. He refused to take the girl's limp body to the hospital, but a passer-by called an ambulance. "The doctors sustained [her] on life support until her mother could get to the hospital, where the baby died in her mother's arms the next day." *Id.* at 505. In affirming the death sentence, the Fifth Circuit described this as "not a close case." *Id.* at 512. That court later denied post-conviction relief.

United States v. Bourgeois, 537 F. App'x 604, 605 (5th Cir. 2013) (per curiam).

These crimes were committed twenty-four, twenty-two, twenty-one, and eighteen years ago respectively. Each appellee received the full panoply of procedural protections afforded under the Constitution and the FDPA. Each received direct review and one or more rounds of collateral review. Yet now, supported by fifteen lawyers on just this appeal, they continue to litigate with a vengeance, ostensibly over the manner of their executions, but with the obvious and intended effect of delaying them indefinitely. As the Supreme Court noted in *Bucklew*, with apparent exasperation, the people and the surviving victims "deserve better." 139 S. Ct. at 1134.

The district court stressed that the government took eight years to craft its revised execution protocol. True enough, but things were fine in 2008, with a three-drug execution protocol in place and approved by the Supreme Court in *Baze*. Then began a long and successful campaign of obstruction by opponents of capital punishment, which removed sodium thiopental from the market by 2011 and made pentobarbital unavailable shortly thereafter. *See Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015). At that point, the government's options were severely limited, and it can hardly be faulted for proceeding with caution. The government declined to press ahead with an available three-drug protocol using midazolam—a milder sedative than either sodium thiopental or pentobarbital—and two other substances to stop respiration and induce cardiac

arrest. Its hesitation in the face of uncertainty proved reasonable, as four Justices would later describe this protocol as possibly "the chemical equivalent of being burned at the stake." *Id.* at 2781 (Sotomayor, J., dissenting).

Instead of proceeding with an inferior option, the government waited until pentobarbital again became available. That barbiturate—which can act as both sedative and lethal agent—is "widely conceded to be able to render a person fully insensate," *Zagorski v. Parker*, 139 S. Ct. 11, 11–12 (2018) (Sotomayor, J., dissenting from denial of application for stay and denial of certiorari), thus ensuring a painless execution. The government also took time to study the successful track record of pentobarbital, documenting its use without incident in more than 100 state executions, A.R. 929–30, as well as the many cases that have upheld its use, *see*, *e.g.*, *Zink v. Lombardi*, 783 F.3d 1089, 1102 (8th Cir. 2015) (en banc) (per curiam); *Ladd v. Livingston*, 777 F.3d 286, 289–90 (5th Cir. 2015). The government's care in selecting an available and effective execution substance does not diminish the importance of carrying out the appellees' sentences.

On the other side of the balance, a death sentence is of course serious business. But here, there is no dispute that the appellees may be executed by lethal injection, nor any colorable dispute that pentobarbital will cause anything but a swift and painless death. Instead, the plaintiffs contend only that their executions cannot occur until the federal government replicates every jot-and-tittle of the relevant state execution protocols. And in doing so,

they would expose other death-row inmates to substances less reliably certain to ensure a painless death than is pentobarbital—including midazolam, which remains in use in five different states. A.R. 92–93. The claims before us are designed neither to prevent unnecessary suffering nor to ensure that needles are properly inserted into veins—a task that nurses routinely perform without difficulty. Instead, they are designed to delay lawful executions indefinitely. We should not assist in that undertaking.

* * * *

For these reasons, I would vacate the preliminary injunction and remand the case to the district court with instructions to enter judgment for the government on the plaintiffs' FDPA claims and their notice-and-comment claims.

RAO, *Circuit Judge*, concurring: The Department of Justice specified a range of procedures to govern federal executions in its 2019 protocol and addendum. Plaintiffs allege that the Department's protocol is inconsistent with the Federal Death Penalty Act ("FDPA"), which requires that federal executions be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). At every stage of this litigation, the debate has centered on whether "manner" should be read at a particular level of generality. The word "manner," however, cannot be interpreted in isolation. It is a broad, flexible term whose specificity depends on context. The FDPA explicitly defines the level of generality of "manner": It is the "manner prescribed by the law of the State." Thus, the FDPA requires the federal government to apply state law—that is, statutes and formal regulations—at whatever level of generality state law might be framed. Where state law is silent, the federal government has discretion to choose whatever lawful execution procedures it prefers.

Under this interpretation, the Department of Justice's 2019 protocol is consistent with the FDPA. The protocol lays out a non-binding procedural framework that the federal government may apply in most cases, and it allows the U.S. Marshal Service to depart from federal procedures when required—a carveout that naturally would encompass situations in which the 2019 protocol conflicts with state law. I therefore agree to vacate the preliminary injunction.

I.

Assessing the validity of the 2019 protocol requires us first to interpret the reach of the FDPA. The Department of Justice maintains that "manner" as used in the FDPA means only the method of execution—i.e., hanging, electrocution, or lethal injection—leaving the government free to set forth a uniform procedure for executions. The plaintiffs, on the other hand, assert that "manner" means any procedures used by a state when implementing the death penalty, thereby precluding any kind of uniform federal protocol. Neither reading comports with the FDPA when read as a whole. In the FDPA, Congress left certain choices regarding execution to the States. Considering the text and structure of the statute, I explain why the FDPA requires the federal government to apply only those execution procedures prescribed by a state's statutes and formal regulations, but leaves the federal government free to specify other procedures or protocols not inconsistent with state law. Moreover, nothing in the statutory history offers a basis to override the plain meaning of the FDPA.

A.

The FDPA provides that the U.S. Marshal "shall supervise implementation of the sentence [of death] in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). The parties as well as my colleagues focus on the meaning of the word "manner." As I explain, the word "manner" may refer to varying levels of specificity, both in its ordinary meaning and in the

context of execution procedures. Reading "manner" alongside other words in Section 3596(a), as well as the statute as a whole, demonstrates that the FDPA uses "manner" to include the positive law and binding regulations of a state—those procedures "prescribed by the law of the State." State "law," however, does not include informal procedures or protocols. In the absence of binding state law, the FDPA leaves other procedures to the discretion of the U.S. Marshal who must "supervise implementation of the sentence" of death.

1.

In ordinary usage, the word "manner" has a broad, flexible meaning. A "manner" is "a characteristic or customary mode of acting" or "a mode of procedure." *Manner*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014). Put differently, a "manner" is "[a] way of doing something or the way in which a thing is done or happens." *Manner*, The American Heritage Dictionary of the English Language (5th ed. 2018). "Manner" may therefore refer to a general way of doing something or the more specific way in which an action is carried out. The word had a similarly broad meaning when the first two federal death penalty statutes were passed in 1790 and 1937. *See Manner*, New International Dictionary of the English Language (2d ed. 1941) ("[A] way of acting; a mode of procedure; the mode or method in which something is done or in which anything happens."); 2 S. Johnson, *A Dictionary of the English Language* (1755) ("Custom; habit;

fashion.").[1]

The word "manner" has the same flexible meaning in the execution context, as demonstrated by federal and state statutes and judicial decisions that use the word with varying levels of generality. As DOJ notes, the word is sometimes used to refer to a general execution method, and courts occasionally use the terms "manner" and "method" interchangeably; yet "manner" is also frequently used to refer to granular details, including in the FDPA itself. In a provision governing aggravating factors in homicide cases, the statute reads, "In determining whether a sentence of death is justified …, the jury … shall consider … [whether] [t]he defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim." 18 U.S.C. § 3592(c)(6). In this instance, the "manner" of committing homicide refers not to the general method of killing, but to the precise way in

[1] Judge Katsas makes much of the fact that eighteenth-century dictionaries, including Samuel Johnson's, also defined "manner" as a "method," Concurring Op. 4–5 (Katsas, J.), but he overlooks that those dictionaries defined "method" in broad terms. For instance, Johnson's dictionary states: "*Method*, taken in the largest sense, implies the placing of several things, or performing several operations in such an order as is most convenient to attain some end." 2 S. Johnson, *A Dictionary of the English Language* (1755). This "largest sense" is the only definition Johnson provides for "method." Judge Katsas notes that "[o]ther dictionaries" also "indicate that 'manner' is synonymous with 'method' as well as 'mode.'" Concurring Op. 4 (Katsas, J.). These dictionaries, however, are not referring to the narrow sense of "method" employed in the execution context.

which the offense was committed.

State legislatures also use the word "manner" to refer to the specifics of an execution procedure, including in some statutes the choice of lethal substance or method of injection. *See, e.g.*, Miss. Code. Ann. § 99-19-51 ("The manner of inflicting the punishment of death shall be by the sequential intravenous administration of a lethal quantity of the following combination of substances ...."); Md. Code Ann., Correctional Services, § 3–905 (repealed in 2013) ("The manner of inflicting the punishment of death shall be the continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent."); Colo. Rev. Stat. Ann. § 18-1.3-1202 ("The manner of inflicting the punishment of death shall be by the administration of a lethal injection .... For the purposes of this part 12, 'lethal injection' means a continuous intravenous injection of a lethal quantity of sodium thiopental or other equally or more effective substance.").

Similarly, federal courts use the term "manner" variably to refer both to the method of execution and to the specifics of execution procedures. *See Glossip v. Gross*, 135 S. Ct. 2726, 2741 (2015) ("[T]here is no scientific literature addressing the use of midazolam as a manner to administer lethal injections in humans." (quoting a party's expert report)); *id.* at 2790 (Sotomayor, J., dissenting) ("These assertions were amply supported by the evidence of the manner in which midazolam is and can be used."); *Baze v. Rees*, 553 U.S. 35, 57 (2008) (plurality opinion)

("[T]he Commonwealth's continued use of the three-drug protocol cannot be viewed as posing an 'objectively intolerable risk' when no other State has adopted the one-drug method and petitioners proffered no study showing that it is an equally effective manner of imposing a death sentence."); *Holden v. Minnesota*, 137 U.S. 483, 491 (1890) ("[The state statute] prescribes … the manner in which[] the punishment by hanging shall be inflicted."); *Williams v. Hobbs*, 658 F.3d 842, 849 (8th Cir. 2011) ("The prisoners next contend that they have demonstrated a facially plausible claim that the Act [which provides for lethal injection in all cases] … increases mental anxiety before execution since the prisoners cannot know the manner in which they will be executed."). [2] These examples demonstrate that the word "manner" is used frequently in the execution context as a broad term that may encompass any level of detail.[3]

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[2] *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 474 (1947) (Burton, J., dissenting) ("The Supreme Court of Louisiana has held that electrocution, in the manner prescribed in its statute, is more humane than hanging."); *In re Kemmler*, 136 U.S. 436, 443–44 (1890) ("'[T]he application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death.'" (citation omitted)); *Harris v. Dretke*, No. 04-70020, 2004 WL 1427042, at *1 (5th Cir. June 23, 2004) ("David Harris appeals the dismissal of his suit … challenging the manner in which the State of Texas intends to carry-out his execution by lethal injection.").

[3] As the question before us concerns the meaning of the FDPA and whether "manner" can include procedural details prescribed by state law, it is of no consequence that the Supreme Court recognized constitutional challenges to the

2.

To determine the level of specificity of "manner" as used in the FDPA, I start with the language of Section 3596. Recall the statute provides that the U.S. Marshal "shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). In this context, "manner" does not operate in isolation, but is modified by the requirement that the Marshal adopt the manner "prescribed by the law of the State." The district court did not address this qualifying language, and both parties gloss over it. In defending the 2019 protocol, the government contends that the Marshal must apply only the state's *method* of execution, without reference to other details that might be included in state law; the plaintiffs contend that the Marshal must apply *all* state procedures, again without reference to whether those procedures were prescribed by state law. The government's distinction is not found anywhere in the FDPA, while the plaintiffs' interpretation would read the phrase "prescribed by … law" out of the statute entirely.

The ordinary meaning of "law of the State" refers to binding law prescribed through formal lawmaking procedures. In analogous contexts, the Supreme Court has read similar statutory language to incorporate only statutes and regulations carrying the force of law. For instance, the Court held in *United States v. Howard* that a Florida regulation

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procedural details of execution only relatively recently. *See* Concurring Op. 11–12 & n.6 (Katsas, J.).

was part of the "law of the state" because violations of the regulation were "punishable as a misdemeanor." 352 U.S. 212, 216–17, 219 (1957). In *Chrysler Corporation v. Brown*, the Court held that the phrase "authorized by law" encompasses "properly promulgated, substantive agency regulations" that "have the 'force and effect of law.'" 441 U.S. 281, 295–96 (1979); *see also Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 398 (1893) ("'[T]he equal protection of the laws,' … means equal protection not merely by the statutory enactments of the state, but equal protection by all the rules and regulations which, having the force of law, govern the intercourse of its citizens with each other and their relations to the public."); *Samuels v. Dist. of Columbia*, 770 F.2d 184, 199 (D.C. Cir. 1985) ("[T]hose federal regulations adopted pursuant to a clear congressional mandate that have the full force and effect of law … have long been recognized as part of the body of federal law."). The Supreme Court has emphasized that something is "prescribed by law" when it includes binding requirements. *Cf. United States v. Rodriquez*, 553 U.S. 377, 390–91 (2008) (holding that the phrase "maximum term of imprisonment … prescribed by law" refers to the statutory maximum, not the maximum set by sentencing guidelines, which do not bind a judge in all circumstances). Consistent with the deep-rooted conception of law as fixed and binding, I have not found, nor did the plaintiffs cite, any case in which the Supreme Court or this court has held that an informal policy or protocol was prescribed by law.[4]

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[4] Judge Tatel argues that the four state execution protocols at

In light of the FDPA's requirement that the manner of execution be prescribed by state "law," the district court's expansive interpretation of Section 3596(a) fails because it includes state procedures regardless of whether they are part of state "law." *See Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, No. 12-CV-0782, 2019 WL 6691814, at *6 (D.D.C. Nov. 20, 2019) (citing informal execution policies from Texas, Missouri, and Indiana). The FDPA simply does not require the U.S. Marshal to follow aspects of a state execution procedure that were not formally enacted or

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issue in this case are in fact part of the "manner prescribed by the law of the State" because they were adopted pursuant to state statutes that "delegate to state prison officials the task of developing specific execution procedures." Dissenting Op. 2. In other words, because "'by law,' each state directed its prison officials to develop execution procedures, and 'by law,' those officials established such procedures and set them forth in execution protocols," Judge Tatel contends that the protocols are subsumed within the phrase "prescribed by … law." *Id.* at 4–5. Yet neither the Supreme Court nor our court has ever adopted such a capacious understanding of "law." Instead, the Supreme Court has directed that we ask whether a protocol has the "force and effect of law," *Chrysler*, 441 U.S. at 295–96, and not everything an official does pursuant to his statutory authority carries the force of law. For instance, agencies issue interpretive rules pursuant to their statutory authority, yet interpretive rules emphatically do not carry the force of law. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015). Indeed, the Supreme Court explicitly said in *Chrysler* that neither "[a]n interpretive regulation [nor] general statement of agency policy" can be considered an "authorization by law" because they lack "the binding effect of law." 441 U.S. at 315–16 (alterations omitted).

promulgated. "[P]rescribed by the law of the State" sets an outer boundary on what the federal government must follow. On the other hand, the statutory command also means that the federal government cannot look only to the "method" of execution prescribed by the state. The interpretation adopted by Judge Katsas and the government does not account for other details that might be included in state law and formal regulations. While, as discussed below, formal state law often specifies little more than the method of execution, the federal government is nonetheless bound by the FDPA to follow the level of detail prescribed by state law.[5]

The textual context of Section 3596(a) supports this interpretation. Section 3596(a) provides that the Marshal "shall supervise *implementation of the sentence* in the manner prescribed by the law of the State." 18 U.S.C. § 3596(a) (emphasis added). This broad language encompasses more than earlier federal death penalty statutes, which incorporated state law only to define the "manner of inflicting the

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[5] Judge Katsas claims that the "participial phrase 'prescribed by the law of the State' functions as an adjective," and adjectives usually "do not expand the meaning of the noun they modify." Concurring Op. 19 (Katsas, J.). This argument begs the question: It makes sense only if we presume that the word "manner" refers exclusively to the general method. But there is no evidence of such an exclusive meaning. Rather, as cases and statutes demonstrate, the word "manner" is broad enough to encompass execution procedures at every level of generality. The phrase "prescribed by the law of the State" actually *narrows* the meaning of the word "manner." Thus, my reading is consistent with the most common grammatical function of a participial phrase.

punishment of death." *See* An Act to Provide for the Manner of Inflicting the Punishment of Death § 323, 50 Stat. 304, 304 (June 19, 1937); An Act for the Punishment of Certain Crimes § 33, 1 Stat. 112, 119 (Apr. 30, 1790). The ordinary meaning of "implementation of the sentence" includes more than "inflicting the punishment of death." The latter refers to the immediate action of execution, whereas "implementation of the sentence" suggests additional procedures involved in carrying out the sentence of death.[6]

In the death penalty context, the term "implementation" is commonly used to refer to a range of procedures and safeguards surrounding executions, not just the top-line method of execution. This is true of DOJ's regulations, which were promulgated during a period when no statute specified procedures for the federal death penalty. DOJ's 1993 execution regulation bears the title, "Implementation of Death Sentences in Federal Cases." *See* 58 Fed. Reg. 4,898 (Jan. 19, 1993). That regulation governs very minute aspects of executions, including the "[d]ate, time, place, and method," whether and when the prisoner has access to spiritual advisors, and whether photographs are allowed during the execution. *Id.* at 4,901–902. Likewise, the 2019 addendum to DOJ's execution protocol, which governs some of the procedures at

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[6] *Compare Implementation Plan*, Black's Law Dictionary (10th ed. 2014) ("An outline of steps needed to accomplish a particular goal."), *with Inflict*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014) ("[T]o cause (something unpleasant) to be endured.").

issue in this case, is titled, "Federal Death Sentence Implementation Procedures." Department of Justice, Addendum to BOP Execution Protocol, Federal Death Sentence Implementation Procedures 1 (July 25, 2019) ("BOP Addendum"). As with the 1993 regulation, the addendum governs minute details, such as the numbering and labeling of syringes. *Id.* at 2. According to DOJ regulations and protocols, all of these details fall under the umbrella of implementing a death sentence. The breadth of the term "implementation" further undermines the government's narrow interpretation that "manner" means only the "method" of execution, irrespective of the requirements of state law.

An interpretation requiring the federal government to follow all procedures prescribed by state statutes and formal regulations, but no more, similarly coheres with the statute's directive that the Marshal "supervise" implementation of the sentence. 18 U.S.C. § 3596(a). To "supervise" is to "superintend" or "oversee." *See Supervise*, Merriam Webster's Collegiate Dictionary (11th ed. 2014). The concept of supervision does not fit with DOJ's position that it may establish a uniform protocol for all procedures short of the method of execution specified by state law. In the context of executing the law, supervision must occur within legal boundaries. While supervision often includes a degree of discretion, it does not include authority to create new law or to act in contravention of law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (emphasizing that "the President's power to see that the laws are faithfully executed" does not include the

power to "make laws which the President is to execute"). Elsewhere, Congress used more active language. In the 1937 statute, for instance, the Marshal was "charged with the execution of the sentence," 50 Stat. at 304, and other provisions of the FDPA refer to "carr[ying] out" an execution. *See* 18 U.S.C. § 3596(b), (c). Congress's choice in Section 3596(a) to provide only that the Marshal will "supervise" implementation hardly suggests that DOJ was given the authority to dictate nearly every aspect of the execution procedure regardless of what state law prescribes.

At the same time, the statute's use of "supervise" suggests that the Marshal enjoys a certain degree of discretion in the absence of state law on a particular question. If the FDPA had provided only that the Marshal "shall implement" the sentence according to state law, there would be less support for the idea that the Marshal has discretion to fill gaps in a state's execution law. Instead, the statute affords the Marshal a measure of supervisory discretion within the bounds of state law.

The FDPA specifies one exception to the general rule that the federal government must follow state law—the federal government may choose state or federal facilities for executions, irrespective of state law. Section 3597(a) addresses the question of where executions will take place and which facilities the Marshal may use. It provides that the Marshal "may use appropriate State or local facilities," so long as the Marshal "pay[s] the costs thereof." 18 U.S.C. § 3597(a). This language establishes that the Marshal has discretion to choose between state and

federal facilities, notwithstanding any state law requiring executions in a particular location. Under familiar canons of construction, the more specific provision controls the general. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (noting this canon "is a commonplace of statutory construction" (citation omitted)). Section 3596(a) directs the government to follow a state's death penalty law generally, while Section 3597(a) is best read as an exception, specifying one aspect of the execution process by allowing the federal government a choice of location. *See id.*[7]

Finally, this fuller reading of the statutory text coheres with the FDPA and the apparent balance Congress struck between providing for a federal death penalty and respecting provisions of state law. If "prescribed by the law of the State" includes only a state's statutes and formal regulations, the Marshal will be able to identify the requirements of state law. Nothing in the FDPA suggests that the federal government must incorporate most or all procedures and practices found in a state's informal execution policies, which could raise practical, and perhaps insurmountable, difficulties to the implementation of federal death sentences. For instance, at least some state protocols are not publicly available. *See* Ark. Code Ann. § 5-4-617(i)(1)(C). Others are "revised as needed" through informal means. *See* Indiana State Prison Facility Directive, ISP 06-26: Execution of

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[7] While it is true that Section 3597 is not written explicitly as an exception, *see* Concurring Op. 13 (Katsas, J.), it provides specific authority that supersedes the general reliance on state law.

Death Sentence 14 (Jan. 22, 2014). When Congress used the term "prescribed by the law of the State," it did not mean secret policies and constantly changing informal protocols.[8]

In this politically charged area, Congress enacted a federalist scheme, incorporating state law as to the "manner" of death penalty implementation, but only for those execution procedures enacted or promulgated by states as part of their binding law. The FDPA leaves the federal government free to specify details regarding execution procedures, as it did in its protocol and addendum, subject to any contrary requirements of state law.

B.

DOJ attempts to use previous federal death penalty statutes to show that "manner" must mean "method." A review of these statutes, however, demonstrates that Congress was at best silent as to

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[8] This interpretation is largely consistent with other courts to have considered the issue. The Fifth Circuit upheld a death sentence under an earlier version of DOJ's protocol because nothing in the protocol was "inconsistent with Texas law." *United States v. Bourgeois*, 423 F.3d 501, 509 (5th Cir. 2005). The only source of law the court considered was Texas's criminal code, *id.*, which does not provide for specific procedures or designate a lethal substance. *See* Tex. Code Crim. Proc. Ann. art. 43.14. Similarly, the District of Vermont held that a U.S. Marshal is "to adopt local state procedures for execution," but the court looked only to state statutes in defining the state's procedures. *See United States v. Fell*, No. 5:01-CR-12-01, 2018 WL 7270622, at *4 (D. Vt. Aug. 7, 2018); *but see Higgs v. United States*, 711 F. Supp. 2d 479, 556 (D. Md. 2010) (declining to reach the Section 3596(a) question, but briefly suggesting in dicta that "manner" refers only to lethal injection).

whether the word had a specialized meaning. Prior federal execution statutes support neither the government's "manner means method only" interpretation, nor the plaintiffs' "manner means everything" interpretation. Rather, the history shows Congress uses "manner" in its ordinary sense, such that the scope of the term's application depends on the context.

There were only two federal statutes regulating execution procedures prior to the FDPA, and neither suggested that "manner" refers exclusively to general methods. The first federal death penalty statute, passed in 1790, read, "the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until dead." § 33, 1 Stat. at 119. That provision is entirely consistent with my interpretation: Congress, using a broad word that can refer to any level of generality, chose on that occasion not to mandate further details. In another section of the same statute Congress used the word "manner" in a highly granular sense. The 1790 statute criminalized the maiming of a person in any of six enumerated "manners"—a list so particularized that "slit[ting] the nose" and "cut[ting] off the nose" were listed separately. § 13, 1 Stat. at 115. Reading the 1790 statute as a whole, Congress used the word "manner" to refer to both general methods and specific details, reinforcing that the term "manner" in isolation has a flexible meaning and must be read in context to determine the appropriate level of specificity.

Judge Katsas argues that the 1790 statute should be read against the backdrop of English common law.

Concurring Op. 4 (Katsas, J.). As he notes, Blackstone wrote that the punishment for many capital crimes was to be "hanged by the neck till dead." 4 W. Blackstone, *Commentaries on the Laws of England* 370 (1769). Notably, Blackstone does not say that hanging by the neck was the "manner" of execution. He says that hanging was the "judgment" pronounced by the court. *Id.* Indeed, this passage never uses the word "manner." Later, Blackstone wrote that a "sheriff cannot alter the manner of the execution by substituting one death for another." *Id.* at 397. Nor could the king substitute one death for another—for instance, by "altering the hanging or burning into beheading." *Id.* at 397–98. Nothing in this passage suggests that the choice of general method was the only detail encompassed by the term "manner of the execution." At most, this passage shows that changing the general method was one way to change the manner of execution.

Judge Katsas's reliance on two Supreme Court cases from the nineteenth century is similarly unavailing. First, *Wilkerson v. Utah*, 99 U.S. 130 (1878), simply paraphrased the language of the 1790 statute, *see id.* at 133 ("Congress provides that the manner of inflicting the punishment of death shall be by hanging."), so it adds no support for the narrow reading of "manner." Next, Judge Katsas argues that the Supreme Court used "manner" and "method" interchangeably in *Kemmler*, 136 U.S. 436. Yet nothing in the Court's opinion indicates that the two terms are synonymous. To the contrary, the opinion strongly suggests that the term "manner" encompasses more than the general method. In

rejecting a petition for habeas corpus, the Court quoted the New York Court of Appeals at length, including its conclusion that the general method of electrocution is painless—not necessarily as a general matter, but when performed "under such conditions and in the manner contemplated by the statute." *Id.* at 443–44 ("[T]he application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death." (citation omitted)). The term "manner" in that sentence must refer to details more specific than the general method of electrocution. *Id.*[9] Even if at points *Wilkerson* and *Kemmler* refer to hanging and electrocution as manners of execution, they are still consistent with the ordinary meaning of "manner," which can refer to the general and the specific. It is not unusual for courts to refer to hanging or lethal injection as manners of execution, just as courts commonly use "manner" to refer to specific details of an execution procedure. *See supra* at 4–5.

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[9] I agree with Judge Katsas that the level of detail in the New York statute is not relevant in itself. Concurring Op. 6 n.2 (Katsas, J.); *see also* Chapter 489, Laws of the State of New York §§ 492, 505–07 (June 4, 1888) (regulating execution timing, location, and personnel, among other things). Indeed, my analysis consistently maintains that the meaning of the word "manner" does not change whenever a legislature chooses to specify more or less detail in a given statute, whether a state statute or the FDPA. Regardless of how detailed the statute was, the Supreme Court in *Kemmler* used the word "manner" to encompass more than the general method of electrocution. *See* 136 U.S. at 443–44.

The government also relies on the 1937 statute to argue that "manner" is used in the FDPA to refer only to the method of execution. *See* DOJ Br. 21–22 ("Congress [in 1937] preserved the meaning of 'the manner' as synonymous with 'the method' of execution."). In the 1937 statute, Congress shifted away from the earlier federal death penalty regime to one that required the federal government to adopt whatever "manner" was "prescribed by the laws of the State." 50 Stat. at 304. The 1790 and 1937 statutes thus had different structures, one specifying a single method of federal execution and the other leaving the manner of execution to be determined by state law. This fundamental change to the statutory scheme undermines DOJ's contention that Congress forever settled the scope of federal death penalty legislation in 1790 when it chose hanging as the method of execution. Indeed, the fact that Congress amended the legally operative text suggests that the 1937 Act did not use "manner" in precisely the same way as the 1790 statute. *See Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018) (stating that a statute "brings the old soil with it" only when "obviously transplanted"); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1578 (2016) (Thomas, J., concurring) ("[W]hen Congress enacts a statute that uses different language from a prior statute, we normally presume that Congress did so to convey a different meaning."). Statutory predecessors can help us to interpret a modern statute, but we must respect the changes Congress enacted.

For the same reasons discussed with respect to the FDPA, the phrase "manner prescribed by the

laws of the State" in the 1937 statute is best read as referring to all execution procedures found in the state's "law." In practice, moreover, the federal government incorporated more than the state's method of execution when it carried out executions under the 1937 statute. The government concedes that nearly all executions conducted under the 1937 statute took place in state facilities. Oral Argument at 3:30. Presumably, those executions were carried out in accordance with state law and possibly with other state procedures. DOJ notes that three executions under the 1937 statute took place in federal facilities, but DOJ is unable to identify a single way in which the executions were otherwise inconsistent with state law. As in the FDPA, the 1937 statute gave the U.S. Marshal discretion over the choice of facilities. *See* 50 Stat. at 304. Thus, the choice of a federal location does not undermine the requirement that the manner of execution follow whatever details are prescribed by state law.

Not only did the federal government perform the vast majority of executions in state prisons, DOJ has suggested on several occasions that it understood the 1937 statute to require compliance with state procedures. In its 1993 protocol, DOJ hypothesized that Congress might have repealed the 1937 statute because it "no longer wanted the federal method of execution dependent on procedures in the states, some of which were increasingly under constitutional challenge." 58 Fed. Reg. at 4,899 (discussing repeal of the 1937 statute in 1984). Similarly, Attorney General Janet Reno wrote shortly before the FDPA's enactment that the bill "contemplate[s] a return to

an earlier system in which the Federal Government does not directly carry out executions, but makes arrangements with states to carry out capital sentences in Federal cases." *See* H.R. Rep. No. 104-23, at 22 (1995) (quoting Letter from Attorney General Janet Reno to Hon. Joseph R. Biden, Jr., at 3–4 (June 13, 1994)). While such sources are not determinative of the meaning of the FDPA, they demonstrate that the Department's narrow interpretation of the statute has hardly been consistent.[10]

Despite rejecting DOJ's historical evidence, I start from the same fundamental principle: that we should not "depart from the original meaning of the statute at hand." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). As explained, the meaning of the word "manner" has always been broad, and its application has always depended on context. DOJ, however, asks us to go beyond established canons of

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[10] Judge Katsas also argues that between 1790 and 1937, "nobody [was] focused on subsidiary procedural details in the legal or policy debates over [] various execution methods." Concurring Op. 7 (Katsas, J.). Even assuming that assessment is correct, it has no bearing on the broader sense of "manner" or how it was used in the FDPA. This observation would be relevant only to the meaning of "manner" in statutes that do not specify the scope of the term's application. For example, if the FDPA said something like "the manner employed by the state," then we would have to determine, as Judge Katsas asks, "the level of detail at which [Section 3596(a)] operates." *Id.* at 1. Yet the FDPA explicitly specifies the level of detail—it is the level of detail "prescribed by the law of the State." That leaves a question of what is included in the "law of the state," but it does not leave open the level of generality regarding the manner of execution.

interpretation: Rather than apply the original, broad sense of the word "manner," DOJ argues that the word should be deprived of its ordinary meaning because Congress chose on a single occasion in 1790 to specify one level of detail. There is no support for this novel approach.

In statutory interpretation as in ordinary usage, a word can have a fixed meaning even if, in application, it can refer to a variety of things. DOJ is confusing the sense of the word "manner" with the word's reference. A word's sense is its linguistic meaning, while its reference is the "actual thing in the world that the word picks out." Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 St. Louis U. L.J. 555, 563 (2006). A single word with a fixed meaning can describe a wide range of references, depending on the factual context and how the word is used. *See id.* at 564; *cf. ConFold Pac., Inc. v. Polaris Indus., Inc.*, 433 F.3d 952, 957–58 (7th Cir. 2006) (explaining that the term "unjust enrichment" has multiple "referents" because it can refer to several factually distinct circumstances in which restitution is appropriate). [11] Rather than explore what the word "manner" meant in 1790 (i.e., what sense it carried), DOJ focuses narrowly on

[11] Judge Katsas's only *linguistic* critique of the sense-reference distinction is that sense and reference arguably converge when dealing with proper names, Concurring Op. 8 n.3 (Katsas, J.), something that is completely irrelevant to this case. We both agree with Justice Scalia (and Professor Green, for that matter) that statutes have "a fixed meaning, which does not change." *Id.* That recognition does nothing to undermine the commonly accepted distinction between a word's meaning and the thing the word refers to on a given occasion.

which procedures Congress chose to require on one occasion (i.e., the reference of "manner"). According to DOJ, the word "manner" in 1994 cannot be broad enough to refer to specific procedures unless the 1790 statute also referred to specific procedures. But Congress's choice not to specify details like the length of the rope did not change the underlying meaning of the word "manner." The word "manner" was broad enough in 1790 to encompass more than the general method (as demonstrated by the statute's discussion of maiming), and the word retains that broad sense today. There is simply no reason to artificially cabin the word in later statutes so that it refers only to the same kinds of procedures required by Congress in 1790.

DOJ's ahistorical reading is also flatly inconsistent with the canons of interpretation governing incorporation. When Congress incorporates a body of law in general terms, the incorporating statute "develops in tandem with the" body of law that was incorporated. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019); *see also New Prime Inc.*, 139 S. Ct. at 539; 2B Sutherland Statutory Construction § 51:8 (7th ed.). For most of the last 80 years, Congress has chosen to incorporate state law rather than specify a manner of execution. As Judge Katsas explains, it was once true that most execution statutes did not "prescribe subsidiary 'procedural details.'" Concurring Op. 6 (Katsas, J.). Today, however, some "state statutes and regulations do contain many granular details." *Id.* at 21. When a state legislature chooses to define the manner of execution in more detail than was common in older

statutes, the FDPA directs the federal government to follow suit. *See New Prime Inc.*, 139 S. Ct. at 539 (explaining that statutes incorporating a general body of law must be read to incorporate "later amendments and modifications").[12]

The historical record is likewise inconsistent with the plaintiffs' assertion that the FDPA does not allow DOJ to adopt nationwide procedures. *See* Plaintiffs' Br. 23–24. It is true that Congress in 1937 replaced a uniform, nationwide approach with a requirement that the federal government follow the sentencing state's manner of execution. Nevertheless, neither the 1937 statute nor the FDPA requires that the federal government follow state practices not prescribed by law. The statutory history thus says

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[12] Failing to find support in the FDPA's text, history, or practice, DOJ tries to prop up its arguments with the 1937 statute's legislative history. This legislative history, however, did not run the Article I, section 7, gauntlet, and cannot determine a statute's meaning. Even for those who find legislative history persuasive, the evidence is thin. DOJ explains that the House Judiciary Committee twice used the word "method" to refer to executions by hanging, electrocution, and gas. H.R. Rep. No. 75-164, at 1 (1937). DOJ argues that because the Committee changed the word "method" to "manner" in the statute, it must have understood the two words to be synonymous. Yet the legislative history is silent about why the Committee made that choice in the final text of the FDPA. If we are playing the legislative history guessing game, another inference is perhaps more likely: that Congress chose to use a different word in order to convey a different meaning. *Cf. Allina Health Servs. v. Price*, 863 F.3d 937, 944 (D.C. Cir. 2017). Ultimately, however, legislative history is not the law, and the history from 1937 tells us little about what the 1937 statute meant, much less what the 1994 FDPA means.

nothing about whether the Department can create uniform procedures to fill gaps in state law, as the protocol and addendum do in this case.

In sum, the historical evidence does not suggest the term "manner" has the narrow meaning pressed by DOJ; neither does it support the plaintiffs' conclusion that the federal government may not create national procedures that govern in the absence of any state law. Rather, for over 200 years, Congress has used the term "manner" flexibly, with the word's scope clarified by additional specifying language—"hang[ing] by the neck," slit[ting] the nose, and "prescribed by the law of the State." In light of this history, the best interpretation follows the plain meaning of the FDPA, which specifies that "manner" is whatever is prescribed by state law. This interpretation respects Congress' decision to create a federal death penalty that relies on federalism. The FDPA requires DOJ to follow the procedures set forth in state laws and regulations but does not foreclose federal protocols that apply in areas not addressed by state law.

C.

The Department raises a parade of horribles if "manner" is read to include more than the method of execution. Specifically, DOJ argues that a broader reading will make it much more difficult to execute prisoners and will leave the federal government unable to choose the most humane execution procedures. The government's purpose-driven arguments rely on broad policy goals and practical difficulties, rather than the plain meaning of the

text. These policy arguments, however valid, cannot overcome Congress's plain choice in the FDPA to allow the manner of execution to turn on state law.[13]

DOJ's concerns are rooted in what the Department deems to be the purposes of the FDPA. DOJ Br. 15; *see also* Concurring Op. 13 (Katsas, J.) (discussing one purpose of the FDPA "to ensure a workable and expanded system of capital punishment"). As a court, however, "our function [is] to give the statute the effect its language suggests," not to further whatever "admirable purposes it might be used to achieve." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 270 (2010). DOJ urges us to give the FDPA the interpretation producing what it believes would be the most effective execution regime, but to do so would ignore both the limited nature of our judicial function and the realities of legislative deliberation:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a

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[13] Judge Katsas suggests that arguments about consequences are relevant to "help resolve textual ambiguity." Concurring Op. 16 n.8 (Katsas, J.). Yet the word "manner" as used in Section 3596 is not ambiguous. Rather, as already explained, the ordinary meaning of the word "manner" is broad and flexible, but as qualified in the FDPA, the "manner" of execution is unambiguous: It is whatever "manner" is prescribed by applicable state law. *See supra* at 6–8; *see also Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("Broad general language is not necessarily ambiguous"). Speculations about congressional intent are rarely illuminating, particularly when, as here, the text of the statute provides the relevant level of specificity.

> particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 646–47 (1990) (citation and quotation marks omitted).

In the FDPA, Congress incorporated state law instead of directing DOJ to promulgate a uniform protocol. This suggests that Congress was balancing at least two competing values: the need to effectively implement federal death sentences and an interest in federalism. Perhaps Congress simply decided to duck controversial specifics by leaving some questions to state law. Whatever the reason, statutes strike a bargain and must be enforced in their details, not in their lofty goals. After all, "[i]f courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to take account of legislative compromises essential to a law's passage and, in that way, thwart rather than honor the effectuation of congressional intent." *New Prime Inc.*, 139 S. Ct. at 543 (quotation marks and alterations omitted). We should decline DOJ's invitation to question the bargain Congress struck here. To the extent more detailed state statutes raise additional interpretive questions, that is an unavoidable consequence of the incorporation of state law. Unless and until Congress amends the FDPA, DOJ is bound to "follow its commands as written, not to supplant those commands with others

it may prefer." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). We have no license to read into the FDPA a limitation on "manner" that has no basis in the text and to read out of the statute its incorporation of state law.

In addition, DOJ's policy concerns about administrability would have applied with equal force in 1937, when Congress first incorporated state law to govern the manner of federal executions. *See New Prime Inc.*, 139 S. Ct. at 539 ("[I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute." (quotation marks omitted)). In 1937, permissible execution methods varied significantly across the country and included hanging, electrocution, the gas chamber, and others. State execution methods also differed, albeit to a lesser extent, when the FDPA was passed in 1994. Thus, even under DOJ's interpretation that "manner" means only method, until recently the federal government would have had to apply varying execution methods on a state-by-state basis. DOJ claims that state-by-state administration is unworkable, but state-by-state administration has indisputably been a feature of this statutory framework since 1937. A uniform method is possible under DOJ's interpretation only because all the death penalty states have made independent choices since the FDPA's enactment to adopt the method of lethal injection.

Similarly, the federal government has never had absolute license to choose the most humane

execution procedures. When Congress passed the 1937 statute, it chose state practice over hanging in part because "[m]any States"—but not all—"use[d] more humane methods of execution, such as electrocution, or gas." H.R. Rep. No. 75-164, at 1 (1937). Congress could have selected one of those more humane methods instead of hanging, but it chose to leave that decision to the states—many of which continued to hang criminals. *See Andres v. United States*, 333 U.S. 740, 745 (1948) (noting that the "method of inflicting the death penalty" in Hawaii in 1948 was "death by hanging"). Indeed, some states continued to provide for hanging even after the passage of the FDPA in 1994. *See Baze*, 553 U.S. at 43 n.1 (plurality opinion) (noting that New Hampshire and Washington still allowed for hanging in 2008). Even under DOJ's interpretation of the FDPA, the government may choose what it considers to be the most humane procedures only when state law does not provide for another method of execution. Whatever the legitimacy of DOJ's concerns, they are necessary features of the statute Congress enacted.[14]

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[14] Like the DOJ, Judge Tatel invokes the FDPA's goal of ensuring more humane executions, but to support the opposite interpretation. He argues that reading "prescribed by the law of the State" to exclude non-binding state execution protocols would "defeat section 3596(a)'s purpose—to make federal executions more humane by ensuring that federal prisoners are executed in the same manner as states execute their own." Dissenting Op. 8. Yet that argument deprives the phrase "prescribed by … law" of all meaning. If Congress had intended the federal government to incorporate all of the state's execution procedures, it would have said so. Instead, Congress chose to incorporate only the manner prescribed by state law.

In any event, as a practical matter, my textual interpretation of the FDPA mitigates many of the concerns raised by the district court's broad reading. The FDPA's reliance on state law leaves ample scope for DOJ to follow its federal execution procedures and protocols. Few of the procedural details cited by the plaintiffs appear to carry the force of law, so the federal government need not follow them. State execution statutes tend to be rather brief, specifying lethal injection without adding further details. For example, none of the four states at issue in this case have statutes precluding the use of pentobarbital. *See* Tex. Code Crim. Proc. Ann. art. 43.14 (calling for lethal injection without specifying which chemical to be used); Ark. Code Ann. § 5-4-617 (allowing lethal injection using either a barbiturate like pentobarbital or a three drug solution); Ind. Code § 35-38-6-1 (calling for lethal injection without specifying which chemical must be used); Mo. Ann. Stat. § 546.720 (calling for lethal injection without specifying which chemical must be used).

Indeed, I have not been able to locate statutes or formal regulations in any state that would prevent the federal government from using pentobarbital, the drug currently specified in DOJ's protocol addendum. In the rare cases where state law provides for a particular substance, states generally either include pentobarbital on the list of permitted substances, *see* 501 Ky. Admin. Regs. 16:330 (allowing either pentobarbital or thiopental sodium), or include a general provision allowing any equally effective substance, *see* Utah Admin. Code r. 251-107-4 (providing for "a continuous intravenous injection,

one of which shall be of a lethal quantity of sodium thiopental or other equally or more effective substance to cause death").

More specific details are generally found in informal state policies and protocols. Execution protocols are exempted from many states' administrative procedure acts, including their formal rulemaking requirements. *See, e.g.*, Ark. Code Ann. § 5-4-617(h); *Middleton v. Mo. Dep't of Corr.*, 278 S.W.3d 193, 195–97 (Mo. 2009); *Porter v. Commonwealth*, 661 S.E.2d 415, 432–33 (Va. 2008); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 312 (Tenn. 2005). Even in states that provide for formal rulemaking, execution protocols tend to be informal and non-binding. Consider Indiana, the state designated by DOJ whenever the sentencing state does not provide for the death penalty. Indiana allows its department of corrections to adopt rules under the state's formal rulemaking provisions to implement its execution statute. *See* Ind. Code § 35-38-6-1(d). Yet the state's current execution procedures were not promulgated under that statute and do not purport to carry the force of law. *See* Indiana State Prison Facility Directive, ISP 06-26: Execution of Death Sentence 14 (Jan. 22, 2014) (noting that Indiana's protocol is "revised as needed," not under the state's formal rulemaking procedures, but in accordance with the department of corrections' policies). Similarly, both Arkansas' and Missouri's protocols permit the director of the department of corrections to modify certain aspects of the execution procedures. *See* Missouri Department of Corrections, Preparation and Administration of Chemicals for

Lethal Injection 1 (Oct. 18, 2013); Arkansas Lethal Injection Procedure 3 (Aug. 6, 2015), https://bit.ly/2ExLkTE. A state execution protocol that explicitly allows the department of corrections to depart from the protocol's requirements on a case-by-case basis cannot be said to be binding. Given that most details found in state execution protocols are not prescribed by law, DOJ will be able to make most procedural choices regarding federal executions.[15]

II.

Based on this interpretation of Section 3596(a), I would hold that the 2019 protocol did not exceed the government's authority under the FDPA. As an initial matter, the protocol is unlikely to conflict with state law in most cases, as state laws usually address execution procedures only in general terms.

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[15] Judge Tatel does not dispute that the four protocols at issue were not promulgated through formal rulemaking procedures. Instead, he attempts to cabin *Chrysler*'s holding to its facts, ignores the consistent line of cases requiring "law" to have binding effect, *see supra* at 7 (collecting cases), and makes a general appeal to examining "context" when determining whether a regulation issued outside a formal rulemaking process constitutes "law." Dissenting Op. 7–8. Judge Tatel, however, fails to identify a single case supporting his theory that non-binding protocols can qualify as "law" in *any* context—despite the fact that, as Judge Tatel emphasizes, "prescribed by law" or similar language appears at least 1,120 times in the United States Code. *Id.* at 7. As the Court explained in *Chrysler*, the question is simply whether these state protocols are binding on state officials. Because these protocols do not appear to have the binding force of law, they cannot be deemed part of the "law of the State."

See supra at 24–26. Should cases arise in which the protocol differs from state law—for example, in states with more detailed regulations governing executions, *see, e.g.*, 501 Ky. Admin. Regs. 16:330; Or. Admin. R. 291-024-0080—DOJ remains free to depart from the federal protocol. Indeed, the protocol provides explicitly that the Director may depart from its procedures in the face of superseding legal obligations—namely, when "necessary" to "comply with specific judicial orders" or when "required by other circumstances." BOP Addendum 1; *see also* Department of Justice, BOP Execution Protocol 4 (2019) ("Execution Protocol") ("These procedures should be observed and followed as written unless deviation or adjustment is required …."). In addition, the protocol directs BOP to "make every effort … to ensure the execution process … [f]aithfully adheres to the letter and intent of the law." Execution Protocol 4–5. These provisions indicate that the government must depart from the protocol as necessary to "adhere to the letter and intent of" the FDPA—including the requirement that the government apply the manner of execution prescribed by state law. Reading the protocol and addendum as a whole suggests that DOJ must follow state law, and not that the BOP Director is merely granted "discretion." Dissenting Op. 9. Because the 2019 protocol allows departures as needed to comply with state law, it is consistent with the FDPA.

Judge Tatel casts this reading of the protocol's plain text as an improper effort to "rewrite the protocol" to support an interpretation that the government has not advanced. Dissenting Op. 10. As

an initial matter, my interpretation requires no revision—it rests on the words DOJ used in promulgating its protocol. Moreover, "[o]ur duty in conducting *de novo* review on appeal is to resolve the questions of law this case presents." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434, 440 (D.C. Cir. 2018). "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *see also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446–47 (1993). Irrespective of the government's litigation strategy, the issue before us in this case is whether the 2019 protocol exceeds the government's authority under the FDPA, and it is entirely appropriate to conduct an independent assessment of all relevant materials—including, in particular, the text of the protocol—in order to fulfill our duty to say what the law is.

Because the district court's order was premised exclusively on the plaintiffs' claim that the protocol was "in excess of statutory … authority," 5 U.S.C. § 706(2)(C), I would vacate the preliminary injunction. I would further hold that the 2019 protocol is a "rule[ ] of agency organization, procedure, or practice" exempt from the APA's notice and comment requirements. *See* 5 U.S.C. § 553(b). The plaintiffs maintain we should not reach this claim before the district court has considered it. It is true that we ordinarily decline to resolve claims and

arguments not addressed by the district court in deciding a preliminary injunction motion. *See Sherley v. Sebelius*, 644 F.3d 388, 397–98 (D.C. Cir. 2011). But if our holding on appeal makes a conclusion "inevitable" then "we have power to dispose [of a claim] as may be just under the circumstances, and should do so to obviate further and entirely unnecessary proceedings below." *Wrenn v. Dist. of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017) (cleaned up); *see also* 28 U.S.C. § 2106 (granting appellate courts authority to "direct the entry of … judgment … as may be just under the circumstances"). The plaintiffs' notice and comment challenge rises and falls with the merits of their FDPA claim—that the protocol is a procedural rule follows inescapably from my conclusion that the protocol does not exceed DOJ's authority under the FDPA. Because the issues are intertwined and the plaintiffs' notice and comment challenge fails under my interpretation of the FDPA, it is entirely unnecessary for the district court to address this claim on remand.

"The critical feature of a procedural rule is that it covers agency actions that do not themselves alter the rights or interests of parties." *Nat'l Min. Ass'n*, 758 F.3d at 250 (quotation marks omitted). By its terms, the protocol does nothing to interfere with the Marshal's ability to comply with the FDPA or with the plaintiffs' right to have their sentences implemented "in the manner prescribed by the law of the State." 18 U.S.C. § 3596(a). To the contrary, the protocol simply lays out procedures for the federal government to follow in cases where state law does

not address some aspect of the execution process. It directs the federal government in all cases "to ensure the execution process … [f]aithfully adheres to the letter and intent of the law," Execution Protocol 4–5, which necessarily includes following the FDPA's directive to implement death sentences in conformity with state positive law. As such, the protocol cannot be said to "impose [any] new substantive burdens," *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 169 (D.C. Cir. 1997), or to "alter the rights or interests of [affected] parties," *Nat'l Min. Ass'n*, 758 F.3d at 250 (citation omitted)—rather, any substantive burdens are derived from the FDPA and the state laws it incorporates.

Moreover, the procedures outlined in the 2019 protocol bear all the hallmarks of "internal house-keeping measures organizing [DOJ's] activities" with respect to preparing for and conducting executions. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (citation omitted). The protocol and accompanying addendum provide lengthy "checklists for pre-execution, execution and post execution procedures," Execution Protocol 4, including matters as specific as arranging food services for an inmate's final meal, *id.* at 17, "open[ing] the drapes covering the windows of the witness rooms" during an execution, *id.* at 24, and announcing the time of death "prior to the drapes being closed," *id.* at 25. DOJ's decision to promulgate detailed "written guidelines to aid [its] exercise of discretion" during the highly sensitive process of conducting executions should not come "at the peril of having a court transmogrify those guidelines into binding norms

subject to notice and comment strictures." *Aulenback*, 103 F.3d at 169 (citation and quotation marks omitted). Because the protocol possesses the essential features of a procedural rule, the plaintiffs' notice and comment challenge also fails.

I would not reach the plaintiffs' argument that only the U.S. Marshal Service has the authority to promulgate rules under the FDPA. The plaintiffs did not develop this argument below, so it is forfeited. *See Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019) ("Absent exceptional circumstances, a party forfeits an argument by failing to press it in district court.").[16] I would also decline to reach the plaintiffs' claims under the Food, Drug & Cosmetic Act and the Controlled Substances Act, which were neither addressed by the district court nor pressed by the plaintiffs on appeal. Unlike the notice and comment challenge to the protocol, the outcome of the FDCA and CSA claims is not plainly dictated by my interpretation of the FDPA. Thus, it will be "for the district court to determine, in the first instance, whether the plaintiffs' showing on [these claims] warrants preliminary injunctive relief." *Sherley*, 644 F.3d at 398.

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[16] The evidence Judge Katsas relies on to conclude that this argument was not forfeited comes from a chart included in the factual background section of one plaintiff's preliminary injunction motion, summarizing the "Details of 2019 Protocol and Concerns That Are Implicated." *See* Pl.'s Mot. for Prelim. Inj., *Roane v. Barr*, No. 19-mc-0145, at 10 (D.D.C. Sept. 27, 2019). Such "fleeting reference[s]" do not a developed legal argument make. *Williams v. Lew*, 819 F.3d 466, 471 (D.C. Cir. 2016).

TATEL, *Circuit Judge,* dissenting: Plaintiffs Daniel Lee, Wesley Purkey, Alfred Bourgeois, and Dustin Honken do not challenge the federal government's authority to execute them. Instead, they argue that the Attorney General's plan for their executions—that is, the federal protocol—conflicts with section 3596(a) of the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. §§ 3591 et seq. Section 3596(a) instructs U.S. Marshals to carry out federal death sentences by arranging for prisoners to be executed "in the manner prescribed by the law of the State" in which they were sentenced—or, if that state has no death penalty, the law of "another State" "designate[d]" by the sentencing judge. *Id.* § 3596(a). Notwithstanding its weighty subject matter, then, this case presents a classic question under the Administrative Procedure Act: whether an agency has acted "in accordance with law." 5 U.S.C. § 706(2)(A).

In defending the federal protocol, the government argues that the word "manner" in section 3596(a) refers only to the general execution method—e.g., lethal injection—not, as plaintiffs argue, to the procedures and techniques used to implement that method, e.g., substance administered or dosage. Because the government seeks no deference to its interpretation of the statute, *see* Oral Arg. Rec. 5:57–6:00 (confirming this), to prevail it must demonstrate not merely that its interpretation of section 3596(a) is reasonable, but that it "best effectuates the underlying purposes of the statute." *Vanguard Interstate Tours, Inc. v. ICC*, 735 F.2d 591, 597 (D.C. Cir. 1984).

I agree with Judge Rao that the term "manner" refers to more than just general execution method. Because her detailed opinion so thoroughly addresses the government's arguments and convincingly responds to Judge Katsas's survey of the historical record, I see no need to say anything more on the issue.

Beyond this, Judge Rao and I part company. She would hold that when carrying out executions under section 3596(a), the Attorney General must comply with state execution procedures set forth in "statutes and formal regulations," but not those in state execution protocols. Rao Op. at 1. She also reads the federal protocol to contain a "carveout" "indicat[ing] that the government must depart from the protocol as necessary to . . . apply the manner of execution prescribed by state law." *Id.* at 1, 29. The government, however, makes neither argument, and the protocol contains no such carveout. In my view, section 3596(a), best understood, requires federal executions to be carried out using the same procedures that states use to execute their own prisoners—procedures set forth not just in statutes and regulations, but also in protocols issued by state prison officials pursuant to state law. Because the federal protocol, on its face, takes no account of these procedures, it is contrary to section 3596(a), and I would vacate it. *See* 5 U.S.C. § 706(2)(A), (C) (requiring courts to "hold unlawful and set aside agency action . . . found to be . . . not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

A.

Plaintiffs were sentenced to be executed "in the manner prescribed by the law," 18 U.S.C. § 3596(a), of Arkansas, Missouri, Texas, and Indiana, respectively. All four states have enacted statutes that establish lethal injection as the method of execution and delegate to state prison officials the task of developing specific execution procedures. Pursuant to these statutes, state officials have adopted execution protocols that designate, among other things, the chemicals to be administered, dosages, procedures for vein access, and qualifications of execution personnel. State officials adopt such protocols not just to comply with state law, but also to ensure that executions comply with the Constitution. *Cf. Baze v. Rees*, 553 U.S. 35, 55–56 (2008) (plurality opinion) (rejecting Eighth Amendment method-of-execution challenge "in light of" "important safeguards" contained in state execution protocol, including "that members of the [intravenous] team . . . have at least one year of professional experience" and specific vein-access procedures); *Raby v. Livingston*, 600 F.3d 552, 560 (5th Cir. 2010) (rejecting Texas inmate's Eighth Amendment claim because state execution protocol "mandates . . . that sufficient safeguards are in place to reduce the risk of pain below the level of constitutional significance").

For example, Texas's governing statute requires condemned prisoners to be "executed . . . by intravenous injection . . . , [with] such execution procedure to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice." Tex. Code

Crim. Proc. Ann. art. 43.14(a). Pursuant to that statute, the Director "adopt[ed]" an "Execution Procedure," under which "100 milliliters of solution containing 5 grams of Pentobarbital" "shall be mixed . . . by members of the drug team," which, in turn, "shall have at least one medically trained individual," a term defined in the protocol. Texas Department of Criminal Justice, Correctional Institutions Division, Execution Procedure 2, 7–8 (Apr. 2019), Administrative Record (A.R.) 84, 89–90. The protocol further requires that intravenous lines be inserted by "a medically trained individual" who "shall take as much time as is needed" to do so "properly," and who is prohibited from employing a "cut-down" technique, a surgical procedure that exposes the vein. *Id.* at 8, A.R. 90.

The governing Missouri statute "authorize[s] and direct[s]" "the director of the department of corrections . . . to provide a suitable and efficient room or place . . . and the necessary appliances" for carrying out lethal injections and requires "[t]he director . . . [to] select an execution team." Mo. Rev. Stat. § 546.720.1–2. Pursuant to that statute, the Director issued a protocol requiring prisoners to be executed using two five-gram doses of pentobarbital—quantities that "may not be changed without prior approval of the department director"—which "shall be injected into the prisoner . . . under the observation of medical personnel," namely, "a physician, nurse, and pharmacist." Missouri Department of Corrections, Preparation and Administration of Chemicals for Lethal Injection 1–2 (Oct. 18, 2013), A.R. 70–71.

The other two states—Arkansas and Indiana—

have similar statutory schemes. *See* Ark. Code Ann. § 5-4-617 ("The director [of the Department of Correction] shall develop logistical procedures necessary to carry out the sentence of death, including . . . [e]stablishing a protocol for any necessary mixing or reconstitution of the drugs and substances set forth in this section in accordance with the instructions."); Ind. Code § 35-38-6-1 (authorizing "[t]he department of correction [to] adopt rules" to implement lethal-injection statute); *see also Kelley v. Johnson*, 496 S.W.3d 346, 352 (Ark. 2016) (discussing Arkansas's lethal injection protocol); Department of Correction, Indiana State Prison Facility Directive, ISP 06-26: Execution of Death Sentence 16–17 (Jan. 22, 2014), Mot. for Prelim. Inj. Barring the Scheduled Execution of Pl. Dustin Lee Honken, Ex. 6, *In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145 (D.D.C. Nov. 5, 2019).

The "law" of each state, then, requires executions to be implemented according to procedures determined by state corrections officials, who, in turn, have set forth such procedures in execution protocols. In other words, "by law," each state directed its prison officials to develop execution procedures, and "by law," those officials established such procedures and set them forth in execution protocols. Accordingly, the protocols have been "prescribed by . . . law." 18 U.S.C. § 3596(a). Apparently agreeing, the government argues that interpreting "manner" to mean more than "method," as Judge Rao and I do, would require it to use the same drugs as the states—drugs "prescribed" in the relevant states' protocols, not in their statutes. *See*

Appellants' Br. 29. Indeed, at oral argument government counsel rejected the notion that "the law of the State" excludes execution protocols, calling it "incongruous to think that Congress thought the degree of federal control over how to implement . . . a federal execution was going to depend on the happenstance of exactly where in its law or regulation or sub-regulatory guidance a state chose to write out very detailed procedures." Oral Arg. Rec. 39:12–32.

Were there any doubt about this, "the natural way to draw the line is in light of the statutory purpose," *Rose v. Lundy*, 455 U.S. 509, 517 (1982) (internal quotation marks and citation omitted), and here, interpreting section 3596(a) to include state execution protocols "best effectuates the underlying purposes of the statute," *Vanguard Interstate Tours*, 735 F.2d at 597. As Judge Rao points out, section 3596(a) replicates nearly word-for-word the statute that governed federal executions from 1937 to 1984. Like the FDPA, that statute required executions to be carried out in "the manner prescribed by the laws of the State within which the sentence [wa]s imposed," or, if that state had no death penalty, another state designated by the sentencing court. Act of June 19, 1937, ch. 367, 50 Stat. 304 (repealed 1984) ("1937 Act"). Central to the issue before us, Congress passed the 1937 Act because the states were undertaking serious efforts to make executions more humane. *See* H.R. Rep. 75-164 at 2 (1937) (letter from Attorney General Homer Cummings) (advising Congress that states "have adopted more humane methods" of execution than hanging and recommending that "the Federal Government

likewise . . . change its law in this respect"); *see also* Stuart Banner, *The Death Penalty: An American History* 171 (2002) (explaining that, as early as the 1830s, states had begun experimenting with execution procedures, endeavoring to "minimize the condemned person's pain"). Accordingly, almost all federal executions pursuant to the 1937 Act were carried out by state officials, who, supervised by U.S. Marshals, executed federal prisoners in the same "manner" as they executed their own. *See* Oral Arg. Rec. 15:00–03 (government counsel agreeing that most executions pursuant to the 1937 Act were carried out in state facilities); David S. Turk, *Forging the Star: The Official Modern History of the United States Marshals Service* 23–24 (2016) (describing how the U.S. Marshal arranged for Ethel and Julius Rosenberg to be executed at Sing-Sing Correctional Facility, then home to New York state's death row and electric chair).

By using virtually identical language in FDPA section 3596(a), Congress signaled its intent to continue the same system—for federal executions to be carried out in the same manner as state executions. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). Given this, reading section 3596(a) to exclude state execution protocols, which set forth the very procedures states use to carry out executions humanely, would run contrary not only to section 3596(a)'s "'ultimate purpose[]'" of ensuring more humane executions, but also to "'the means [Congress] has deemed appropriate . . . for the

pursuit of [that] purpose[]'"—requiring federal prisoners to be executed in the same manner as states execute their own. *Gresham v. Azar*, 950 F.3d 93, 101 (D.C. Cir. 2020) (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 n.4 (1994)). And at least as recently as 2008, the states have "by all accounts" "fulfilled" their "role . . . in implementing their execution procedures . . . with an earnest desire to provide for a progressively more humane manner of death." *Baze*, 553 U.S. at 51.

Judge Rao argues that state execution protocols are not "prescribed by . . . law" within the meaning of section 3596(a) because they are not "formal regulations." Rao Op. at 1. In support, she cites *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), in which the Supreme Court considered a provision of the Trade Secrets Act that protected confidential information by prohibiting its disclosure unless "'authorized by law,'" *id.* at 294 (quoting 18 U.S.C. § 1905). The Court held that a regulation issued pursuant to an agency's "housekeeping" statute and without notice-and-comment procedures did not qualify as "law" under the Act. *Id.* at 309–16. From this, Judge Rao concludes that the word "law" in FDPA section 3596(a) is limited to regulations issued pursuant to notice-and-comment procedures. *See* Rao Op. at 7, 28 n.13.

By my count, the phrase "authorized by law" and its twin sisters—"prescribed by law" and "prescribed by the law"—appear 1,120 times in the United States Code, and the Supreme Court has repeatedly made clear that, even within the same statute, "the presumption of consistent usage 'readily yields' to

context." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 320 (2014) (quoting *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)). In *Chrysler*, moreover, it was only after closely examining "evidence of legislative intent," including statutory text and legislative history, that the Court limited "law" in the Trade Secrets Act to notice-and-comment regulations. 441 U.S. at 312. In other words, context matters, and here context requires a different result. Limiting "the manner prescribed by the law of the State" to execution procedures contained in statutes and in regulations issued pursuant to notice and comment, and thereby excluding those contained in state execution protocols, would defeat section 3596(a)'s purpose—to make federal executions more humane by ensuring that federal prisoners are executed in the same manner as states execute their own.

Judge Rao also argues that the Attorney General need not follow state execution protocols because they "do not appear to have the binding force of law," "leav[ing] the federal government free to specify" its own procedures. Rao Op. at 2, 28 n.15. But whether state execution protocols are binding under *state* law has nothing to do with whether the Attorney General has authority under *federal* law to issue a uniform execution protocol. And as explained above, section 3596(a) shifts authority for determining how to "implement" death sentences to the states, leaving no comparable authority for the Attorney General. Indeed, apart from the Attorney General's authority to establish procedures unrelated to "effectuat[ing] the death," *see infra* at 12, the statute assigns the Attorney General just three narrow tasks: keeping

custody of persons sentenced to death until they exhaust their appeals, 18 U.S.C. § 3596(a); releasing prisoners into Marshal custody for implementation of their death sentences, *id.*; and approving the amount Marshals may pay for the use of state facilities and personnel, *id.* § 3597(a).

B.

Of course, the federal protocol's failure to incorporate state execution procedures would pose no problem if, as Judge Rao believes, it contained a "carveout," "indicat[ing] that the government must depart from the protocol as necessary to . . . apply the manner of execution prescribed by state law." Rao Op. at 1, 29. But it does not. In relevant part, the protocol states:

> The procedures utilized by the [Bureau of Prisons (BOP)] to implement federal death sentences shall be as follows unless modified *at the discretion of* the Director or his/her designee, as necessary to (1) comply with specific judicial orders; (2) based on the recommendation of on-site medical personnel utilizing their clinical judgment; or (3) *as may be required by other circumstances*.

Department of Justice, Addendum to BOP Execution Protocol, Federal Death Sentence Implementation Procedures 1 (July 25, 2019) (emphasis added).

Far from requiring Marshals to follow state law, this provision mentions neither state law nor section 3596(a), and it leaves the decision to "modif[y]" protocol procedures to "the discretion" of the BOP Director, *id.* Moreover, only the third justification for

departing from the protocol—"other circumstances," *id.*—could possibly encompass inconsistent state law. But the government—which, after all, wrote the protocol—does not so argue. At most, the government suggests that it could exercise its residual discretion in accordance with state law, noting that "nothing in the federal protocol expressly precludes" "offer[ing] . . . a sedative" or having a physician present. Appellants' Br. 33 (referring to the two differences between the federal protocol and the relevant state protocols identified by the district court).

Where, as here, agency action is challenged under the Administrative Procedure Act, we can uphold the action only on "[t]he grounds . . . upon which the record discloses that [it] was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Throughout this litigation, the government has insisted that requiring it to comply with state law would be "perverse[]," Appellants' Br. 19, and would "hamstring" implementation of the federal death penalty, Reply Br. 13. We have no authority to rewrite the protocol to ensure it complies with the FDPA. "[A]gency policy is to be made, in the first instance, by the agency itself . . . . Courts ordinarily do not attempt . . . to fashion a valid regulation from the remnants of the old rule." *Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989). The problem with Judge Rao's interpretation of the protocol, then, is not just that it represents an "independent assessment" of the protocol's meaning, Rao Op. at 30**,** but more fundamentally that "it sustains a rule which the agency has never adopted at all," *Harmon*, 878 F.2d at 495 n.20.

C.

I end with a few observations about the government's defense of the protocol.

First, had Congress intended to authorize the Attorney General to adopt a uniform execution protocol, "it knew exactly how to do so." *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). The year before Congress enacted the FDPA, then-Attorney General William Barr issued a regulation setting lethal injection as the uniform federal method of execution and authorizing the BOP Director to determine which chemicals to use. *See* Department of Justice, Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4898, 4901–02 (Jan. 19, 1993) (codified at 28 C.F.R. § 26.3) (1993 Regulation). This regulation was a gap-filler: several years earlier, Congress had repealed the 1937 Act, leaving unclear how federal executions would be carried out. While Congress was considering the bill that would become the FDPA, General Barr's successor, Attorney General Janet Reno, warned that section 3596(a)'s "proposed procedures contemplate a return to an earlier system"—i.e., the 1937 Act—"in which the Federal Government does not directly carry out executions, but makes arrangements with states to carry out capital sentences in Federal cases." H.R. Rep. No. 104–23, at 22 (1995) (quoting Letter of Attorney General Janet Reno to Honorable Joseph R. Biden, Jr., Detailed Comments at 3–4 (June 13, 1994)). She therefore recommended that Congress amend the bill "to perpetuate the current approach"—i.e., the 1993 Regulation—"under which the execution of capital sentences in Federal cases is carried out by Federal

officials pursuant to uniform regulations issued by the Attorney General." *Id.* Despite this recommendation, "Congress didn't choose to pursue that known and readily available approach here. And its choice"—to require executions to be carried out according to state, not federal, law—"must be given effect rather than disregarded." *SAS Institute*, 138 S. Ct. at 1356.

Second, the government argues that requiring it to comply with state law would "preclud[e]" it "from selecting *more* humane lethal-injection protocols than those used by the states." Appellants' Br. 29. As explained above, however, section 3596(a), like the 1937 Act, relies on the states, not the Attorney General, to ensure that federal executions are humane. Perhaps circumstances have changed and authorizing the Attorney General to select lethal substances, dosages, and injection procedures would lead to more humane executions. That, however, "is a decision for Congress and the President to make if they wish by enacting new legislation." *Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014); *see also* Rao Op. at 24. They have ready templates in the nine bills Congress has considered and rejected in the years since the FDPA's enactment, every one of which would have permitted federal executions to be carried out "pursuant to regulations prescribed by the Attorney General." H.R. 2359, 104th Cong. § 1 (1995); *see also* H.R. 851, 110th Cong. § 6 (2007); H.R. 3156, 110th Cong. § 126 (2007); S. 1860, 110th Cong. § 126 (2007); H.R. 5040, 109th Cong. § 6 (2006); S. 899, 106th Cong. § 6504 (1999); H.R. 4651, 105th Cong. § 501 (1998); S. 3, 105th Cong. § 603 (1997); H.R. 1087, 105th Cong. § 1 (1997).

Finally, the government argues that requiring it to follow "every nuance" of state protocols "could impose significant barriers to administering" the federal death penalty. Appellants' Br. 27. Plaintiffs, however, do not contend that the government must follow "every nuance." Quite to the contrary, they argue, and I agree, that section 3596(a) requires the federal government to follow only "implementation" procedures, 18 U.S.C. § 3596(a), which plaintiffs define as those procedures that "effectuat[e] the death," Oral Arg. Rec. 1:01:06, including choice of lethal substances, dosages, vein-access procedures, and medical-personnel requirements, *see id*. 1:01:58–1:05:25. To be sure, plaintiffs' interpretation could present courts with line-drawing challenges: is, for example, color-coding syringes part of effectuating an execution? But here we face no such challenges given that the federal protocol fails to account for state procedures that are obviously integral to "implement[ing]" a death sentence, 18 U.S.C. § 3596(a).

In any event, if crafting a federal protocol consistent with the FDPA proves too difficult, then the Attorney General may, pursuant to section 3596(a), arrange for plaintiffs to be executed by the relevant states—just as most federal prisoners have been since 1937. *See* Oral Arg. Rec. 1:38:13–34 (plaintiffs' counsel acknowledging as much). The government fears that states could "block implementation of a federal death sentence," Appellants' Br. 28, but at oral argument government counsel assured us that the government has no evidence of state recalcitrance in this case, *see* Oral Arg. Rec. 18:50–55 (responding "no" to the question

whether there "is any evidence of" "obstructionism" "in this case"). And if such problems do come to pass—that is, if section 3596(a)'s incorporation of state procedures creates obstacles for federal executions—then Congress will have all the more reason to revise the statute. Until it does, this court must enforce section 3596(a) as written. "[I]t is never our job to rewrite . . . statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,

LEAD CASE: *Roane et al. v. Barr*

THIS DOCUMENT RELATES TO:

Bourgeois v. U.S. Dep't of Justice, et al.,
12-cv-0782

Lee v. Barr, 19-cv-2559

Purkey v. Barr, et al., 19-cv-03214

Case No. 19-mc-145 (TSC)

MEMORANDUM OPINION

On July 25th of this year, the U.S. Department of Justice ("DOJ") announced plans to execute five people. *See* Press Release, Dep't of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse. The DOJ intends to execute Daniel Lewis Lee on December 9, 2019; Lezmond Mitchell on

December 11, 2019; Wesley Ira Purkey on December 13, 2019; Alfred Bourgeois on January 13, 2020; and Dustin Lee Honken on January 15, 2020. *Id.* To implement these executions, the Federal Bureau of Prisons ("BOP") adopted a new execution protocol: the "2019 Protocol." *Id;* (ECF No. 39-1 ("Administrative R.") at 1021–1075).

Four of the five individuals with execution dates[1] (collectively, "Plaintiffs"), have filed complaints against the DOJ and BOP (collectively, "Defendants"), alleging that the 2019 Protocol is unlawful and unconstitutional on numerous grounds.[2] *See Purkey v. Barr,* 19-cv-03214 (D.D.C.), Doc. # 1 (Oct. 25, 2019); *Lee v. Barr,* 1:19-cv-02559 (D.D.C.), Doc. #1 (Aug. 23, 2019); *Bourgeois v. U.S. Dep't of Justice, et al.*, 1:12-cv-00782 (D.D.C.), Doc. # 1 (May 5, 2012); ECF. No. 38 ("Honken Compl."). The court consolidated the cases and ordered Plaintiffs to complete the necessary 30(b)(6) depositions on or before February 29, 2020 and to amend their complaints on or before March 31, 2020.

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[1] Mitchell has not filed a complaint in this court.

[2] Bourgeois' complaint was filed in 2012 and relates to a separate execution protocol. *See Bourgeois v. U.S. Dep't of Justice, et al.*, 1:12-cv-00782 (D.D.C.), Doc. # 1 (May 5, 2012). In addition, his Motion for Preliminary Injunction (ECF. No. 2 ("Bourgeois Mot. for Prelim. Inj.")) does not articulate his bases for a preliminary injunction, but instead argues that a preliminary injunction is warranted because the plaintiffs in the *Roane* litigation were granted a preliminary injunction. Despite the shortcomings of Bourgeois' briefing, this court has determined that he meets the requirements of a preliminary injunction, as do the three other plaintiffs in the consolidated case, whose motions are fully briefed.

(*See* ECF No. 1 ("Consolidation Order"); Min. Entry, Aug. 15, 2019.) Because Plaintiffs are scheduled to be executed before their claims can be fully litigated, they have asked this court, pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65.1, to preliminarily enjoin the DOJ and BOP from executing them while they litigate their claims. (ECF No. 34 ("Purkey Mot. for Prelim. Inj."); ECF No. 29 ("Honken Mot. for Prelim. Inj."); ECF No. 13 ("Lee Mot. for Prelim. Inj."); ECF No. 2 ("Bourgeois Mot. for Prelim. Inj.")) Having reviewed the parties' filings, the record, and the relevant case law, and for the reasons set forth below, the court hereby GRANTS Plaintiffs' Motions for Preliminary Injunction.

I. BACKGROUND

Beginning in 1937, Congress required federal executions to be conducted in the manner prescribed by the state of conviction. *See* 50 Stat. § 304 (former 18 U.S.C. 542 (1937)), recodified as 62 Stat. § 837 (former 18 U.S.C. 3566). After the Supreme Court instituted a *de facto* moratorium on the death penalty in *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972), and then lifted it in *Gregg v. Georgia,* 428 U.S. 153, 187 (1976), Congress reinstated the death penalty for certain federal crimes but did not specify a procedure for implementation. *See* Anti-Drug Abuse Act of 1988, Pub. L. 100–690, § 7001, 102 Stat. 4181 (enacted Nov. 18, 1988). Four years later, under the direction of then-Attorney General William Barr, the DOJ published a proposed rule to establish a procedure for implementing executions. Implementation of Death Sentences in Federal Cases, 57 Fed. Reg. 56536 (proposed Nov. 30, 1992).

The proposed rule noted that the repeal of the 1937 statute "left a need for procedures for obtaining and executing death orders." *Id.* The final rule, issued in 1993, provided a uniform method and place of execution. *See* 58 Fed. Reg. 4898 (1993), *codified at* 28 C.F.R. pt. 26 (setting method of execution as "intravenous injection of a lethal substance.")

But a year later, Congress reinstated the traditional approach of following state practices through passage of the Federal Death Penalty Act ("FDPA"). *See* Pub. L. No. 103–322, 108 Stat. 1796 (1994), *codified at* 18 U.S.C. §§ 3591–3599. The FDPA establishes that the U.S. Marshal "shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." *Id.* § 3596(a). The FDPA provides no exceptions to this rule and does not contemplate the establishment of a separate federal execution procedure. Plaintiffs' cases are governed by the FDPA because when the death penalty portions of the ADAA were repealed in 2006, the FDPA was "effectively render[ed] . . . applicable to all federal death-eligible offenses." *United States v. Barrett*, 496 F.3d 1079, 1106 (10th Cir. 2007).

Given the conflict between the FDPA's state-by-state approach and the uniform federal approach adopted by DOJ's 1993 rule (28 C.F.R. pt. 26), the DOJ and BOP supported proposed legislation to amend the FDPA to allow them to carry out executions under their own procedures. One bill, for example, would have amended § 3596(a) to provide that the death sentence "shall be implemented pursuant to regulations prescribed by the Attorney General." H.R. 2359, 104th Cong. § 1 (1995). In his

written testimony supporting the bill, Assistant Attorney General Andrew Fois wrote that "H.R. 2359 would allow Federal executions to be carried out . . . pursuant to uniform Federal regulations" and that "amending 18 U.S.C. § 3596 [would] allow for the implementation of Federal death sentences pursuant to Federal regulations promulgated by the Attorney General." *Written Testimony on H.R. 2359 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. 1 (1995) (Statement of Andrew Fois, Assistant Att'y Gen. of the United States). None of the proposed amendments were enacted, and the FDPA continues to require the federal government to carry out executions in the manner prescribed by the states of conviction.

In 2005, three individuals facing death sentences sued, alleging that their executions were to be administered under an unlawful and unconstitutional execution protocol. *Roane v. Gonzales*, 1:05-cv-02337 (D.D.C.), Doc. #1 ¶ 2. The court preliminarily enjoined their executions. *Roane*, Doc. #5. Three other individuals on death row intervened, and the court enjoined their executions. *See Roane*, Doc. #23, 27, 36, 38, 67, 68. A seventh individual on death row subsequently intervened and had his execution enjoined as well. *See id.* Doc. #333. During this litigation, the government produced a 50-page document ("2004 Main Protocol") outlining BOP execution procedures. *Roane*, Doc. #179–3. The 2004 Main Protocol cites 28 C.F.R. pt. 26 for authority and does not mention the FDPA. *See id.* at 1. The government then produced two three-page addenda to the 2004 Main Protocol. *See Roane*, Doc. #177-1 (Addendum to Protocol, Aug. 1, 2008) (the

"2008 Addendum"); *Roane*, Doc. #177-3 (Addendum to Protocol, July 1, 2007) ("2007 Addendum"). In 2011 the DOJ announced that the BOP did not have the drugs needed to implement the 2008 Addendum. *See* Letter from Office of Attorney General to National Association of Attorneys General, (Mar. 4, 2011), https://files.deathpenaltyinfo.org/legacy/documents/2011.03.04.Holder.Letter.pdf. The government told the court that the BOP "has decided to modify its lethal injection protocol but the protocol revisions have not yet been finalized." *Roane*, Doc. #288 at 2. In response, the court stayed the *Roane* litigation.

No further action was taken in the cases for seven years, until July of this year, when DOJ announced a new addendum to the execution protocol ("2019 Addendum") (Administrative R. at 870–871), that replaces the three-drug protocol of the 2008 Addendum with a single drug: pentobarbital sodium. *See id* at ¶ C. In addition to the 2019 Addendum, the BOP adopted a new protocol to replace the 2004 Main Protocol (the 2019 Main Protocol). (Administrative R. at 1021–1075.)

The court held a status conference in the *Roane* action on August 15, 2019. (*See* Min. Entry, Aug. 15, 2019). In addition to the *Roane* plaintiffs, the court heard from counsel for three other death-row inmates, including Bourgeois, all of whom cited the need for additional discovery on the new protocol. (*See* ECF No. 12 ("Status Hr'g Tr.")). The government indicated that it was unwilling to stay the executions, and the court bifurcated discovery and ordered Plaintiffs to complete 30(b)(6) depositions by February 28, 2020 and to file

amended complaints by March 31, 2020. (*See* Min. Entry, Aug. 15, 2019.)

Lee filed a complaint challenging the 2019 Addendum on August 23, 2019 (*see Lee v. Barr*, 1:19-cv-02559 (D.D.C.), Doc. 1), and a motion for a preliminary injunction on September 27, 2019, (Lee Mot. for Prelim. Inj.). On August 29, 2019 Bourgeois moved to preliminarily enjoin his execution. (Bourgeois Mot. for Prelim. Inj.) Honken filed an unopposed motion to intervene in *Lee v. Barr*, which was granted. (ECF No. 26. ("Honken Mot. to Intervene").) He then filed a motion for a preliminary injunction on November 5, 2019. (Honken Mot. for Prelim. Inj.) Purkey filed a complaint and a motion for preliminary injunction under a separate case number, 1:19-cv-03214, which was consolidated with *Roane*. Thus, the court now has before it four fully briefed motions to preliminarily enjoin the DOJ and BOP from executing Lee, Purkey, Bourgeois, and Honken.

II. ANALYSIS

A preliminary injunction is an "extraordinary remedy" that is "never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)). Courts consider four factors on a motion for a preliminary injunction: the likelihood of plaintiff's success on the merits, (2) the threat of irreparable harm to the plaintiff absent an injunction, (3) the balance of equities, and (4) the public interest. *Id.* at 20 (citations omitted); *John Doe Co. v. Consumer Fin. Prot. Bureau,* 849 F.3d 1129, 1131 (D.C. Cir. 2017). The D.C. Circuit has traditionally evaluated

claims for injunctive relief on a sliding scale, such that "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius,* 644 F.3d 388, 392 (D.C. Cir. 2011). It has been suggested, however, that a movant's showing regarding success on the merits "is an independent, free-standing requirement for a preliminary injunction." *Id.* at 393 (quoting *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring)). Here, Plaintiffs' claims independently satisfy the merits requirement.

A. Likelihood of Success on the Merits

Plaintiffs allege, *inter alia*, that the 2019 Protocol exceeds statutory authority and therefore under the Administrative Procedure Act ("APA"), it must be set aside. Under the APA, a reviewing court "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 right." 5 U.S.C. § 706(2)(C). Plaintiffs argue that the 2019 Protocol exceeds statutory authority by establishing a single procedure for all federal executions rather than using the FDPA's state-prescribed procedure. (Purkey Mot. for Prelim. Inj. at 16; Honken Mot. for Prelim. Inj. at 34–35; Lee Mot. for Prelim. Inj. at 5–6, 17). Given that the FDPA expressly requires the federal government to implement executions in the manner prescribed by the state of conviction, this court finds Plaintiffs have shown a likelihood of success on the merits as to this claim.

Defendants argue that the 2019 Protocol "is not contrary to the FDPA" because the authority given to

DOJ and BOP through § 3596(a) of the FDPA "necessarily includes the authority to specify . . . procedures for carrying out the death sentence." (ECF No. 16 ("Defs. Mot. in Opp. To Lee Mot. for Prelim. Inj.") at 34.) Section 3596(a) states:

> When the [death] 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.

18 U.S.C. § 3596(a) (emphasis added). Because a United States Marshal is to "supervise" the process, it does appear that at least some authority is granted to the Marshal. But it goes too far to say that such authority necessarily includes the authority to decide procedures without reference to state policy. The statute expressly provides that "the implementation of the sentence" shall be done "in the manner" prescribed by state law. *Id.* Thus, as between states and federal agencies, the FDPA gives decision-making authority regarding "implementation" to the former. Accordingly, the 2019 Protocol's uniform procedure approach very likely exceeds the authority provided by the FDPA.

Defendants contest the meaning of the words "implementation" and "manner." As they interpret § 3596(a), Congress only gave the states the authority to decide the "method" of execution, e.g., whether to use lethal injection or an alternative, not the authority to decide additional procedural details such as the substance to be injected or the safeguards taken during the injection. The court finds this reading implausible. First, the statute does not refer to the "method" of execution, a word with particular meaning in the death penalty context. *See id.* Instead, it requires that the "implementation" of a death sentence be done in the "manner" prescribed by the state of conviction. *Id.* "Manner" means "a mode of procedure or way of acting." *Manner*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 756 (11th ed. 2014.) The statute's use of the word "manner" thus includes not just execution method but also execution *procedure.* To adopt Defendants' interpretation of "manner" would ignore its plain meaning. As one district court concluded, "the implementation of the death sentence [under the FDPA] involves a process which includes more than just the method of execution utilized." *United States v. Hammer*, 121 F. Supp. 2d 794, 798 (M.D. Pa. 2000).[3]

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[3] Defendants cite three cases to suggest that "manner" means "method": *Higgs v. United States*, 711 F. Supp. 2d 479, 556 (D. Md. 2010); *United States v. Bourgeois,* 423 F.3d 501 (5th Cir. 2005); and *United States v. Fell*, No. 5:0-cr-12-01, 2018 WL 7270622 (D. Vt. Aug. 7 2018). *Higgs* interpreted the FDPA to require the federal government to follow a state's chosen method of execution but not to follow any other state procedure. 711 F. Supp. 2d at 556. This interpretation, however, was

Moreover, legislative efforts to amend the FDPA further support this court's interpretation of the terms "manner" and "implementation." As noted above, in 1995, the year after the FDPA became law, the DOJ supported bills amending the statute to allow the DOJ and BOP to create a uniform method of execution, indicating that the FDPA as drafted did not permit federal authorities to establish a uniform procedure. The amendments were never enacted.

Defendants argue that reading the FDPA as requiring adherence to more than the state's prescribed method of execution leads to absurd results. (*See, e.g.*, Defs. Mot. in Opp. to Purkey Mot. for Prelim. Inj. at 28.) They contend that if the state's choice of drug is to be followed, the federal government would have to "stock all possible lethal agents used by the States." *Id.* But the FDPA contemplates and provides for this very situation: it permits the United States Marshal to allow the assistance of a state or local official and to use state

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stated in dicta and is not supported by persuasive reasoning. *Id*. *Bourgeois* did not reach the question of what the words "implementation" and "manner" mean in 18 U.S.C. § 3596(a). 423 F.3d 501 (5th Cir. 2005). Instead, it evaluated only whether the sentence violated Texas law. *Id.* at 509. The opinion appeared to assume that § 3596(a) only requires the federal government to follow the state-prescribed method of execution, but it provided no basis for that assumption. *Id.* at 509. In *Fell*, the district court held that the creation of a federal death chamber does not violate the FDPA. *Fell,* slip op., at 4. This holding affirms the notion that the federal government has some authority in execution procedure (such as the place of execution), but it does not conflict with the proposition that the FDPA requires the federal government to follow state procedure as to more than simply the method of execution.

and local facilities. 18 U.S.C. § 3596(a). Moreover, the practice of following state procedure and using state facilities has a long history in the United States. Before the modern death penalty, the relevant statute provided that the:

> manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed. The United States marshal charged with the execution of the sentence may use available State or local facilities and the services of an appropriate State or local official . . .

50 Stat. § 304 (former 18 U.S.C. 542 (1937)), recodified as 62 Stat. § 837 (former 18 U.S.C. 3566) (1948). The federal government carried out executions in accordance with this statute for decades, including those of Julius and Ethel Rosenberg in New York's Sing Sing prison, and Victor Feguer in the Iowa State Penitentiary. *See Feguer v. United States,* 302 F.2d 214, 216 (8th Cir. 1962) (noting sentence of death by hanging imposed pursuant to § 3566 and Iowa law); *Rosenberg v. Carroll,* 99 F. Supp. 630, 632 (S.D.N.Y. 1951) (applying § 3566 to uphold state law confinement prior to execution). Thus, far from creating absurd results, requiring the federal government to follow more than just the state's method of execution is consistent with other sections of the statute and with historical practices. For all these reasons, this court finds that the FDPA does not authorize the creation of a single implementation procedure for federal executions.

Defendants argue that the 2019 Protocol derives authority from 28 C.F.R. § 26.3(a), which provides that executions are to be carried out at the time and place designated by the Director of the BOP, at a federal penal or correctional institution, and by injection of a lethal substance or substances under the direction of the U.S. Marshal. (Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj. at 31.) However, this argument is undercut by the fact that, as with the 2019 Protocol itself, 28 C.F.R. Pt. 26 also conflicts with the FDPA. As noted above, 28 C.F.R. Pt. 26 was promulgated in 1993 (before the FDPA was enacted) to implement the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e) (the "ADAA"), which does not specify how federal executions are to be carried out. 28 C.F.R. § 26.3(a) filled that gap by providing an implementation procedure. But when Congress passed its own requirements for the implementation procedure in the FDPA, those requirements conflicted with 28 C.F.R. § 26.3(a).

Defendants concede that "where a regulation contradicts a statute, the latter prevails." (Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj. at 31.) They argue instead that the regulation does not conflict with the FDPA as applied to Plaintiffs because lethal injection (the method required by 28 C.F.R. § 26.3(a)(4)) is either permitted or required in the Plaintiffs' states of conviction (Texas, Arkansas, Missouri, and Indiana[4]). (ECF No. 37 ("Defs. Mot. in

[4] Honken was convicted in Iowa, which does not have a death penalty. The FDPA requires a court to designate a death penalty state for any individual convicted in a state without the death penalty, and the court designated Indiana. (Honken Mot. for Prelim. Inj. at 37.)

Opp. to Purkey Mot. for Prelim. Inj.") at 26–27; ECF No. 36 ("Defs. Mot. in Opp. to Honken Mot. for Prelim. Inj.") at 19–20; Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj at 31–32.)[5] Two of those states—Texas and Missouri—use a single dose of pentobarbital for executions. (Administrative R. at 99, 104.)

But this overlap does not, in and of itself, reconcile 28 C.F.R. pt. 26 with the FDPA. 28 C.F.R. Pt. 26 remains inconsistent with the FDPA because it establishes a single federal procedure, while the FDPA requires state-prescribed procedures. In addition, 28 C.F.R. § 26.3(a)(2) requires use of a federal facility, while the FDPA permits the use of state facilities. *Compare* 28 C.F.R. § 26.3(a)(2) *with* 18 U.S.C. § 3597. There are also inconsistencies between the FDPA's required state procedures and the 2019 Protocol. For example, states of conviction establish specific and varied safeguards on how the intravenous catheter is to be inserted.[6] The 2019 Protocol, however, provides only that the method for insertion of the IV is to be selected based on the training, experience, or recommendation of execution personnel. (Administrative R. at 872.) Thus, the fact that the states of conviction and 28 C.F.R. § 26.3(a)

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[5] Defendants do not assert this argument as to Bourgeois (likely because he did not raise 28 C.F.R. Part 26 in his motions), but does include Texas' execution protocol—which requires lethal injection—in the Administrative Record. (Administrative R. at 83-91.)

[6] *See, e.g.*, Administrative R. at 90-91 (Texas); Administrative R. at 70-71 (Missouri); Honken Mot. for Prelim. Inj. Ex. 6 at 16–17 (Indiana).

all prescribe lethal injection as the method of execution is not enough to establish that the regulation is valid as applied to Plaintiffs.

Defendants further argue that even if 28 C.F.R. § 26.3(a) did not conflict with the FDPA by requiring lethal injection, the DOJ would still adopt lethal injection as its method of execution for these Plaintiffs. (*See e.g.,* Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj at 32–33.) On this basis, they ask the court to sever section 26.3(a)(4)—which establishes lethal injection as the federal method—and affirm the rest of 28 C.F.R. § 26.3(a). *Id.* Defendants cite *Am. Petroleum Inst. V. EPA*, 862 F.3d 50 (D.C. Cir. 2017), for the proposition that the court "will sever and affirm a portion of an administrative regulation" if it can say "*without any substantial doubt* that the agency would have adopted the severed portion on its own." *Id.* at 71 (emphasis added). The court declines to take this approach for several reasons. First, it is premised on the strained reading of the FDPA that this court has already rejected. Moreover, the court cannot say "without any substantial doubt" that DOJ "would have adopted the severed portion on its own." *Id.* Even were the court to engage in such speculation, it seems plausible that if 28 C.F.R. § 26.3(a) instructed the BOP to follow state procedure, rather than to implement lethal injection, that BOP would in fact adopt whatever specific procedures were required by each state. Finally, even if the court severed the language in 28 C.F.R. § 26.3(a) that conflicts with the FDPA, another problem would arise: that is the very language that purportedly authorizes the creation of a single federal procedure. If the court severs it, then 28

C.F.R. § 26.3(a) would no longer contain the support for a single federal procedure that Defendants claim it does.

More importantly, Defendants' arguments regarding the regulation's applicability to these Plaintiffs take us far afield from the task at hand. The arguments do not control the court's inquiry of whether the 2019 Protocol exceeds statutory authority. Based on the reasoning set forth above, this court finds that insofar as the 2019 Protocol creates a single implementation procedure it is not authorized by the FDPA. This court further finds that because 28 C.F.R. § 26.3 directly conflicts with the FDPA, it does not provide the necessary authority for the 2019 Protocol's uniform procedure. There is no statute that gives the BOP or DOJ the authority to establish a single implementation procedure for all federal executions. To the contrary, Congress, through the FDPA, expressly reserved those decisions for the states of conviction. Thus, Plaintiffs have established a likelihood of success on the merits of their claim that the 2019 Protocol exceeds statutory authority. Given this finding, the court need not reach Plaintiffs' other claims.

B. Irreparable Harm

To constitute irreparable harm, "the harm must be certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm," and it "must be beyond remediation." *League of Women Voters of U.S. v. Newby,* 838 F. 3d 1, 7–8 (D.C. Cir. 2016) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006))

(internal quotation marks and brackets omitted). Here, absent a preliminary injunction, Plaintiffs would be unable to pursue their claims, including the claim that the 2019 Protocol lacks statutory authority, and would therefore be executed under a procedure that may well be unlawful. This harm is manifestly irreparable.

Other courts in this Circuit have found irreparable harm in similar circumstances. *See, e.g.*, *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) (finding irreparable injury where plaintiffs faced detention under challenged regulations); *Stellar IT Sols., Inc. v. U.S.C.I.S.*, Civ. A. No. 18-2015 (RC), 2018 WL 6047413, at *11 (D.D.C. Nov. 19, 2018) (finding irreparable injury where plaintiff would be forced to leave the country under challenged regulations); *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 126–27 (D.D.C. 2015) (finding irreparable injury where challenged regulations would threaten company's existence); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 19 (D.D.C. 2009) (finding irreparable injury when challenged regulations would limit guest workers).

Plaintiffs have clearly shown that, absent injunctive relief, they will suffer the irreparable harm of being executed under a potentially unlawful procedure before their claims can be fully adjudicated. Given this showing, the court need not reach the various other irreparable harms that Plaintiffs allege.

C. Balance of Equities

Defendants assert that if the court preliminarily enjoins the 2019 Protocol they will suffer the harm of a delayed execution date. (*See, e.g.*, Def. Mot. in Opp. to Purkey Mot. for Prelim. Inj. at 43.) While the government does have a legitimate interest in the finality of criminal proceedings, the eight years that it waited to establish a new protocol undermines its arguments regarding the urgency and weight of that interest. Other courts have found "little potential for injury" as a result of a delayed execution date. *See, e.g.*, *Harris v. Johnson*, 323 F. Supp. 2d 797, 809 (S.D. Tex. 2004). This court agrees that the potential harm to the government caused by a delayed execution is not substantial.

D. Public Interest

The public interest is not served by executing individuals before they have had the opportunity to avail themselves of legitimate procedures to challenge the legality of their executions. On the other hand, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands,* 686 F. Supp. 2d at 21. Accordingly, this court finds that the public interest is served by preliminarily enjoining the execution of the four Plaintiffs because it will allow them to determine whether administrative agencies acted within their delegated authority, and to ensure that they do so in the future.

III. CONCLUSION

This court finds that at least one of Plaintiffs' claims has a likelihood of success on the merits and that absent a preliminary injunction, they will suffer irreparable harm. It further finds that the likely harm that Plaintiffs would suffer if this court does not grant injunctive relief far outweighs any potential harm to the Defendants. Finally, because the public is not served by short-circuiting legitimate judicial process, and is greatly served by attempting to ensure that the most serious punishment is imposed lawfully, this court finds that it is in the public interest to issue a preliminary injunction. Accordingly, each of Plaintiffs' motions for preliminary injunctions is hereby GRANTED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5322

September Term, 2019

1:19-mc-00145-TSC

Filed On: May 22, 2020

In re: In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,

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JAMES H. ROANE, JR., ET AL.,

Appellees,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,

Appellants.

BEFORE: Tatel, Katsas, and Rao, Circuit Judges

O R D E R

Upon consideration of plaintiff-appellees' motion to stay issuance of the mandate, the opposition thereto, and the reply, it is

ORDERED that the Clerk is directed to issue the mandate on June 8, 2020.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5322

September Term, 2019

1:19-mc-00145-TSC

Filed On: December 2, 2019

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,

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JAMES H. ROANE, JR., ET AL.,

Appellees,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,

Appellants.

BEFORE: Rogers, Griffith, and Rao, Circuit Judges

O R D E R

Upon consideration of the motion to stay or vacate preliminary injunction, the opposition thereto, and the reply, it is

ORDERED that the motion be denied. Appellants have not satisfied the stringent requirements for a stay pending appeal. See Nken v. Holder, 556 U.S. 418, 434 (2009); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2018).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Amy Yacisin
Deputy Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. 19A615

Cite as: 589 U.S. ____ (2019)

Statement of ALITO, J.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.

v.

JAMES H. ROANE, JR., ET AL.

ON APPLICATION FOR STAY OR VACATUR

December 6, 2019

The application for stay or vacatur presented to THE CHIEF JUSTICE and by him referred to the Court is denied. We expect that the Court of Appeals will render its decision with appropriate dispatch.

Statement of JUSTICE ALITO, with whom JUSTICE GORSUCH and JUSTICE KAVANAUGH join, respecting the denial of stay or vacatur.

The District Court for the District of Columbia has preliminarily enjoined the Federal Government from carrying out the execution of four prisoners who were convicted in federal court more than 15 years ago for

exceptionally heinous murders. In this action, none of the four is contesting his guilt or his sentence, but the District Court enjoined the Bureau of Prisons (BOP) from carrying out these executions based on its interpretation of a statute, 18 U. S. C. §3596(a), directing that federal executions be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." This means, the Government contends, that the mode of execution (*i.e.*, by lethal injection, electrocution, etc.) must be the same as that called for under the law of the State in question, but the District Court held instead that a federal execution must follow all the procedures that would be used in an execution in that State—down to the selection of the way a catheter is inserted.

The Government has shown that it is very likely to prevail when this question is ultimately decided. The centerpiece of the District Court's reasoning was that Congress referred to the "manner" and not the "method" of execution, but there is strong evidence that this reading is not supported either by the ordinary meaning of these two terms or by the use of the term "manner" in prior federal death penalty statutes. Moreover, the District Court's interpretation would lead to results that Congress is unlikely to have intended. It would require the BOP to follow procedures that have been attacked as less safe than the ones the BOP has devised (after extensive study); it would demand that the BOP pointlessly copy minor details of a State's protocol; and it could well make it impossible to carry out executions of prisoners sentenced in some States.

Vacating the stay issued by the District Court for the District of Columbia would not necessarily mean that the prisoners in question would be executed before the merits of their Administrative Procedure Act claim is adjudicated. They remain free to seek review on other grounds. Nevertheless, in light of what is at stake, it would be preferable for the District Court's decision to be reviewed on the merits by the Court of Appeals for the District of Columbia Circuit before the executions are carried out.

The Court has expressed the hope that the Court of Appeals will proceed with "appropriate dispatch," and I see no reason why the Court of Appeals should not be able to decide this case, one way or the other, within the next 60 days. The question, though important, is straightforward and has already been very ably briefed in considerable detail by both the Solicitor General and by the prisoners' 17-attorney legal team. For these reasons, I would state expressly in the order issued today that the denial of the application to vacate is without prejudice to the filing of a renewed application if the injunction is still in place 60 days from now.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5322

September Term, 2019

1:19-mc-00145-TSC

Filed On: May 15, 2020

In re: Federal Bureau of Prisons' Execution Protocol Cases,

JAMES H. ROANE, JR., ET AL.,

Appellees,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,

Appellants.

BEFORE: Srinivasan[*], Chief Judge; Henderson, Rogers, Tatel[**], Garland, Griffith,

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[*] Chief Judge Srinivasan did not participate in this matter.

[**] A statement by Circuit Judge Tatel is attached.

Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

O R D E R

Upon consideration of appellees' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5322

September Term, 2019

Statement by Circuit Judge Tatel

TATEL, *Circuit Judge*: Even though I believe this case is en banc worthy, I did not call for a vote because, given that the Supreme Court directed this court to proceed "with appropriate dispatch," Barr v. Roane, 140 S. Ct. 353 (2019), I agree that "[our] review should be concluded without delay," Opp'n to Pet. for Reh'g En Banc 15.

APPENDIX G

U.S. DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISON

Office of the Director

Washington, DC 20534

July 24, 2019

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Hugh J. Hurwitz
Acting Director
Federal Bureau of Prisons

SUBJECT: The Federal Bureau of Prisons' Federal Execution Protocol Addendum

The Federal Bureau of Prisons ("BOP") Addendum to its Federal Execution Protocol provides for the use of a single drug, pentobarbital sodium, as the lethal agent. The BOP has a viable source for the drug, and the BOP is prepared to implement the Addendum.

RECOMMENDATION: The Attorney General directs the Acting Director of the Federal Bureau of Prisons to adopt the Addendum to the Federal Execution Protocol.

DIRECT: W.P. Barr
Date: July 24, 2019

DO NOT DIRECT: _____

OTHER: _____

Attachments

U.S. DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISON

July 24, 2019

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Hugh J. Hurwitz
Acting Director
Federal Bureau of Prisons

SUBJECT: Summary of the Federal Bureau of Prisons' Federal Execution Protocol Addendum

I. Introduction

The Federal Bureau of Prisons ("BOP"), along with the United States Marshals Service ("USMS"), is responsible for implementing federal death sentences. *See* 28 C.F.R. Part 26. These regulations require the sentence be implemented by, " . . . intravenous injection of a lethal substance or substances in a quantity sufficient to cause death, such substance or substances to be determined by the Director of the Federal Bureau of Prisons . . . ." *See* 28 C.F.R. § 26.3(a)(4). Prior to 2003, BOP's lethal injection protocol consisted of three drugs: sodium pentothal, pancuronium bromide, and potassium

chloride.[1] No federal execution has occurred since 2003, in part, because of the unavailability of sodium pentothal.

BOP has studied the issue and is prepared to approve an Addendum to its Federal Execution Protocol ("Addendum") that provides for the use of a single drug, pentobarbital sodium ("pentobarbital"), as the lethal agent. *See* Attachment. This new Addendum will replace the three-drug procedure previously used in federal executions. BOP has a viable domestic source to obtain pentobarbital, which would allow it to resume federal executions.

This Memorandum discusses BOP's proposed Addendum.

II. Background

Implementation of the federal death penalty is governed by 18 U.S.C. §§ 3596-3597. These provisions require BOP to carry out death sentences "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). As noted above, the Federal regulation further clarifies that BOP must implement death sentences "by intravenous injection of a lethal substance or substances in a quantity sufficient to cause death." 28 C.F.R. § 26.2(a)(2). The Director of BOP is charged with determining what "substance or substances" should be used in federal executions. 28 C.F.R. § 26.3(a)(4).

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[1] BOP carried out the executions of Timothy McVeigh (2001), Juan Garza (2001), and Louis Jones (2003) using this drug compound.

A. Use of Pentobarbital

All states that currently permit the death penalty allow for lethal injection as their primary method of execution.[2] State protocols comprise of one-, two-, and three-drug methods. The three-drug protocol typically involves an anesthetic or sedative, followed by pancuronium bromide to paralyze the inmate, and finally potassium chloride to stop the inmate's heart. The one-or two-drug protocols typically use a lethal dose of an anesthetic or sedative.

There has been much litigation regarding death penalty protocols. In *Baze v. Rees,* 553 U.S. 35 (2008), the Supreme Court upheld Kentucky's use (along with at least 30 other states) of a three-drug combination, including sodium pentothal, pancuronium bromide, and potassium chloride.[3] While *Baze* provided clear approval of a specific protocol for states to carry out the death penalty, practical obstacles soon emerged as pharmaceutical companies began refusing to supply the drugs used to implement the death sentences. *See Glossip v.*

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[2] Death Penalty Information Center, https://deathpenaltyinfo.org/lethal-injection.

[3] To successfully challenge a state's lethal injection protocol under the Eighth Amendment, a condemned prisoner must: (1) "establish[ ] that the State's lethal injection protocol creates a demonstrated risk of severe pain[;]" and (2) "show that the risk is substantial when compared to the known and available alternatives." *Baze,* 553 U.S. at 61. On April 1, 2019, the Supreme Court held that a death row inmate's as-applied Eighth Amendment challenge to Missouri's one drug lethal injection protocol using pentobarbital must meet the same standard applied to facial challenges as set forth in *Baze. Bucklew v. Precythe,* 139 S.Ct. 1112, 1126-30 (2019).

Gross, 135 S.Ct. 2726, 2733 (2015). Specifically, the sole American manufacturer of sodium pentothal stopped producing the drug because of its use in the death penalty.[4]

After the availability of sodium pentothal declined, states developed an alternative drug combination that replaced sodium pentothal with pentobarbital. *Glossip,* 135 S.Ct. at 2733. On December 16, 2010, Oklahoma was the first state to execute an inmate using pentobarbital in place of sodium pentothal in its three-drug compound. *Id.*[5] The following year, Ohio used pentobarbital in a one-drug execution.[6] Subsequently, many states incorporated pentobarbital into their protocols and all 43 executions carried out in 2012 reportedly used pentobarbital.[7]

Currently, fourteen states have used pentobarbital, either as part of a three-drug combination or by itself, in executions. An additional five states have

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[4] Hospira, Press Release, Hospira Statement Regarding Pentothal (sodium thiopental) Market Exit (Jan. 21, 2011).

[5] Divinda Mims, *Death row inmate executed using pentobarbital in lethal injection,* CNN, December 16, 2010, *available at* http://www.cnn.com/2010/CRIME/12/16/oklahoma.execution.

[6] Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1382 (2014).

[7] *Glossip*, 135 S.Ct. 2733 (citing Death Penalty Institute, Execution List 2012, online at www.deathpenaltyinfo.org/execution-list-2012).

announced plans to use it.[8] Georgia, Idaho, Missouri, South Dakota, and Texas administer a single-drug pentobarbital protocol, as BOP seeks to do, as the primary method of execution. Both Missouri and Texas have extensive experience using the single-drug pentobarbital method, executing 20 and 78 inmates, respectively, since approximately 2012.[9] Of the 25 executions in 2018, 16 used a single-drug pentobarbital protoco1.[10] Of the ten executions thus far in 2019, five used the single-drug pentobarbital protocol.[11] Although various media outlets have reported complications with lethal injection executions, none of those executions appear to have resulted from the use of single-drug pentobarbita1.[12]

B. Development of Addendum

In 2011, BOP began exploring pentobarbital and other methods of conducting executions. That year, BOP personnel visited several states to observe executions. Based upon research, observation, and the opinion of medically trained personnel, as described below, BOP developed the single-drug pentobarbital protocol.

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[8] Death Penalty Information Center, *State by State Lethal Injection*, available at https://deathpenaltyinfo.org/state-lethal-injection.

[9] Death Penalty Information Center, *supra* note 8.

[10] https://deathpenaltyinfo.org/execution-list-2018

[11] https://deathpenaltyinfo.org/execution-list-2019

[12] Death Penalty Information Center, *Botched Executions*, https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions?scid=8&did=478.

As part of its research and study, BOP examined a three-drug process using pentobarbital as the first anesthetic. BOP disfavored this method because of the complications inherent in obtaining multiple drugs. Further, a one-drug protocol simplifies the procedure and therefore reduces the risk of administration mishaps. The BOP determined that the single-drug pentobarbital protocol is the most suitable method based on its widespread use by the states and its acceptance by many courts.[13]

The Addendum provides for the use of five grams of pentobarbital during executions. The Addendum calls for three syringes to be prepared, with the first two containing 2.5 grams of pentobarbital sodium (in diluent) and the final syringe containing 60 mL of saline flush. *See* Attachment at ¶ H. Supervisory personnel then direct the administration of each syringe. *Id.*

BOP's draft procedures are similar to execution protocols adopted by Georgia, Ohio, South Dakota, Missouri, and Arizona. Texas's protocol utilizes one injection of 5 grams of pentobarbital.[14] These states

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[13] Courts have held that the use of pentobarbital in executions does not violate the Eighth Amendment. *See, e.g., Ladd v. Livingston*, 777 F.3d 286 (5th Cir. 2015); *Zink v. Lombardi*, 783 F.3d 1089, 1102 (8th Cir. 2015); *Jackson v. Danberg*, 656 F.3d 157 (3d Cir. 2011); *DeYoung v. Owens*, 646 F.3d 1319 (11th Cir. 2011); and *Pavatt v. Jones*, 627 F.3d 1336 (10th Cir. 2010). *See also Bucklew*, 139 S.Ct. at 1129-1132 (finding that death row inmate challenging Missouri's method of execution using a single-drug pentobarbital protocol failed to show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain).

[14] Death Penalty Information Center, *supra* note 8.

have successfully effectuated executions, therefore the protocols are instructive to the proposed BOP protocols.

BOP consulted with the USMS Office of General Counsel regarding the Addendum. USMS concurred with the Addendum and noted their deference to BOP on all matters related to the time, place, and manner of carrying out federal executions.

BOP also retained a medical consulting firm to review the Addendum in anticipation of litigation. If the Addendum is approved, BOP anticipates its protocol will be subject to vigorous litigation both facially and as applied to specific inmates. Currently, one federal case is pending in the District of Columbia challenging BOP's method of execution. *See Roane et al. v. Gonzales,* No. 05-2337 (D.D.C.). Upon adoption of a protocol, that case will be reopened and the protocol will be a subject of that litigation. There are three additional cases pending in the District of Columbia, which challenge the method of execution, but in which an official stay of execution has not been issued.[15] In May and October 2017, BOP in coordination with the U.S. Attorney's Office in the District of Columbia consulted with Dr. Joseph F. Antognini, M.D., a clinical professor of anesthesiology and pain medicine at University of California Davis School of Medicine. Dr. Antognini concurs with the Addendum and is prepared to submit an expert report in defense of the protocol.

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[15] *Bourgeois v. U.S. Dept. of Justice, et al.*, l:12-cv-00782 (D.D.C.); *Robinson v. Mukasey*, No. 1:07-cv-02145 (D.D.C.); *Fulks v. U.S. Dept. of Justice, et al.*, No. 1:13-cv-00938 (D.D.C.).

III. Implementation of Amended Protocol

BOP has a viable domestic source to obtain pentobarbital, and has confirmed with the Drug Enforcement Administration ("DEA") that the manufacturer is properly registered as a bulk manufacturer of pentobarbital. The manufacturer has produced samples of the active pharmaceutical ingredient ("API"), which were subject to quality assurance testing, further supporting the selection of this manufacturer. Additionally, BOP has secured a compounding pharmacy to store the API and to convert the API into injectable form as needed. BOP worked with DEA to ensure the compounding pharmacy is properly registered. The compounding pharmacy has performed its own testing of the injectable form, and it has additionally worked with two independent laboratories on quality testing.

Following approval of the Addendum, BOP is prepared to implement the amended Federal Execution Protocol. BOP has the necessary facilities and staff to resume federal executions and is prepared to conduct executions at its facilities in Terre Haute, Indiana. BOP regularly trains staff in the Federal Execution Protocol and conducts training exercises, most recently in April 2019. BOP has additionally confirmed with DEA that the BOP facility in Terre Haute, Indiana, meets the regulatory requirements for storage and handling of pentobarbital.

Further, pursuant to 28 C.F.R. § 26.3(a)(1), the Director of the BOP will set execution dates for inmates with federal death sentences who are identified by the Attorney General.

DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

BOP EXECUTION PROTOCOL

SERVICE – LIMITED OFFICIAL USE ONLY

2019

INTRODUCTION: GENERAL PROVISONS

I. Purpose of Manual

The purpose of this manual is to outline Federal Bureau of Prisons (BOP) policy and procedures for planning and carrying out the execution of a person convicted of a capital offense. These procedures should be observed and followed as written unless deviation or adjustment is required, as determined by the Director of the BOP or the Warden. This manual explains internal government procedures and does not create any legally enforceable rights or obligations.

II. Organization

This manual provides specific time related checklists for pre-execution, execution and post execution procedures as well as detailed procedures related to the execution process, command center operations, contingency planning, news media procedures, and handling stays, commutations and other delays.

III. Cross References

A. Title 28, Code of Federal Regulations, Chapter 1, Part 26

B. Title 28, Code of Federal Regulations, Chapter 1, Part 1

C. Correctional Systems Manual – Program Statement 5800.15, Paragraph 803

D. Searching, Detaining, or Arresting Visitors to Bureau Grounds and Facilities – Program Statement 5510.09

E News Media Contacts – Program Statement 1480.05

F. Accounting Management Manual – Program Statement 2000.02, Chapter 10950

G. Receiving and Discharge Manual –Program Statement 5800.18

IV. Procedure

A. The BOP will ensure the execution of a person sentenced to death under federal law by a court of competent authority and jurisdiction be carried out in an efficient and humane manner.

B. The BOP will make every effort in the planning and preparation of an execution to ensure the execution process:

1. Faithfully adheres to the letter and intent of the law;

2. Is handled in a manner that minimizes the negative impact on the safety, security, and operational integrity of the correctional institution in which it occurs and the BOP in general;

3. Accommodates the public's right to obtain information concerning the event;

4. Reasonably addresses the privacy interests of those persons for whom the law and BOP policy require such privacy;

5. Provides sufficient contingency planning to ensure that unforeseen problems can be addressed and overcome;

6. Allows for stays of execution, commutations and other delays in the execution countdown;

7 Provides an opportunity for interested person to exercise their First Amendment rights to demonstrate for or against capital punishment in a lawful manner; and

8. Ensures a firm and adequate response to unlawful civil disobedience, trespass, or other violations of the law by persons attempting to disrupt or prevent the execution.

C. The BOP will seek the arrest and encourage the prosecution of persons, including but not limited to those, who:

1. Violate prohibitions against filming, taping, broadcasting, or otherwise electronically documenting the death of the inmate;

2. Trespass or otherwise enter upon BOP property without proper permission and clearance from the Warden;

3. Participate in unlawful demonstrations;

4. Unlawfully attempt to disrupt, prevent, or otherwise interfere with the execution;

5. Are inmates involved in disruptive, assaultive, or other unlawfully proscribed behavior related to an execution; or

6. Unlawfully threaten, intimidate, or terrorize persons involved in the execution process.

D. BOP staff involved in the execution will make every effort, within the limits of these procedures and the laws of the United States, to:

1. Display appropriate levels of professionalism, restraint, and courtesy, in interaction with witnesses, demonstrators, news media, and other persons during the execution process;

2. Prevent emotion or intimidation from hindering efforts to carry out assigned duties; and

3. Conduct themselves at all times in a manner reflecting the solemnity and sensitivity of the occasion.

E. BOP staff trained in crisis support will be available for counseling sessions with all personnel participating directly in an

execution process, before and after an execution.

CHAPTER 1: PRE-EXECUTION CHECKLIST

I. General Provisions

A. Purpose of Chapter

1. The purpose of this chapter is to provide a checklist of procedures and events that should occur between the period of time prior to the establishment of an execution date and 24 hours prior to the execution.

2. Full detail will not be provided for each procedure or event in this chapter. For detail, refer to specific chapters which follow.

3. This chapter covers the following time periods:

   a. Prior to the execution date being established;

   b. Establishment of the execution date to thirty days prior to the execution;

   c. Twenty-nine to fourteen days prior to the execution;

   d. Thirteen to seven days prior to the execution;

   e. Six to three days prior to the execution; and

   f. Forty-eight to twenty-four hours prior to the execution.

B. Procedure

1. A systematic countdown to an execution must be completed to ensure that all procedures and events necessary to adequately prepare for the execution are completed in a timely manner.

2. Absent intervention by the court system or the President as noted in Chapter 7, delays in the countdown process will only occur in extraordinary situations relating to the security and good order of the institution as approved by the Director of the BOP.

II. Establishing of an Execution Date

After a sentencing hearing is conducted in a United States District Court resulting in a determination that a criminal defendant be sentenced to death for commission of an offense described in a federal statute, and the sentencing judge signs the appropriate Judgment and Order:

A. Except to the extent a court orders otherwise, the Director of the BOP will designate a date and time for the execution of the sentence. The following individuals/offices will be advised in writing of the execution date: the sentencing judge, Attorney General, Office of the Deputy Attorney General, Office of the Pardon Attorney, the Assistant Attorney General for the Criminal Division, the Chief of the Capital Case Unit, Director for the United States

Marshals Service (USMS), the Office for Victims of Crime, Assistant Director for Correctional Programs Division, Assistant Director for General Counsel and Review Division, appropriate Regional Director, United Sates Attorney's Office for the district of conviction, United Sates Attorney's Office for the Southern District of Indiana and Warden of USP Terre Haute.

B. Under current federal regulations, the date established will be no sooner than 60 days from the entry of the judgment of death (28 C.F.R.§ 26.3 (a) (1)) and notice of it must be given to the defendant no later than 20 days before the execution (28 C.F.R.§ 26.4 (a)). If the date designated passes by reason of a stay of execution, then a new date will be promptly designated by the Director of the BOP when the stay is lifted.

C. The Warden of USP Terre Haute will notify, in writing, the inmate under sentence of death, of the date designated by the Director for execution at least 90 days in advance. If the designated execution date is stayed, notice of the new execution date must be given no later than 20 days before the execution, if time permits and if not, as soon as possible. If the execution date is set by a judge, the Warden will notify the inmate, in writing, as soon as possible. The Warden will include information concerning the clemency application process in the written notice.

Under 28 C.F.R. §1.10(b), a petition for commutation of sentence should be filed no later than 30 days after the inmate has received notification from the Warden of the execution date.

D. Unless the President interposes, the execution of the sentence will not be stayed on the basis of the inmate filing a petition for executive clemency.

III. Period of Time Between Establishment of an Execution Date to Thirty Days Prior to the Execution

The following procedures should be completed between the time an execution date is set and 30 days prior to the execution.

A. Briefing the Inmate

As soon as practical after establishment of the execution date, the Warden at USP Terre Haute or designee, will personally brief the inmate regarding relevant aspects of the execution process including information contained in items C through F of this section. A briefing sheet outlining these aspects of the execution will be given to the inmate. If requested, a copy of the briefing sheet will be given to a representative identified by the inmate. In addition, the Warden will ascertain the inmate's religious preference.

B. Inmate's Choice of Witnesses

When the inmate is informed by the Warden of the execution date, he/she will be advised that he/she may designate not more than one spiritual adviser, two defense attorneys, and three adult friends or relatives (at least 18 years old) to be present at the execution. The inmate will be asked to submit the list of his/her witnesses to the Warden no later than 30 days after notification of the date of the scheduled execution.

C. Disposition of Person Property and Accounts

The Warden will review the options available to the inmate for property/account distribution and will ask the inmate to provide instructions, no later than 14 days prior to the execution, concerning the disposition of the personal property and funds in any accounts controlled or administered by the BOP. If the inmate fails to provide instructions for such disposition, the property/accounts will be disposed on in accordance the Accounting Management Manual and the Receiving and Discharge Manual.

D. Organ Donation

The inmate's body will not be used for organ donation.

E. Disposition of Body

The Warden will review options available to the inmate following the release of the body to the Vigo County Coroner. The Warden will ask the inmate to provide instructions concerning disposition of his/her body no later 14 days prior to the execution. If the inmate fails to provide instructions, the body will be handled in accordance with the Accounting Management Manual.

F. Designation of Persons Required to Assist with the Execution

1. Those persons necessary to carry out the execution will be identified.

   a. The Warden, with the assistance of the Director, USMS, and the Director, BOP, will be responsible for identifying, selecting and obtaining the services of the individuals administering the lethal injection.

   b. The Warden, in conjunction with the Regional Director, is responsible for selection of the local staff involved in perimeter security, transportation, and command post operations, as well as crowd control, support functions and access screening.

2. All individuals identified for placement in vital or important positions and identified alternates, will be attired in a

uniform as determined by the presiding Regional Director.

3. No officer or employee of the Department of Justice will be required to be in attendance at or participate in any execution if such attendance or participation is contrary to the moral or religious convictions of the officer or employee. Staff participation in the execution process must be on a voluntary basis.

G. Other Approved Witnesses

1. In addition to the United States Marshal designated by the Director of the USMS (hereafter called the "Designated United Sates Marshal") and the Warden, the following persons will be present at the execution.

   a. Necessary personnel selected by the Designated United States Marshal and the Warden.

   b. Those attorneys of the Department of Justice whom the Deputy Attorney General determines are necessary.

   c. Not more than the following members of persons selected by the Warden:

      (1) Up to eight citizens (in identifying these individuals, the Warden, no later than 30 days

after the setting of an execution date, will ask the United States Attorney for the jurisdiction in which the inmate was prosecuted to recommend up to eight individuals who are victims or victim family members to be witnesses of the execution); and

(2) Ten representatives of the press.

2. No other person will be present at the execution unless such person's presence is granted by the Director of the BOP. No person younger than 18 years of age will witness the execution.

3. The Warden will notify all witnesses of the date, time and place of the execution as soon as practicable before the designated time of execution.

H. Contact with the Vigo County Coroner

1. The Warden will contact the Vigo County Coroner to coordinate the Coroner's role.

2. The Vigo County Coroner will be requested to provide direction concerning:

a. Transfer of custody of the body of the executed individual from the Warden to the Vigo County Coroner;

b. Transportation of the body from the Execution Room to the Vigo County Coroner's facility; and

I. Briefing of Institution Staff

1. It is necessary to modify prison operations and communicate with local staff throughout the execution process.

2. Local prison administrators should be briefed by the Warden, as appropriate, on plans for the execution, restrictions on access, crowd control, additional security procedures, etc., on an on-going basis.

3. As soon as plans begin to evolve which will affect general prison operations, briefings should begin and continue until operations return to normal.

IV. Period of Time Between Twenty-Nine to Fourteen Days Prior to the Execution

A. Witnesses

1. To the extent possible, the Warden will develop a final list of citizen and inmate's witnesses.

2. All witnesses/participants will be required to sign an agreement prior to being cleared and added to the witness list. Included in the document will be an agreement to be searched before entering the Execution Facility and not to photograph or make any other visual

or audio recording of the execution (see Appendix A.).

B. Qualified Person

The Warden will finalize arrangements for a qualified person to be present at the execution and to declare the executed individual deceased.

C. Inmate's Property and Account

The Warden will finalize arrangements for disposition of the inmate's property and accounts no later than 14 days prior to the scheduled execution date.

D. Disposition of Body

The Warden will finalize arrangements with the Vigo County Coroner for disposition of the body, security for the Vigo County Coroner's vehicle, and transfer of custody of the body in accordance with appropriate state and local laws.

E Selection of Executioner (s)

The Warden, with the assistance of the Regional Director, Director and USMS will finalize the selection of executioner(s) and their alternates.

F. Training

The Regional Director will ensure that appropriate training Sessions are held for persons involved in the various aspects of the execution event.

V. Period of Time Between Thirteen to Seven Days Prior to the Execution

A. Inmate's Property and Accounts

All paperwork regarding disposition of property and accounts should be completed.

B. Food Services

At least seven days prior to execution, the Warden or designee will contact the inmate to arrange for his/her last meal.

C. Purchase of Substances to be Used in Lethal Injection

The Bureau of Prisons will ensure the purchase of lethal substances to be used in the execution. Once purchased, the lethal substance or substances will be secured in the institution until called for by the Regional Director.

D. Law Enforcement Coordination

1. The Warden will meet with federal, state, and local law enforcement personnel to coordinate support related to the execution.

2. Joint practices should be conducted between law enforcement staff involved to ensure coordination and interaction is well defined and understood.

E. Restrictions on Inmate's Visitors

Beginning seven days prior to the designated date of execution, the inmate

will have access only to his/her spiritual advisers (not to exceed two), his/her defense attorneys, members of his/her family, and designated officers and employees of the BOP. Upon approval of the Director of the BOP, the Warden may grant access to such other proper persons as the inmate may request.

VI. Period of Time Between Six to Three Days Prior to the Execution

A. Witnesses

Non-media witness agreements should be signed by the witnesses and reviewed by the Regional Director.

1. The Warden will provide a final list of witnesses to the:

   a. Director, Bureau of Prisons

   b. Assistant Director, Correctional Programs Division;

   c. Assistant Director, Information, Policy, and Public Affairs Division;

   d. Assistant Director, Office of General Counsel

   e. Director, USMS; and

   f. Designated United States Marshal

   g. United States Attorney's Office – district of conviction

h. United States Attorney's Office-Southern District of Indiana

2. Persons who refuse to sign agreements will not be allowed to attend the execution.

B. Brief Affected Law Enforcement Agencies

The Warden will ensure that staff from other law enforcement agencies who have not participated in practice session or have not otherwise been briefed previously will be briefed and their responsibilities explained.

C. Inmate's Property and Accounts

Verify arrangements are complete.

D. Executioner(s)

An individual designated by the Warden will:

1. Review with executioner(s) and alternates arrangements for their transportation and escort to the Execution Facility; and

2. Review with participants' arrangements for security of executioner(s) and protection of their identities.

E. Equipment Check/Inventory

All equipment necessary to conduct the execution will be inventoried and checked at least 72 hours prior to the execution by

individuals designated by the Regional Director.

VII. Period of Time Between Two Days to One Day Prior to the Execution

[REDACTED]

B. Practices

Final practices will be conducted as directed by the Regional Director.

C. Equipment Checks

Maintenance staff should verify necessary installation of and test electrical, heating/air conditioning, backup generator and communications equipment in:

1. BOP Execution Facility;

2. Command Center.

D. Regional Director and/or Warden Contacts

1. To ensure that coordination efforts are in place, the following entities and specifically identified individuals will be contacted by the Regional Director and/or the Warden:

   a. Department of Justice Command Center (to ensure communications, if required, by the Attorney General, the Supreme Court, the President of the United States and the affected United States Attorneys Offices);

   b. BOP Director's Office;

c. USMS Director's Office; and

d. Affected law enforcement agencies.

E. Equipment Check Verification by the Regional Director

1. The Regional Director will ensure completion of pre-execution inventory and equipment check in the BOP Execution Facility.

2. The Regional Director will verify that the Execution Facility's equipment checks have been completed.

CHAPTER 2: EXECUTION CHECKLIST

I. General Provisions

A. Purpose of Chapter

1. This chapter provides a checklist of procedures and events that should occur during the final 24 hours prior to the execution.

B. Procedure

The execution will be carried out in a manner consistent with Title 28, Code of Federal Regulations, Part 26.

II. Period of Time Within Twenty-Four Hours Prior to the Execution

[REDACTED]

B. Inmate Communication

1. Excluding calls to the inmate's attorney(s) of record and calls specifically approved by the Warden, the inmate's telephone privileges will be terminated 24 hours prior to the execution.

2. The inmate's attorney(s) of record, spiritual adviser(s), or other persons approved by the Director of the BOP, will be given visiting privileges during the final 24 hours as determined by the Warden. Visiting privileges will be suspended when preparations for the execution require suspension.

C. Food Service

The Warden will contact the inmate to finalize arrangements for his/her final meal and ensure that it is properly prepared and served by staff.

D. Maintenance Response Team

Beginning eight hours prior to an execution, the Facility Manager or other appropriate individual will ensure that a Maintenance Response Team is available to provide necessary maintenance and repair of systems at the Execution Facility or in other areas of the institution.

E. Access to the Execution Facility

[REDACTED]

II. Period of Time Between Twelve to Three Hours Prior to the Execution

A. Final Briefing

[REDACTED]

2. A final briefing will be held, attended by senior BOP and Marshals Service staff, the Regional Director, and representatives deemed appropriate by the Regional Director. The Regional Director will conduct the meeting, with the senior staff providing guidance and policy decisions, as needed.

3. During the briefing, participants will:

a. Identify problems, develop solutions, and specific time lines;

b. Provide status reports;

c. Coordinate support services involvement; and

d. Conduct a final review of procedures.

B. Food Service

The inmate will be served a final meal at a time determined by the Warden.

C. Visits

Visits by attorneys, religious representatives, and other persons approved by the Director of the BOP, will be at the discretion of the Warden.

D. Restricting Access to Prison Property

1. At the discretion of the Warden, during the final 12 hours prior to the execution, access to prison property will be limited to:

   a. On-duty staff;

   b. On-duty contract workers;

   c. Volunteers deemed necessary by the Warden;

   d. Approved delivery vehicles;

   e. Law enforcement personnel on business-related matters;

   f. Routine inmate visitors; and

   g. Other persons approved by the Warden.

2. During the final eight hours:

   a. All off-duty Department of Justice personnel will be required to leave institution property;

   [REDACTED]

E. Establishment of Command Center

[REDACTED]

IV. Period of Time Between Three Hours to Thirty Minutes Prior to the Execution

A. Pre-Execution Procedures

1. The Regional Director will ensure that all countdown procedures for required activities and actions are progressing.

2. Immediate action to complete any unfinished required procedures will be initiated.

3. The Warden will designate a recorder who will begin logging execution activities in the official execution log commencing three hours prior to the scheduled execution. The log will reflect, at a minimum, the time each of the following events occurs:

    a. Inmate removed from Inmate Holding Cell;

    b. Inmate strapped to gurney;

    c. Arrival of government/community witnesses;

    d. Arrival of inmate's authorized witnesses;

    e. Arrival of media witnesses;

    f. Opening of drapes;

    g. Last statement by inmate;

    h. Reading of statement conveying inmate's sentence of death;

    i. Upon Designated United States Marshal's approval, the execution process begins;

j. Signal by Executioner(s) that lethal substances have been administered;

k. Determination of inmate's death by designated qualified person;

I. Announcement of death of inmate;

m. Closing of drapes;

n. Notification of outside media and demonstrators of inmate's death;

o. Removal and transportation of media witnesses to media center;

p. Removal of inmate's authorized witnesses;

q. Removal of government/community witnesses;

r. Restraint Team/Vigo County Coroner enter Execution Room to remove body;

s. Removal of body to Vigo County Coroner's vehicle;

t. Performance of any necessary cleaning chores;

u. Directive by Warden to secure Execution Facility.

B. Execution Room Staff Assemble

1. The Executioner(s) will be escorted into the Execution Facility and will

inventory supplies and ensure that everything is ready.

[REDACTED]

3. All other Execution Room staff will be assembled on-site for final instructions at least forty five minutes prior to the scheduled execution.

C. Contact with the Department of Justice Command Center

[REDACTED]

V. The Final Thirty Minutes Prior to the Execution

A. Final Sequence of Events: Preparation

1. Bringing the Inmate to the Execution Room

At the appropriate time, the inmate will be:

a. Removed from the Inmate Holding Cell by the Restraint Team;

b. Strip-searched by the Restraint Team and then dressed appropriately;

c. Secured with restraints;

d. Escorted to the Execution Room by the Restraint Team.

2. Restraint Team Procedures And Preparation

a. In the Execution Room the ambulatory restraints will be removed and the inmate will be restrained to the Execution Table.

b. The inmate will then be assessed and prepared for execution by qualified medical personnel.

3. Admit Witnesses

a. Subsequent to appropriate search procedures, witnesses will be admitted to the witness rooms.

b. The government/community witnesses will then enter and will be escorted to their assigned area. The escorts will remain with the witnesses.

c. The authorized witnesses invited by the inmate individual will be admitted and escorted to their assigned area.

1. If any of the inmate's invited witnesses wish to be on-site, but not actually witness the execution, accommodations will be made for them by the Warden.

2. Escorts will remain with the inmate's witnesses. There will be a minimum of two escorts for each witness group.

d. The last witnesses to be admitted will be the news media representatives. The members of the news media selected to witness the execution will be escorted to their assigned area. Escorts will remain with the news media witnesses and ensure their separation from the other witnesses while at the Execution Facility. Media witnesses will not be permitted to interview or question staff or other witnesses while at the Execution Facility.

VI. Final Sequence of Events: Execution

A. Staff Witnesses

1. Staff participating in the preparation for the execution will exit the Execution Room but stand by in an adjacent area.

2. Staff members participating in and/or observing the execution will include the:

a. Designated United States Marshal;

b. Senior BOP Official;

c. Executioner(s);

d. Other staff authorized by the Director of the BOP.

B. Countdown

1. Upon the direction of the Senior BOP Official, staff inside the Execution Room

will open the drapes covering the windows of the witness rooms.

2. The inmate will be asked if he/she has any last words or wishes to make a statement. The inmate will have been advised in advance that this statement should be reasonably brief.

3. At the conclusion of the remarks, or when a determination is made to proceed, the documentation deemed necessary to the execution process will be read. Once the Designated United States Marshal makes a final determination that the execution is to proceed, the executioner(s) will be directed to administer the lethal injection.

4. If the execution is ordered delayed [REDACTED] the Designated United State Marshal will notify the Senior BOP Official who will in turn instruct the Executioner(s) to step away from the execution equipment and will notify the inmate and all present that the execution has been stayed or delayed.

C. Determination of Death

1. After the lethal injection has been administered:

   a. The inmate will be monitored until apparent signs of life have ceased;

b. The time of death will be announced prior to the drapes being closed.

2. The Designated United States Marshal will complete and sign the Return described in 28 C.F.R. § 26.2(b) and will file such document with the sentencing court.

CHAPTER 3: POST-EXECUTION CHECKLIST

I. General Provisions

A. Purposes of Chapter

The purpose of this chapter is to:

1. Provide the procedures to be followed after the execution of the inmate;

2. Identify the responsibilities for tasks to be completed; and

3. Provide for the transfer of the body of the inmate from the custody of the BOP.

B. Procedure

It is the procedure of the BOP that:

1. The inmate will be examined by a specified qualified person following the administration of the lethal substances to ensure that death has occurred;

2. When the qualified individual is satisfied that death has occurred, the time of death will be announced to the witnesses;

3. The witnesses to the execution will then be removed from the Execution Facility and returned to their individual staging areas so that they may leave the institution. News media witnesses will be removed to a secondary press location where they will participate in a press briefing;

4. The body of the inmate will be surrendered to the Vigo County Coroner;

5. After removal of the body, the site will be cleaned and restored to its previous condition.

II. Removing Witnesses from the Execution Facility

A. After the pronouncement of death, the witnesses will be escorted from the facility in the following order:

1. News media witnesses;

2. Inmate's authorized witnesses; and

3. Government/community witnesses.

B. Each group of witnesses will be kept separate from the others and escorted to waiting vehicles to be driven to separate designated sites.

III. Removal of the Body of the Inmate

A. After the witnesses have departed, the restraints will be removed from the inmate's body.

B. The Vigo County Coroner or designee will be escorted into the Execution Facility. The body will be removed by the Vigo County Coroner, who will place it in a coroner's vehicle for transportation.

IV. Site Clean-Up

A. Under the supervision of an individual designated by the Warden, staff will clean and secure the Execution Facility.

B. The Execution Facility will be locked and secured when the Warden is satisfied that clean-up has been completed.

V. Returning to Routine Operations

A. Following the execution, Department of Justice and BOP staff involved in the execution will be deactivated, as appropriate, under direction of the DOJ, BOP and USMS staff on-site.

B. The designated public affairs representative will determine when to secure the media assembly site after the news conference is complete.

C. The Warden will bring the institution security back to routine operations as he/she sees fit.

CHAPTER 4: Command Center

I. General Provisions

A. Purpose of Chapter

The purpose of this chapter is to:

1. Identify the role and function of the Command Center;

2. Specify the individuals authorized to staff the Command Center; and

3. Provide an inventory of the minimum resources required in the Command Center.

B. Procedure

It is the procedure of the BOP that:

1. The Bureau operate a local, emergency Command Center during the execution operation to:

   a. Coordinate security, transportation, crowd control, access and other processes;

   b. Provide policy and procedural advice, as needed, or upon request;

   c. Coordinate inter-agency functions; and

   d. Serve as an information processing and operations information center for the execution.

[REDACTED]

II. Location, Role and Function

A. The Command Center will be operational prior to the scheduled execution and maintained for the duration of the execution operation.

B. The roles and functions of the Command Center include:

1. Coordinating the various personnel, components and elements of the execution operation;

[REDACTED]

III. Command Center Staffing

A. Command Center staff should include the following positions:

[REDACTED]

B. Access to the Command Center will be limited to persons specifically authorized by the Command Center Director or Warden.

[REDACTED]

CHAPTER 5: CONTINGENCY PLANNING

I. General Provisions

A. Purpose of Chapter

The purpose of this chapter is to:

1. Aid in the development of a predetermined contingency plan to assist staff in the management of the execution event and in responding to related emergency situations;

2. Identify the role and function of staff needed to formulate and activate the plan, if needed; and

3. Identify specific areas to stage staff and equipment. The location of witness processing will be pre-determined by the Warden on a case-by-case basis.

B. Procedure

It is the procedure of the BOP to:

1. Prepare and test contingency plans;

2. Identify all security measures needed to protect staff and inmates of an institution as well as BOP property; and

3. Coordinate all resources to ensure the safety of the public, staff, and inmates.

II. Specific Procedures

A. An individual identified by the Warden will prepare contingency plans related to an

emergency occasioned by the execution, such as an institution disturbance, hostage taking, outside demonstration, outside assault on the facility, etc. All plans will be reviewed and approved by the Warden and the Regional Director.

B. Plans will include provisions for:

[REDACTED]

C. Intelligence Operations

[REDACTED]

D. Staging Areas

[REDACTED]

E. Tactical Deployment

[REDACTED]

III. Execution Witness Management

[REDACTED]

4. While all witnesses to the execution are subject to search, no pat or visual search of any witnesses will be conducted unless the Warden has reasonable suspicion to believe the witness is concealing any weapons, drugs, audio or visual recording devises, or any other item not expressly authorized and the witness agrees to be searched. If the witness refuses to be searched, he/she will not be permitted to serve as a witness.

5. Staff at each staging area will notify the Command Center when all execution witnesses are accounted for and processed.

6. Escorts will remain at their assigned staging area until the Command Center directs them to transport the witnesses to the Execution Facility.

B. Transportation to the Execution Facility

[REDACTED]

3. Escorts will ensure that witness groups do not come into contact with each other.

4. Escorts will transport witnesses to the Execution Facility and notify the Command Center when each group of witnesses is secured in the assigned observation area.

5. Once each group is secured, the next group will be moved as directed by the Command Center.

6. The Command Center will be notified by the appropriate staff member when all groups are in place.

7. The Command Center, in turn, will notify the Warden or designee.

C. Transportation from the Facility

[REDACTED]

2. The groups will be returned to the staging areas by the escorts, who will ensure that no group comes in contact with another group.

3. Escorts will notify the Command Center as each group returns to the staging area.

4. The Command Center will direct each move to expedite departures and also to prevent groups from encountering one another in the parking lot.

5. Media witnesses will be returned to the Media Center to have a press pool briefing as outlined in Chapter 6.

IV. Reservation Security Plan

[REDACTED]

3. BOP staff will be available and will accompany execution witnesses.

[REDACTED]

CHAPTER 6: NEWS MEDIA PROCEDURES

I. General Provisions

A. Purpose of Chapter

This chapter describes the procedures and requirement for allowing representatives of the news media access to an inmate sentenced to death, as well as procedures for news media access to the execution. This chapter also provides procedures for releasing information relating to the execution.

B. Procedure

The BOP recognizes the desirability of establishing procedures which afford the public information about its operations through the news media. In accordance with established policy, reasonable efforts will be made to accommodate representatives of the news media before, during, and after a scheduled execution. Media representatives will be treated in a fair and consistent manner in accordance with current policies and procedures of the BOP. The agency has the responsibility, however, to ensure the orderly and safe operation of its institutions, and therefore must regulate media access.

C. Roles

1. Representatives of the news media are those individuals described in Program Statement 1480.05, News Media Contacts, whose principal employment is to gather and report news.

2. The Regional Director will designate a specific staff member as the official representative to the news media regarding death penalty issues and the scheduled execution.

3. The BOP Assistant Director, Information, Policy and Public Affairs Division, will coordinate the release of information to the news media and assist the Regional Director in the selection of individual news media witnesses. The Department of Justice Office of Public Affairs will be kept informed of these matters.

II. Inmate Interviews

A. Purpose

As stated in Program Statement 1480.05, News Media Contacts, it is not the BOP's intent to provide publicity for an inmate or special privileges for the news media, but rather to ensure a better informed public.

B. Limits

With this in mind, representatives of the news media may be permitted to conduct interviews with inmates. Guidelines regarding the frequency and length of

interviews, as well as accompanying security, will reflect BOP/institution policy and will be established by the Warden, who will take into account the available resources.

C. Prohibition

Ordinarily, no media interviews will be permitted with the inmate once the execution date is within seven days.

III. Media Orientation

A. Definition

Ordinarily one day before a confirmed execution date, the institution will hold a Media Orientation to provide media representatives with information on the scheduled execution. No other press conference or Media Orientation regarding the execution will be scheduled or held until after the scheduled execution, except as provided below in subsection B. Every effort will be made by the Warden's representative to notify local, state and national media representatives of the scheduled Media Orientation. Central Office Public Affairs staff will provide assistance in this area.

1. All persons, including media representatives, must have appropriate identification to enter the institution on any occasion. Media representatives must have appropriate press

credentials. This requirement includes camerapersons, sound technicians, and reporters.

2. All individuals will be advised that they are subject to search of their person and equipment prior to entering and prior to leaving a BOP facility.

B. Updates Prior to the Execution

Following activation of the Media Center, the Warden's representative will provide the news media with regular briefings or updates of the execution process.

1. No later than eight hours prior to the scheduled execution, a Media Center will be activated. Telephone lines, tables, risers for cameras and outlets for electrical equipment and cameras will be available. Restroom facilities will also be provided.

2. A BOP representative will be present in the Media Center to provide regular announcements.

C. Media Orientation Releases

During the Media Orientation, the following information will be made available to members of the media:

1. General information regarding the scheduled execution and about the individual scheduled for execution.

2. Specific information regarding procedures to be followed by the media on the date of the scheduled execution.

3. Media representatives will be reminded that there are obvious security concerns about aircraft flying over federal correctional facilities and therefore, their assistance and cooperation in this matter is expected.

4. Media representatives will be informed of how the press pool will be established (see paragraph IV D 2) and advised that if they are selected as press pool witnesses to the execution, they will agree prior to the execution to:

    a. Sign the document designated as the Media Witness Press Pool Agreement (see Media Witness Press Pool Agreement, Appendix B);

    b. Be subject to search which includes metal detection scanning;

    c. Not make any photographic, visual or audio recordings of the execution (each media witness will be provided only paper and a pencil or pen while in the execution witness area); and

    d. Return to the Media Center after the execution to answer questions of all other media represented concerning their observations during the execution.

5. After the BOP representative, media pool witnesses and appropriate Department of Justice staff, if available, have addressed the media in the Media Center, the press briefing will be terminated and all media personnel will leave the Media Center.

IV. Media Center Operations

A. Requesting Authorization

1. After an execution date is set by the Court/Director of the BOP, and no sooner than twenty days prior to the scheduled execution, news media representatives will be advised, in writing, by the BOP's representative that they may request, in writing, authorization to participate in the institution's Media Center activity in the hours preceding the scheduled execution (see Sample Letter to Media, Appendix C).

   The request, which must be in writing, should be received by the Warden no later than ten days prior to the execution. Requests must include names, social security numbers, and dates of birth for each representative of a media organization and his/her support staff. Only those media organizations submitting written requests, within the stated time frame,

will be considered for participation in Media Center activities.

2. Requests for consideration may be granted by the Warden, provided they demonstrate that the requesting individual falls within the definition of "member of the press and broadcast media" set forth in BOP Program Statement 1480.05, News Media Contacts.

B. Possible Limitations

The number of media representatives may be limited by the Regional Director due to space and safety considerations, but care will be taken to include representatives from both the print and broadcast media.

C. Briefing Packets and Updates

1. Packets

Following activation of the Media Center, the Warden's representative will provide press briefing packets for reporters in the Media Center. The contents of the press briefing packet will include, but not limited to, releasable information on the inmate, pool reporters (once selected), the sequence of events, and the history of federal executions.

2. Updates

Written updates generally will be distributed to the press on a regular basis following activation of the Media Center. Updates will include:

a. A summary of activities related to the execution and sequence of events; and

b. A summary, cleared by the Warden, of the inmate's activities during his/her final twenty-four hours.

D. News Media Witness Selection

1. Number in Attendance

The Warden will permit no more than 10 members of the media to witness the execution. The number of additional media representatives authorized to remain in the Media Center of the day of the execution may be limited due to space and safety concerns.

2. Pool Selection Process

a. Press pool members will be selected by their peers at least three hours prior to the scheduled execution. Representatives from each of the following categories must be included:

(1) One local media source (located within the city or town of the institution);

(2) Three television news programs of a station or network holding an FCC license (at least two being national broadcast stations);

(3) Two media sources from the area where the crime was committed;

(4) One wire service;

(5) One radio station; and

(6) Two print media organizations.

b. Press pool witnesses will be selected from qualified media representatives who have been admitted into the institution's Media Center and who have provided staff with proper identification. A list of media representatives will be compiled by the BOP's representative and furnished to the media for their review in the selection process.

3. Signed Agreement

Media selected as press pool witnesses will then be required to agree to:

a. Act as a pool representative as described further in this chapter; and

b. Abide by all established conditions, rules, and regulations while in attendance at the execution; to include allowing a metal detector scan of their person.

4. Supplemental Representatives

In the event the media are unable to identify witnesses in each of the above described categories, the BOP's designated representative may name other qualifying media representatives to attend, with a maximum of 10 being named.

E. Media Witnesses to the Execution

1. Search Process

Each media pool witness attending the execution will be scanned by a metal detector prior to admittance to the Execution Facility.

a. While all witnesses to the execution may be subject to search, no pat or visual search of any media pool witness will be conducted unless the Warden has reasonable suspicion to believe the media representative is concealing weapons, drugs, audio or visual recording devices, or any other items not expressly authorized and the media representative agrees to be searched. If the representative refuses to be searched, he/she will not be permitted to serve as a media witness.

1. Electronic or mechanical recording devices include, but are not limited to, still, moving

picture or video tape cameras, tape recorders or similar devices, and radio/television broadcasting devices.

2. The representative will only be permitted paper and a pencil or pen as provided by institution staff.

2. Witness Briefing

The 10 selected members of the news media will be required to sign both the witness agreement (Appendix A) and the Media Witness Press Pool Agreement (Appendix B). They must also attend the pre-execution briefing at the Media Center. This briefing, conducted by a representative of the Warden, will provide specific information on the event and expectations regarding their conduct. This will include:

a. Review of approved materials that can be taken to the Execution Room;

b. Search procedures;

c. Escort procedures; and

d. The role of pool reporters.

3. Prohibition of Substitutes

No substitute media pool witness will be permitted after this briefing is conducted.

4. Segregation after the Search

   After clearing the metal detector, all witnesses will be segregated and escorted to the Execution Facility. Media witnesses will not be permitted to have physical contact with any other persons during this time.

5. Excluding Witnesses

   The Warden will not exclude any media witness duly selected in accordance with this chapter from attendance at the execution or cause a selected media witness to be removed from the media pool witness area unless the media witness:

   a. Refuses to submit to a reasonable search as outlined in these regulations;

   b. Faints, becomes ill, or requests to be allowed to leave during the execution;

   c. Causes a disturbance within the media pool witness area that disrupts the orderly progress of the execution as determined by the Warden's representative on site; or

   d. Fails to abide by the provisions of the Witness Agreement.

6. The Execution Process

The selected media pool witnesses will be escorted as a group to the execution location prior to the execution. A designated BOP Spokesperson will remain with the media pool witnesses throughout the process.

F. Death Announcement

Immediately following the execution and prior to the post-execution press pool briefing, a BOP representative will read the following prepared statement to the press and demonstrators:

SAMPLE STATEMENT

(To be read at post execution press briefing and to any assembled members of the public.)

_____, Warden of _____, reports that pursuant to the sentence of the United States District Court in _____, _____,
(Inmate's Name)

has been executed by lethal injection.

_____, was pronounced dead at
(Inmate's Name)

_____, on _____,
(Time) (Date)

G. Press Pool Post-Execution Briefing

All news media press pool witnesses will, after being returned from the execution to the Media Center, immediately brief other media representatives covering the event.

The pool witnesses will provide an account of the execution and will endeavor to answer all questions asked of them by other media representatives. They will not report their observations regarding the execution to their respective news organizations until after the non-witness media representatives have had the benefit of the pool representatives' accounts of the execution.

H. Post Execution Press Conference

If deemed necessary and appropriate, representatives of the Department of Justice, USMS, and BOP will answer questions from the assembled media for no more than 30 minutes after the press briefing.

V. The Execution Information Center

A. Responsibility

The BOP's representative will establish and operate an Execution Information Center.

B. Purpose

The Execution Information Center:

1. Is a central processing point for all incoming media and public interest telephone calls pertaining to the scheduled execution;

2. Allows the institution's staff to handle normal and routine business;

3. Handles "crank" calls and bomb threats in accordance with BOP policy; and

4. Establishes a log of calls for future reference, investigation and evaluation.

C. Location

1. The Execution Information Center will be located in an area identified by the Warden.

2. Only persons authorized by the Regional Director and/or Warden will be allowed in the Center's operational area. Center staff are responsible for keeping the area clear of unauthorized personnel.

D. Schedule

1. The Execution Information Center will commence operations approximately two working days prior to the scheduled execution. The Information Center will operate twelve hours a day on the days prior to the scheduled execution and for the eighteen hours immediately preceding the scheduled execution. The Center will remain in operation until approximately one hour after the execution.

2. The BOP's representative will arrange coverage of telephones, based on the volume of calls.

3. Staff for the Execution Information Center will be coordinated by the BOP's representative.

E. Screening Calls

1. Types of Calls

a. Business Calls

Calls from BOP staff or other Federal agencies relating to the execution; or from BOP staff relating to operational issues affected by the execution which may need to be forwarded to the Command Center.

b. Personal Calls

Calls intended for individuals (staff or witnesses) connected with the execution.

c. Inquiry Calls

Execution-related calls from the general public.

1. Staff will endeavor to answer every call in a professional, courteous and efficient manner.

2. If bomb threats are received, the staff member receiving the call will utilize established procedures. Bomb threats will be communicated to the Command Center immediately.

3. If possible, all "crank" calls and calls considered to be an emergency, should be recorded and traced.

CHAPTER 7: STAYS, COMMUTATIONS AND OTHER DELAYS

I. General Provisions

A. Purpose of Chapter

The purpose of this chapter is to:

1. Cite the entities capable of causing execution stays, commutations, and other delays;
2. Specify the manner of communicating such delays/commutations; and
3. Provide the procedures for implementing the delay/commutation.

B. Procedure

It is the procedure of the BOP that:

1. Processes must be in place to receive and ensure proper handling of legal interruptions of the execution countdown;
2. Staff understand their roles and the BOP's responsibilities in the event of such interruptions; and
3. Contingency plans provide methods for responding to:

a. Temporary delays;

b. Lengthy delays; and

c. Commutations.

II. Presidential and Judicial Authority to Interrupt Execution

A. President

1. The United States Constitution confers upon the President the power to grant reprieves and pardons for offenses against the United States. This has been held to include the power to grant conditional pardons and commute sentences.

2. Neither Congress nor a State legislature can limit the President's power to pardon.

B. Courts

A federal court of competent jurisdiction may issue a stay of execution or invalidate a sentence of death as a result of appellate or collateral proceedings.

III. Communication of Pardons, Stays, Commutations or Delays

A. Prior to Final Execution Countdown

If the BOP receives an order from a federal court of competent jurisdiction or the President ordering a respite, reprieve, stay, commutation, pardon or other action which

requires the suspension or termination of the execution:

1. The Attorney General's Office will be contacted for consultation; and

2. A decision will be made by the Director of the BOP concerning the status of planning and preparation for the execution.

B. During Final Execution Countdown

1. During the final twenty-four hours, the BOP and the USMS will maintain frequent contact with the Attorney General's Office [REDACTED]

[REDACTED]

C. Final Clearance for Execution

At an appropriate time prior to the execution [REDACTED] the Designated United States Marshal will verify clearance to continue with the execution [REDACTED]

IV. Procedures to Implement Last-Minute Stays

A. Upon receiving a stay during the final countdown, the first effort will be to determine the probable length of the delay.

B. If the witnesses have not been moved from their staging areas, they will be held in those locations until further instructions are received from the Senior BOP staff to proceed with or terminate the execution.

C. If witnesses are already at the Execution Facility and the inmate is restrained:

1. If the delay appears to be relatively lengthy, the inmate will be returned to the Holding Cell by the Restraint Team. The witnesses will be returned to their staging areas in the order listed. There they will await further information.

2. If the delay is likely to be relatively short in duration, the witnesses will remain in place. The drapes will be closed and the inmate will remain restrained on the table.

3. If the execution is indefinitely stayed, set for re-sentencing, commuted, or halted by pardon, the execution will be halted, and the inmate and witnesses will be immediately advised. Witnesses will be returned to their staging areas and the inmate returned to appropriate quarters in the institution.

DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

BOP EXECUTION PROTOCOL

SERVICE – LIMITED OFFICIAL USE ONLY

2019

APPENDIX A

MEMORANDUM OF AGREEMENT

BETWEEN

FEDERAL BUREAU OF PRISONS AND WITNESS

This agreement is made between the Federal Bureau of Prisons and the following witness:

_____

In accordance with Title 28, Code of Federal Regulations, Section 26.4, the Federal Bureau of Prisons may allow you, as a witness, to be present at the execution. However, your presence at the execution is not a right and, in order to be entitled to be present, you will be required to agree to the following conditions:

1. You will not bring onto institution grounds anything constituting legal or illegal contraband under applicable statute, regulation or policy, including, but not limited

to, firearms, weapons, explosives, metal cutting tools, narcotic drugs, alcoholic beverages, or any item creating a threat to institution safety, security, or good order;

2. You agree to submit to a reasonable search for contraband and other searches as considered necessary by the Bureau of Prisons for entry into the institution;

3. You will conduct yourself in a lawful and orderly manner;

4. You will comply with all lawful directives of correctional personnel while on institution grounds;

5. You will not bring onto institution grounds any photographic or other visual or audio recording device, to include cellular devices; and

You have read, understand, and agree to the above. By signing this agreement, you agree to comply with its conditions and understand that failure to abide by them will result in your removal from institution grounds and could lead to prosecution for violation of Federal laws.

_____	_____
(Witness)	(Date)
_____	_____
(Agency Representative)	(Date)

DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

BOP EXECUTION PROTOCOL

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APPENDIX B

MEDIA WITNESS PRESS POOL AGREEMENT

In consideration of having been selected as an official witness to the execution of _____on _____ I, _____ hereby agree to act as a pool reporter and, not to interview non-media witnesses or Department of Justice staff at the Execution Facility. Following the execution, I agree to return immediately to the Media Center to brief my colleagues there regarding the execution and answer their questions. I also agree to file my story only after I have completed my responsibilities as a pool reporter.

NAME: _____

(Signature)

ORGANIZATION: _____

DATE: _____

_____

(BOP Staff Witness)

DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

BOP EXECUTION PROTOCOL

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APPENDIX C

SAMPLE LETTER TO MEDIA

(Re: Media Center Operations)

In accordance with the provisions of 28 C.F.R., Part 26, Implementation of Death Sentences in Federal Cases,

_____is scheduled to be executed
(Inmate's Name)
at _____ on _____.
(Institution) (Date)

No later than eight hours preceding the scheduled execution, a Media Center will be established at the _____ in Terre Haute, Indiana,
(Location)

and telephones will be available. Should you desire to cover the event from the Media Center, or if selected, be a media pool witness, please submit your written request to me, via fax or by mail, so that it is

received in my office no later than _____.
(Date 10 days prior to execution)

The request must include your name, the names of all support staff (sound technician, cameraperson, etc.) who may accompany you on this day. Social security numbers and date of birth for all participants, including yourself, must also be furnished in your letter so that appropriate security checks can be completed. You will be notified promptly if we have any concerns with your request. Space is limited and admittance to the Media Center will have to be on a first-come, first-accommodated basis.

Should you desire to be considered to be a media pool witness to the execution, you will also be required to sign agreements consenting to a search prior to entering the execution facility, and agreeing to abide by all relevant conditions, rules and regulations. Should you participate, your name is subject to being released to the media.

Please note that all media representatives will be required to sign a log and show proper press credentials in order to be admitted to the Media Center.

Sincerely,
Name
Title

U.S. DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

Office of the Director

Washington, D.C. 20534

July 25, 2019

MEMORANDUM FOR J. E. KRUEGER,
REGIONAL DIRECTOR
NORTH CENTRAL REGION

FROM: HUGH J. HURWITZ
Acting Director

SUBJECT: Addendum to Execution Protocol

This memorandum is to advise that I hereby adopt the attached Addendum to the Federal Execution Protocol. Please coordinate as appropriate, including incorporating the Addendum into the Federal Execution Protocol.

Attachment

U.S. DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

ADDENDUM TO BOP EXECUTION PROTOCOL FEDERAL DEATH SENTENCE IMPLEMENTATION PROCEDURES

EFFECTIVE JULY 25, 2019

A. Federal death sentences are implemented by an intravenous injection of a lethal substance or substances in a quantity sufficient to cause death, such substance or substances to be determined by the Director, Federal Bureau of Prisons (BOP) and to be administered by qualified personnel selected by the Warden and acting at the direction of the United States Marshal. 28 CFR 26.3. The procedures utilized by the BOP to implement federal death sentences shall be as follows unless modified at the discretion of the Director or his/her designee, as necessary to (1) comply with specific judicial orders; (2) based on the recommendation of on-site medical personnel utilizing their clinical judgment; or (3) as may be required by other circumstances.

B. The identities of personnel considered for and/or selected to perform death sentence related functions, any documentation establishing their qualifications and the identities of personnel participating in federal judicial executions or training for such judicial executions shall be

protected from disclosure to the fullest extent permitted by law.

C. The lethal substances to be utilized in federal lethal injections shall be Pentobarbital Sodium.

D. Not less than fourteen (14) days prior to a scheduled execution, the Director or designee, in conjunction with the United States Marshal Service, shall make a final selection of qualified personnel to serve as the executioner(s) and their alternates. See BOP Execution Protocol, Chap. 1, §§ III (F) and IV (B) & (E). Qualified personnel includes currently licensed physicians, nurses, EMTs, Paramedics, Phlebotomists, other medically trained personnel, including those trained in the United States Military having at least one year professional experience and other personnel with necessary training and experience in a specific execution related function. Non-medically licensed or certified qualified personnel shall participate in a minimum of ten (10) execution rehearsals a year and shall have participated in at least two (2) execution rehearsals prior to participating in an actual execution. Any documentation establishing the qualifications, including training, of such personnel shall be maintained by the Director or designee.

E. The Director or designee shall appoint a senior level Bureau employee to assist the United States Marshal in implementing the federal death sentence. The Director or designee shall appoint an additional senior level Bureau employee to

supervise the activities of personnel preparing and administering the lethal substances.

F. The lethal substances shall be prepared by qualified personnel in the following manner unless otherwise directed by the Director, or designee, on the recommendation of medical personnel. The lethal substances shall be placed into three sets of numbered and labeled syringes. One of the sets of syringes is used in the implementation of the death sentence and two sets are available as a backup.

G. Approximately thirty (30) minutes prior to the scheduled implementation of the death sentence, the condemned individual will be escorted into the execution room. The condemned individual will be restrained to the execution table. The leads of a cardiac monitor will be attached by qualified personnel. A suitable venous access line or lines will be inserted and inspected by qualified personnel and a slow rate flow of normal saline solution begun.

H. Lethal substances shall be administered intravenously. The Director or designee shall determine the method of venous access (1) based on the training and experience of personnel establishing the intravenous access; (2) to comply with specific orders of federal courts; or (3) based upon a recommendation from qualified personnel.

A set of syringes will consist of:

Syringe #1 contains 2.5 grams of Pentobarbital Sodium in 50 mL of diluent

Syringe #2 contains 2.5 grams of Pentobarbital Sodium in 50 mL of diluent

Syringe #3 contains 60 mL of saline flush,

Each syringe will be administered in the order set forth above when directed by supervisory personnel.

If peripheral venous access is utilized, two separate lines shall be inserted in separate locations and determined to be patent by qualified personnel. A flow of saline shall be started in each line and administered at a slow rate to keep the line open. One line will be used to administer the lethal substances and the second will be reserved in the event of the failure of the first line. Any failure of a venous access line shall be immediately reported to the Director or designee.