

**TOO MANY COOKS SPOIL THE SENTENCE:
FRAGMENTATION OF AUTHORITY IN FEDERAL AND STATE
SENTENCING SCHEMES**

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I. INTRODUCTION

In the American federal system, both federal and state courts often have contemporaneous jurisdiction over a defendant, for related or unrelated offenses. A variety of statutes and procedures enable federal and state sovereigns to resolve their charges with the defendant. The defendant can be tried and sentenced by each sovereign, and then will first serve the sentence of the sovereign with primary jurisdiction, which belongs to the sovereign that first arrested the defendant. A problem arises when a judge wishes to impose a consecutive or concurrent sentence with the sentence of another sovereign.¹

This Comment focuses on the narrow issue of what the proper response is when a federal judge—who sentences first but whose sentence will be served second because the state has primary jurisdiction—orders a consecutive sentence to a yet-to-be-imposed state sentence, and the state judge subsequently intends to give the defendant a concurrent sentence. There are three parts to this problem. First, there is a circuit split regarding whether a federal judge, who sentences first, can mandate that the federal sentence run consecutively to the anticipated but yet-to-be-imposed state sentence.² This split re-

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¹ Consecutive sentences are defined as “[t]wo or more sentences of jail time served in sequence.” BLACK’S LAW DICTIONARY 1393 (8th ed. 2004). Concurrent sentences are defined as “[t]wo or more sentences of jail time to be served simultaneously.” *Id.*

² Compare *United States v. Donoso*, 521 F.3d 144, 149 (2d Cir. 2008), *United States v. Smith*, 472 F.3d 222, 227 (4th Cir. 2006), *Romandine v. United States*, 206 F.3d 731, 738 (7th Cir. 2000), *McCarthy v. Doe*, 146 F.3d 118, 121–22 (2d Cir. 1998), *United States v. Quintero*, 157 F.3d 1038, 1039–40 (6th Cir. 1998), *United States v. Clayton*, 927 F.2d 491, 493 (9th Cir. 1991), with *United States v. Andrews*, 330 F.3d 1305, 1307 (11th Cir. 2003), *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001), *United States v. Williams*, 46 F.3d 57, 59 (10th Cir. 1995), *United States v. Bal-*

volves around the ambiguity in 18 U.S.C. § 3584(a), which gives federal courts the discretion to impose consecutive or concurrent sentences but does not clearly resolve whether this authority extends to circumstances where the federal judge is sentencing first and anticipating another sentence to be imposed by a state court.³ Additionally, many state legislatures permit a trial court to order consecutive or concurrent sentences, but this does not apply to anticipated sentences that have not yet been imposed.⁴

Second, the credit and designation authority of the executive branch of the federal government, specifically the Bureau of Prisons (BOP), further exacerbates the problem.⁵ The BOP and state corrections departments can render sentences consecutive or concurrent in two ways: (1) by choosing whether to designate the institutions of the other sovereign as the place of incarceration for the sentence of its sovereign and (2) by choosing whether to credit the sentence served by the defendant for the state against the sentence imposed by a federal judge.⁶ The BOP will sometimes refuse to credit a defendant for time served in state custody even when the state judge, sentencing second, ordered the sentences to be served concurrently.

The third and final aspect of the problem is the doctrine of primary jurisdiction.⁷ Primary jurisdiction belongs to the sovereign that first arrested the defendant.⁸ The sovereign with secondary jurisdiction does not lack authority over the defendant; rather its jurisdiction is secondary in terms of priority for trial, sentencing, and incarceration.⁹ The sovereign with secondary jurisdiction can bring the defendant before it through a writ of habeas corpus *ad prosequendum*¹⁰ or

lard, 6 F.3d 1502, 1510 (11th Cir. 1993), *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991).

³ See 18 U.S.C. § 3584(a) (2006).

⁴ See, e.g., FLA. STAT. § 921.16(2) (LEXIS through 2011 Act 141); IOWA CODE § 901.8 (LEXIS through 2010 legislation); KAN. STAT. ANN. § 21-4608(a) (LEXIS through 2010 legislation); KY. REV. STAT. ANN. § 532.115 (LEXIS through 2011 1st Extraordinary Sess.); MO. REV. STAT. § 558.026 (LEXIS through 2010 2d Reg. Sess.); N.J. STAT. ANN. § 2C:44-5 (West 2011); R.I. GEN. LAWS § 12-19-5 (LEXIS through Jan. 2010 Legis. Sess.); WASH. REV. CODE § 9.92.080 (LEXIS through 2011 Reg. & 1st Spec. Sess.).

⁵ See 18 U.S.C. §§ 3585, 3621(b) (2006).

⁶ See, e.g., *id.*; FLA. STAT. § 921.16(2) (LEXIS through 2011 Act 141); 730 ILL. COMP. STAT. 5/5-8-6 (LEXIS through 2011 Act 97-225).

⁷ See, e.g., *United States v. Cole*, 416 F.3d 894, 897 (8th Cir. 2005); *Roche v. Sizer*, 675 F.2d 507, 510 (2d Cir. 1982).

⁸ See, e.g., *Taylor v. Reno*, 164 F.3d 440, 444 n.1 (9th Cir. 1998).

⁹ *Id.*

¹⁰ 28 U.S.C. § 2241(c)(5) (2006).

through a detainer, pursuant to the Interstate Agreement on Detainers.¹¹ By bringing the defendant before it, the sovereign with secondary jurisdiction does not acquire primary jurisdiction.¹² The defendant will serve the sentence of the sovereign with primary jurisdiction first.¹³

This Comment argues that the intersection of primary jurisdiction, the federal Executive's credit and designation authority, and the judiciary's authority to impose concurrent or consecutive sentences creates a fragmented system of conflicting authority whereby a defendant may be required to serve consecutive sentences despite the fact that the second sentencing judge—the state judge—ordered concurrent sentences. Federal judges and executives may, and sometimes do, ignore the authority of the state sovereign to impose a sentence and to have that sentence carried out. This violates principles of dual sovereignty and comity.¹⁴

This Comment argues that the proper effect of the sentencing scheme between the state and federal governments, and between the branches of each government, should be that if either sovereign orders the sentences to be served concurrently, then the sentences must be served concurrently regardless of the order of sentencing. Each sovereign must respect the sentencing authority and discretion of the other sovereign to impose a sentence that it deems appropriate in light of a variety of factors outlined in its respective sentencing guidelines.¹⁵ If Sovereign A deems the defendant's service of Sovereign B's sentence satisfactory, Sovereign A should not receive a greater sentence than the sentence that Sovereign A ordered. This rule would promote uniformity, certainty, and fairness in sentencing procedures.

¹¹ See 18 U.S.C. app. § 2 (2006).

¹² See *Taylor*, 164 F.3d at 444 n.1.

¹³ *Id.*

¹⁴ See, e.g., *Pinaud v. James*, 851 F.2d 27, 30 (2d Cir. 1988) (“[E]ven if the state sentence has been imposed with the expectation that it will be served concurrently with a yet-to-be imposed federal sentence, the federal court need not make its sentence concurrent with the state sentence but remains free to make the federal sentence consecutive.” (internal citation omitted)); *United States v. Sackinger*, 704 F.2d 29, 32 (2d Cir. 1983) (holding that under dual sovereignty, a state cannot bind a federal court sentencing second to concurrent sentences through a plea agreement with the defendant); *Cozine v. Crabtree*, 15 F. Supp. 2d 997, 1012 (D.Or. 1998) (“It would be extraordinarily provincial for the United States to assert that federal judges may impose sentences that run concurrently with pre-existing state sentences but not the other way around.”); *Meagher v. Dugger*, 737 F. Supp. 641, 646 (S.D. Fla. 1990); *People v. Chaklader*, 29 Cal. Rptr. 2d 344, 347 (Cal. Ct. App. 1994) (holding that under dual sovereignty, the state court could not bind the federal court's ability to impose a concurrent or consecutive sentence with the existing state sentence).

¹⁵ E.g., 18 U.S.C. § 3553 (2006).

The difference between concurrent and consecutive sentences in practice is significant.¹⁶ For example, a young woman having a bad day goes to a mall in Mississippi and shoplifts.¹⁷ She shoplifts at fifteen different stores. She is then caught and prosecuted for fifteen counts of shoplifting. She has two previous convictions for shoplifting. In Mississippi, after two prior shoplifting convictions, the third conviction becomes a felony, and the maximum punishment for one count of felony shoplifting is five years in prison.¹⁸ She receives the maximum sentences for all fifteen counts. If she serves the sentences for all fifteen counts concurrently, she will serve five years in prison. If she serves the sentences consecutively, she will serve seventy-five years in prison. Whether the sentences are consecutive or concurrent is significant to this woman and to the prison system, which will have to expend more resources to keep her incarcerated for consecutive sentences. Additionally, although she shoplifted from fifteen different stores, these fifteen counts of shoplifting are essentially all part of the same bad act.

Another example is one “scheme” that results in several crimes. Two men plan to bring cocaine into the country from Colombia. They successfully get across the border with the drugs, but are arrested by state officials as they attempt to sell it to their friends. They are each charged with conspiracy, drug trafficking, and possession with intent to distribute. The federal authorities learn of this activity and charge each of them with the same three crimes under federal law. For the purposes of this example, in both the state and federal systems, each of these counts carries a minimum twenty-year sentence. If the two men are ordered to serve these sentences concurrently, they will each serve twenty years in prison. If they are ordered to serve these sentences consecutively, they will each serve one hundred and twenty years in prison, sixty years for the state and sixty years for the federal government. The difference between consecutive and concurrent sentences for each of these men is one hundred years. This example illustrates the implications of criminal activity: one single act can violate numerous criminal statutes at both the federal and state levels. Whether a sentence is consecutive or concur-

¹⁶ See *Oregon v. Ice*, 555 U.S. 160, 174 (2009) (Scalia, J., dissenting).

¹⁷ In Mississippi, shoplifting is a felony for a third or subsequent conviction of shoplifting and carries with it a maximum sentence of five years in prison. MISS. CODE ANN. § 97-23-93 (LEXIS through 2011 Reg. Sess.). Additionally, when \$500 or more worth of merchandise is stolen, shoplifting is a felony that is punished in accordance with the crime of grand larceny. *Id.*

¹⁸ See *id.*

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rent is very significant to defendants and to the criminal justice system.

In order to adequately explain the problems of the current sentencing scheme between the state and federal governments and between the executive branch and the judiciary, Part II of this Comment highlights the three areas the interaction of which gives rise to the problems of fragmented authority: (1) judicial authority at state and federal levels to impose consecutive or concurrent sentences, (2) the credit and designation authority of the BOP, and (3) the concept of primary jurisdiction and how both sovereigns are able to contemporaneously exercise jurisdiction over the same defendant. These three areas relevant to criminal sentencing create a system whereby the federal government with secondary jurisdiction, whether sentencing first or second, can effectuate consecutive sentences even in the face of opposition from the state government, which would prefer concurrent sentences. Part III discusses proposed resolutions and advocates for the imposition of a new rule that if a sovereign—state or federal—orders a concurrent sentence, the sentence shall be served concurrently with any sentences that the defendant is already serving or with any future sentence to be imposed for a crime known to that sovereign at the time of sentencing. Concurrent sentences should take priority over consecutive sentences because this aligns the sentencing practices of the state and federal governments with the core principles of the American criminal justice system—that a criminal should not receive a greater punishment than is necessary. Simultaneously, this new proposed rule preserves each sovereign's interest in the defendant serving a sentence for his criminal infractions. Part IV explains how this result may be effectuated by revising three federal statutes and enforced through the existing federal habeas statutes. These statutory solutions will provide uniformity, certainty, and clarity in the sentencing scheme between the state and federal governments.

II. THE PROBLEM OF FRAGMENTED AUTHORITY BETWEEN THE STATES AND THE FEDERAL GOVERNMENT IN THE CRIMINAL JUSTICE SYSTEM

The intersection of (1) judicial authority to impose concurrent or consecutive sentences, (2) BOP credit and designation authority, and (3) primary jurisdiction creates a problem of fragmented authority in the criminal justice system. Primary jurisdiction means that the defendant will first serve the sentence of the sovereign that initially arrested him, but it does not mean that the arresting sovereign will

sentence the defendant first.¹⁹ In some cases, the state arrests a defendant, but the federal government sentences him first. The federal judge, in some instances, may order consecutive sentences even though the federal judge sentences first.²⁰ By contrast, the state may order concurrent sentences,²¹ and in some cases, the defendant may have even entered into a plea agreement with the state for concurrent sentences. The defendant, however, could serve consecutive sentences because, after serving his state sentence, he would go into federal custody, and the BOP may refuse to credit him for his time in state custody if the federal judge ordered consecutive sentences.²² Overlapping authority between the state and federal criminal justice systems, as well as between the judicial and executive branches, creates a situation in some cases in which the federal government with secondary jurisdiction sentences first and therefore can effectuate the imposition of consecutive sentences on a defendant, despite the fact that the state sentencing second with primary jurisdiction ordered concurrent sentences. This section will explain all these facets and discuss how they come together to create this system of fragmented authority.

A. *Judicial Authority to Impose Consecutive or Concurrent Sentences*

By 18 U.S.C. § 3584(a), Congress vests the authority to impose concurrent or consecutive sentences in the federal courts. The statute states:

If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.²³

¹⁹ *E.g.*, Taylor v. Reno, 164 F.3d 440, 444 n.1 (9th Cir. 1998).

²⁰ *E.g.*, United States v. Mayotte, 249 F.3d 797, 798 (8th Cir. 2001).

²¹ *E.g.*, *id.*

²² *See, e.g.*, 18 U.S.C. §§ 3584(a), 3585, 3621 (b) (2006); *Mayotte*, 249 F.3d at 799.

²³ § 3584(a).

Additionally, state statutes grant state judges the authority to impose consecutive or concurrent sentences.²⁴

1. Circuit Split Over § 3584(a)

The statute governing federal judges, § 3584, does not address whether the phrase “multiple terms of imprisonment imposed at different times” includes not-yet-imposed but anticipated state sentences.²⁵ This omission has led to a circuit split. The Second, Fourth, Sixth, Seventh, and Ninth Circuits have held that a federal judge may not order consecutive sentences to an anticipated but not-yet-imposed state sentence, and that the statutory presumptions that apply when a federal judge is silent on this issue do not apply if the federal judge sentences first.²⁶ The Fifth, Eighth, Tenth, and Eleventh Circuits hold that a federal judge may order that the federal sentence run consecutively to an anticipated but not-yet-imposed state sentence and that the presumptions apply when the federal judge is silent on the issue, regardless of whether the federal sentence is imposed first.²⁷ The factual posture in all of the cases forming the circuit split is that the federal government—either the judge through judicial sentencing authority or the BOP based on the presumptions in § 3584(a)—attempted to run the federal sentences consecutively to not-yet-imposed state sentences.²⁸ In several of these cases, the federal court expressly ordered consecutive sentences when sentencing first, while the state judge ordered concurrent sentences when

²⁴ *E.g.*, FLA. STAT. § 921.16(2) (LEXIS through 2011 Act 141); IOWA CODE § 901.8 (LEXIS through 2010 legislation); KAN. STAT. ANN. § 21-4608(a) (LEXIS through 2010 Supp.); KY. REV. STAT. ANN. § 532.115 (LEXIS through 2011 1st Extraordinary Sess.); MO. REV. STAT. § 558.026 (LEXIS through 2010 2d. Reg. Sess.); N.J. STAT. ANN. § 2C:44-5 (West 2011); R.I. GEN. LAWS § 12-19-5 (LEXIS through Jan. 2010 Legis. Sess.); WASH. REV. CODE § 9.92.080 (LEXIS through 2011 Reg. & 1st Spec. Sess.).

²⁵ *See* § 3584.

²⁶ *E.g.*, *United States v. Donoso*, 521 F.3d 144, 149 (2d Cir. 2008); *United States v. Smith*, 472 F.3d 222, 227 (4th Cir. 2006); *Romandine v. United States*, 206 F.3d 731, 738 (7th Cir. 2000); *United States v. Quintero*, 157 F.3d 1038, 1039–40 (6th Cir. 1998); *McCarthy v. Doe*, 146 F.3d 118, 121–22 (2d. Cir. 1998); *United States v. Clayton*, 927 F.2d 491, 493 (9th Cir. 1991).

²⁷ *E.g.*, *United States v. Andrews*, 330 F.3d 1305, 1307 (11th Cir. 2003); *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir. 1995); *United States v. Ballard*, 6 F.3d 1502, 1510 (11th Cir. 1993); *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991).

²⁸ *Donoso*, 521 F.3d at 145–46; *Smith*, 472 F.3d at 224; *Andrews*, 330 F.3d at 1306; *Mayotte*, 249 F.3d at 798; *Romandine*, 206 F.3d at 732–35; *Quintero*, 157 F.3d at 1039; *McCarthy*, 146 F.3d at 119–20; *Williams*, 46 F.3d at 58; *Ballard*, 6 F.3d at 1504–05; *Clayton*, 927 F.2d at 492; *Brown*, 920 F.2d at 1214.

sentencing second.²⁹ In other cases, the federal judge who sentenced first expressly ordered consecutive sentences, and the state judge who sentenced second was silent as to concurrency presumably because the federal judge had already made the determination.³⁰ Additionally, in a majority of these cases, the state government had primary jurisdiction while the federal government had secondary jurisdiction.³¹

a. Circuits Holding that a Federal Judge May Not Impose Consecutive Sentences to Not-Yet-Imposed State Sentences

Five circuits do not allow a federal court to order that its sentence be served consecutively to an anticipated but not-yet-imposed state sentence.³² In *United States v. Donoso*, while Donoso was on federal supervised release after serving time for conspiracy to distribute narcotics, he was arrested by state authorities for various narcotic offenses.³³ After Donoso pled guilty in state court but before being sentenced, he was charged in federal district court for violation of supervised release by committing a state crime.³⁴ The district court sentenced him to twenty-four months and mandated that the sentence run consecutively to the not-yet-imposed state sentence.³⁵ The next day, the state court sentenced Donoso.³⁶ Donoso would serve twenty-four months longer if his state and federal sentences were served consecutively than he would if they were served concurrently.³⁷ Shortly thereafter, the district court, “*sua sponte*, recalled the case” because the court was unsure of whether it had the authority to impose consecutive sentences to anticipated state sentences.³⁸ The district court vacated the original sentence under Federal Rule of Criminal Procedure 35(a) and reordered the same sentence to ensure that

²⁹ *Mayotte*, 249 F.3d at 798; *Williams*, 46 F.3d at 58; *Clayton*, 927 F.2d at 492.

³⁰ *Donoso*, 521 F.3d at 145–46; *Smith*, 472 F.3d at 224; *Andrews*, 330 F.3d at 1306; *Romandine*, 206 F.3d at 732–35; *Quintero*, 157 F.3d at 1039; *Ballard*, 6 F.3d at 1504; *Brown*, 920 F.2d at 1214.

³¹ *Donoso*, 521 F.3d at 145–46; *Romandine*, 206 F.3d at 732–35; *Quintero*, 157 F.3d at 1039; *McCarthy*, 146 F.3d at 119–20; *Williams*, 46 F.3d at 58; *Ballard*, 6 F.3d 1502; *Clayton*, 927 F.2d at 492.

³² For a list of the circuits and cases, see *supra* note 26 and accompanying text.

³³ 521 F.3d at 145.

³⁴ *Id.*

³⁵ *Id.* at 145–46.

³⁶ *Id.* at 146.

³⁷ *Id.*

³⁸ *Id.*

the court's intent of consecutive sentences was realized.³⁹ The Second Circuit determined that, as to the first federal sentence, the district court did not have the authority to impose consecutive sentences, but held that the court properly used Rule 35(a) to correct the sentence.⁴⁰

Another example is *United States v. Clayton* from the Ninth Circuit.⁴¹ Clayton was arrested by state authorities and pled guilty in state court to second degree burglary and second degree robbery.⁴² Three days later, Clayton pled guilty in federal court to "making false statements in the acquisition of a firearm and possession of a firearm by a felon."⁴³ The federal court sentenced Clayton to twenty-four months to be served consecutively to any state sentence.⁴⁴ Three days later, the state court sentenced Clayton to seventeen months to run concurrently with his federal sentence.⁴⁵ If Clayton served his sentences concurrently, he would serve twenty-four months; however, if he served his sentences consecutively, he would serve forty-one months.⁴⁶ While Clayton was serving the state sentence first, he appealed, and the Ninth Circuit remanded for Clayton to be resentenced because a federal court could not order a consecutive sentence to a yet-to-be-imposed state sentence.⁴⁷

The circuit courts holding that a federal judge may not order consecutive sentences to yet-to-be imposed state sentences rely on several rationales in support of their position. The Second, Fourth, and Sixth Circuits rely on a textual interpretation of the statute, which refers to the imposition of simultaneous sentences or to the sentencing of a defendant who is already serving another sentence.⁴⁸

³⁹ *Donoso*, 521 F.3d at 146.

⁴⁰ *Id.* at 149.

⁴¹ 927 F.2d 491 (9th Cir. 1991).

⁴² *Id.* at 492.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *Clayton*, 927 F.2d at 493.

⁴⁸ *United States v. Donoso*, 521 F.3d 144, 149 (2d Cir. 2008) (opining that section 3584(a) "applies: (1) where multiple terms of imprisonment are imposed at the same time; and (2) where a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment"); *United States v. Smith*, 472 F.3d 222, 225–26 (4th Cir. 2006) (holding that the plain language of the sentencing statute gives the district court the power to determine whether a sentence will run concurrently or consecutively only when a defendant is sentenced to "multiple terms of imprisonment *at the same time*" or is "*already subject* to an undischarged imprisonment," and that this determination cannot be applied to sentences imposed

These courts also rely on the legislative history of the statute to determine that the statute applies when a court is sentencing a defendant already subject to a prison term.⁴⁹ Additionally, the Seventh Circuit advances a common sense rationale, explaining that a sentence cannot be concurrent or consecutive to a sentence that does not exist or that may exist in the future.⁵⁰ Additionally, these courts express

in the future); *McCarthy v. Doe*, 146 F.3d 118, 121 (2d. Cir. 1998) (holding that the presumptions in the last two sentences of section 3584(a) must be read in light of the limiting language at the beginning of the section); *United States v. Quintero*, 157 F.3d 1038, 1039–40 (6th Cir. 1998).

To reach our conclusion, we primarily rely on the language of section 3584(a). Section 3584(a) only authorizes district courts to impose concurrent or consecutive sentences if the court either imposes multiple terms of imprisonment on the defendant at the same time or imposes a sentence on a defendant who is “*already subject* to an undischarged term of imprisonment.” . . . We disagree with the *Williams* court’s reading of the final sentence of section 3584(a). The language neither abrogates the requirement that to run consecutively there be an undischarged sentence or sentences imposed at the same time nor expands a district court’s authority; it establishes a default rule that applies if a district court fails to specify whether a sentence should run concurrently or consecutively *and* either of the initial two conditions are satisfied—“multiple terms of imprisonment are imposed on a defendant at the same time, or . . . a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment.”

Id.

⁴⁹ *McCarthy*, 146 F.3d at 122 (noting that the Senate Report indicates that the drafters of section 3584(a) were referring to the imposition of a federal sentence on a defendant who was already serving a state or federal sentence); *Clayton*, 927 F.2d at 492.

The “already subject to” language of section 3584(a) could conceivably be interpreted broadly to encompass those defendants found guilty of, but not yet sentenced for, a state offense. However, the legislative history discussing the section indicates that Congress contemplated only that federal sentencing be consecutive to state convictions for which the defendant was already sentenced. In discussing consecutive sentencing under section 3584(a), the legislative history refers to “a term of imprisonment imposed on a person *already serving* a prison term,” “imposed *while the defendant is serving* another one,” and “a person sentenced for a Federal offense who is *already serving* a term of imprisonment for a State offense.” Thus, as a matter of statutory construction, we interpret the “already subject to” provision of section 3584(a) as only granting federal courts the power to sentence consecutive to a previously imposed term of imprisonment.

Id. (internal citations omitted).

⁵⁰ *Romandine v. United States*, 206 F.3d 731, 737–38 (7th Cir. 2000).

concern for infringement upon state sentencing authority and the rights of defendants.⁵¹

Despite ruling that federal judges do not have the authority to order that a federal sentence run consecutively to an anticipated state sentence, the Seventh Circuit describes the sentencing conflict between state and federal courts as “illusory” in light of the presumption in the last sentence of section 3584(a), which states that “multiple terms of imprisonment imposed at different times run consecutively unless the court orders them to run concurrently.”⁵² Therefore, even if a federal judge sentences first, the sentences will automatically be consecutive regardless of the judge’s determination because the BOP would follow the statutory presumption when designating the defendant’s place of incarceration.⁵³

b. Circuits Holding that Federal Courts May Impose Consecutive Sentences to Not-Yet-Imposed State Sentences

Four circuits allow a federal court to order consecutive sentences to yet-to-be imposed state sentences.⁵⁴ In *United States v. Andrews*, Andrews, while on federal supervised release from a prior drug sentence, was found in possession of fifty pounds of marijuana and was arrested by Mississippi officials.⁵⁵ Andrews subsequently escaped from the Mississippi jail after bribing a guard and was arrested in Florida months later.⁵⁶ While Andrews’s federal drug and escape charges were pending in Mississippi and drug charges were pending in Flori-

⁵¹ *Clayton*, 927 F.2d at 493 (“Such potential difficulties arising from dual sovereignty are best avoided if neither sovereign binds the sentencing discretion of the other.”).

⁵² *Romandine*, 206 F.3d at 738.

⁵³ *Id.* at 737–38.

Neither sec.3584(a) nor any other statute of which we are aware authorizes a federal judge to declare that his sentence must run consecutively to some sentence that may be imposed in the future. . . . But sentences may well run consecutively by force of law; indeed, the subject may simply be out of the judge’s hands. The final sentence of sec.3584(a) reads: “Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.” A judge cannot make his sentence concurrent to nonexistent sentences that some other tribunal may or may not impose; thus the sentence is automatically consecutive.

Id.; see also *infra* Part II.B.

⁵⁴ For a list of the circuits and cases, see *supra* note 27 and accompanying text.

⁵⁵ 330 F.3d 1305, 1306 (11th Cir. 2003). Officials also found an additional fifty-one pounds of marijuana in Andrews’ home. *Id.*

⁵⁶ *Id.*

da, the District Court for the Northern District of Florida sentenced Andrews to twenty-four months for violation of supervised release.⁵⁷ This sentence was to run consecutively to any other sentences Andrews was serving and to any sentences pending for the criminal conduct that constituted the basis of his violation of supervised release.⁵⁸ Andrews's incarceration would be twenty-four months longer if his federal and state sentences were served consecutively than if they were served concurrently.⁵⁹ The Eleventh Circuit upheld the district court's imposition of a consecutive sentence to yet-to-be imposed state sentences.⁶⁰

Another example of a case in which the court reached the same conclusion is *United States v. Mayotte*.⁶¹ Mayotte was on federal supervised release after serving time for bank robbery when he robbed another bank, robbed a pizzeria, and would not submit to a urine sample, which was a condition of his supervised release.⁶² Mayotte was charged in the District Court for the Western District of Missouri for the bank robbery and in Missouri state court for the pizzeria robbery.⁶³ The federal court ordered Mayotte to serve forty months for the bank robbery consecutively with both his six-month sentence for violation of supervised release and with any state sentence that he was facing at the time.⁶⁴ The state court later sentenced Mayotte to five years for the pizza store robbery to be served concurrently with his two federal sentences.⁶⁵ If Mayotte served his federal and state sentences consecutively, he would serve one hundred and six months, but if he served them concurrently he would serve sixty months.⁶⁶ The Eighth Circuit upheld the federal court's order that Mayotte's federal sentences run consecutively with the pending state sentence.⁶⁷

The circuit courts that hold that a federal judge may impose a concurrent or consecutive sentence to an anticipated but yet-to-be

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1307.

⁶¹ 249 F.3d 797 (8th Cir. 2001).

⁶² *Id.* at 798.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ *Mayotte*, 249 F.3d at 799.

imposed state sentence⁶⁸ explain that the plain meaning of section 3584(a) establishes a preference for consecutive sentencing based on the following language: “Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.”⁶⁹ The Eighth and Eleventh Circuits find support for a federal judge’s authority to impose a consecutive sentence to a pending but yet-to-be-imposed state sentence in the commentary of the Sentencing Guidelines, which recommends that any sentence for violation of supervised release should run consecutively to a sentence imposed for an offense committed while on supervised release.⁷⁰ The Eighth Circuit further relies on the fact that federal courts have broad discretion under section 3584(a), which does not prohibit district courts from imposing consecutive sentences with anticipated state sentences.⁷¹ The Tenth Circuit likewise relies on the broad discretion of the federal courts under section 3584(a).⁷² Similarly, the Fifth Circuit cites to the language in the second provision of the statute, section 3584(b),⁷³ and opines, “Whether a sentence imposed should run consecutively or concurrently is commit-

⁶⁸ *United States v. Andrews*, 330 F.3d 1305, 1307 (11th Cir. 2003); *Mayotte*, 249 F.3d at 799; *United States v. Williams*, 46 F.3d 57, 59 (10th Cir. 1995); *United States v. Ballard*, 6 F.3d 1502, 1510 (11th Cir. 1993); *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991).

⁶⁹ *Mayotte*, 249 F.3d at 799 (“[T]he statute encourages consecutive sentences when prison terms are imposed at different times”); *Williams*, 46 F.3d at 59 (“The plain meaning of this provision is that multiple terms of imprisonment imposed at different times will normally run consecutively, unless the district court affirmatively orders the terms be served concurrently.”); *Ballard*, 6 F.3d at 1510 (“The statute and the analogous Sentencing Guidelines evince a preference for consecutive sentences when imprisonment terms are imposed at different times.”).

⁷⁰ *Ballard*, 6 F.3d at 1506; *Mayotte*, 249 F.3d at 799 (“[I]t is the Commission’s recommendation that any sentence of imprisonment for a criminal offense that is imposed after revocation of probation or supervised release be run consecutively to any term of imprisonment imposed upon revocation.” (citing U.S. SENTENCING GUIDELINES MANUAL § 7B1.3 cmt. n.4 (2000))).

⁷¹ *Mayotte*, 249 F.3d at 799.

⁷² *Williams*, 46 F.3d at 59.

The plain meaning of this provision is that multiple terms of imprisonment imposed at different times will normally run consecutively, unless the district court affirmatively orders that the terms be served concurrently. We find no language in section 3584(a) prohibiting a district court from ordering that a federal sentence be served consecutively to a state sentence that has not yet been imposed.

Id. (citations omitted).

⁷³ 18 U.S.C. § 3584(b) (2006). “The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which term of imprisonment is being imposed, the factors set forth in section 3553(a).” *Id.*

ted to the sound discretion of the district court, subject to consideration of the factors set forth in 18 U.S.C. § 3553(a).⁷⁴ Furthermore,

⁷⁴ United States v. Brown, 920 F.2d 1212, 1216 (5th Cir. 1991) (relying on 18 U.S.C. § 3553(a) to hold that the district court could consider anticipated, subsequent sentences when exercising its discretion); *see also* United States v. Ballard, 6 F.3d 1502, 1504 (11th Cir. 1993) (explaining that since the defendant committed a federal crime purposefully to get the benefit of federal incarceration, allowing him to serve his sentences concurrently would not serve the deterrence principles under § 3553(a) (1) (A)–(B), but would instead serve as an incentive).

Section 3553 reads:

Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g) [18 USC § 3742(g)], are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

these circuit courts take the position that federal courts should not be bound by state courts.⁷⁵

2. State Authority to Impose Concurrent or Consecutive Sentences

Many state legislatures have given state trial courts the authority to determine whether sentences run consecutively or concurrently with other sentences.⁷⁶ Some state statutes expressly permit state courts to order that state sentences run concurrently or consecutively with sentences that the defendant may be serving for another state or the federal government.⁷⁷ Many of these statutes create default rules governing whether a sentence shall be concurrent or consecutive in cases in which the state judge is silent on the issue.⁷⁸ Oregon's statu-

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[:]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2006).

⁷⁵ *Mayotte*, 249 F.3d at 799 (“To the extent that the federal and state sentences conflict, . . . the federal sentence controls.”); *Ballard*, 6 F.3d at 1509 (explaining that it was proper for the federal court to order consecutive sentences when the court was sentencing first because a concurrent sentence imposed by a state court would encroach on the federal court’s sentencing authority by essentially eliminating a shorter federal sentence and stating that “[t]he tenet for dual sovereignty purposes is that each sovereign must respect not only the sentencing authority of the other, but also the sentence.”).

⁷⁶ *See, e.g.*, FLA. STAT. § 921.16(2) (LEXIS through 2011 Act 141); IOWA CODE § 901.8 (LEXIS through 2010 legislation); KAN. STAT. ANN. § 21-4608(a) (LEXIS through 2010 legislation); KY. REV. STAT. ANN. § 532.115 (LEXIS through 2011 1st Extraordinary Sess.); MO. REV. STAT. § 558.026 (LEXIS through 2010 2d Reg. Sess.); N.J. STAT. ANN. § 2C:44-5 (West 2011); N.Y. PENAL LAW § 70.25 (Consol. 2010); R.I. GEN. LAWS § 12-19-5 (LEXIS through Jan. 2010 Legis. Sess.); WASH. REV. CODE § 9.92.080 (LEXIS through 2011 Reg. & 1st Spec. Sess.).

⁷⁷ CAL. PENAL CODE § 669 (Deering, LEXIS through 2011 Extraordinary Sess.); FLA. STAT. § 921.16 (LEXIS through 2011 Act 141) (only references concurrent sentences); KAN. STAT. ANN. § 21-4608(a) (LEXIS through 2011 1st Extraordinary Sess.) (references both concurrent and consecutive sentences in other jurisdictions); KY. REV. STAT. ANN. § 532.115 (LEXIS through 2011 1st Extraordinary Sess.) (references only concurrent sentences); MO. REV. STAT. § 558.026 (LEXIS through 2010 2d Reg. Sess.) (references only concurrent sentences).

⁷⁸ *E.g.*, CAL. PENAL CODE § 669 (Deering, LEXIS through 2011 Extraordinary Sess.); FLA. STAT. § 921.16(2) (LEXIS through 2011 Act 141); KAN. STAT. ANN. § 21-4608 (LEXIS through 2011 1st Extraordinary Sess.); KY. REV. STAT. ANN. § 532.115 (LEXIS through 2011 1st Extraordinary Sess.); MO. ANN. STAT. § 558.026 (LEXIS through 2010 2d Reg. Sess.); N.J. STAT. ANN. § 2C:44-5 (West 2011); N.Y. PENAL LAW § 70.25 (Consol. 2010); WASH. REV. CODE § 9.92.080 (LEXIS through 2011 Reg. & 1st Spec. Sess.).

tory scheme has a presumption that sentences run concurrently.⁷⁹ One exception to Oregon's concurrency presumption is that, if the judge finds that the criminal offenses for which a defendant is charged did not arise "out of a continuous and uninterrupted course of conduct," the judge may impose concurrent or consecutive sentences in his discretion.⁸⁰ The second exception to Oregon's presumption of concurrency is that the judge may impose consecutive sentences even if the sentences arise from the same course of conduct if the judge finds

- (a) That the criminal offense . . . was an indication of defendant's willingness to commit more than one criminal offense; or (b) The criminal offense . . . caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or . . . to a different victim⁸¹

Similarly, California's statutory scheme shows a preference for concurrent sentences.⁸² The statutory scheme does not, however, give a state judge the authority to order a consecutive or concurrent sentence to a yet-to-be-imposed federal or state sentence.⁸³ Whether or

⁷⁹ OR. REV. STAT. § 137.123(4) (LEXIS through 2009 Leg. Sess.).

⁸⁰ *Id.*

⁸¹ § 137.123(5).

⁸² CAL. PENAL CODE § 669 (Deering, LEXIS through 2011 Extraordinary Sess.) ("Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."); *see also In re Altstatt*, 38 Cal. Rptr. 616, 617 (Cal. Ct. App. 1964) (stating, in reference to section 669, that "[i]n statutory construction, the interpretation resulting in concurrent sentences is favored.").

⁸³ *See, e.g.*, § 669.

When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively.

Id. The principle that a state court cannot preemptively bind a federal judge's exercise of sentencing authority is widely accepted. *E.g.*, *Hawley v. United States*, 898 F.2d 1513, 1514 (11th Cir. 1990) ("Because of the division of power between the federal government and the states under dual sovereignty principle of our form of government, a defendant may not, by agreement with state authorities, compel the federal government to impose a sentence that is concurrent with an existing state sentence."); *Pinaud v. James*, 851 F.2d 27, 30 (2d Cir. 1988) ("Further, even if the state sentence has been imposed with the expectation that it will be served concurrently with a yet-to-be imposed federal sentence, the federal court need not make its sentence concurrent with the state sentence but remains free to make the federal sentence consecutive."); *United States v. Sackinger*, 704 F.2d 29, 32 (2d Cir. 1983) (holding that under dual sovereignty, a state cannot bind a federal court that sentences second to concurrent sentences through a plea agreement with the defen-

not these statutes would be susceptible to the interpretation of the Fifth, Eighth, Tenth, and Eleventh Circuits does not appear to be at issue in these cases because state courts do not even presume to bind the federal government.⁸⁴

B. The Bureau of Prisons' Designation and Credit Authority

The federal government's power to designate the institution of a defendant's incarceration resides with the Attorney General, but the Code of Federal Regulations expressly delegates this power to the BOP.⁸⁵ Pursuant to 18 U.S.C. § 3621(b), Congress gives the BOP the authority to designate "any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise," as the place of incarceration,⁸⁶ thereby including both state and federal

dant); *Meagher v. Dugger*, 737 F. Supp. 641, 646 (S.D. Fla. 1990); *People v. Chaklader*, 29 Cal. Rptr. 2d 344, 347 (Cal. Ct. App. 1994) (holding that under dual sovereignty, the state court could not bind the federal court's ability to impose a concurrent or consecutive sentence to an existing state sentence).

⁸⁴ See, e.g., *Hawley*, 898 F.2d at 1514; *Pinaud*, 851 F.2d at 30; *Sackinger*, 704 F.2d at 32; *Meagher*, 737 F. Supp. at 646; *Chaklader*, 29 Cal. Rptr. 2d at 347.

Although these cases do not specifically reference the Supremacy Clause, their assertion that a state court may not bind a federal court may rest in part on the Supremacy Clause, which underlies the United States' system of federalism. See U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

⁸⁵ 28 C.F.R. § 0.96 (2011).

The Director of the Bureau of Prisons is authorized to exercise or perform any of the authority, functions, or duties conferred or imposed upon the Attorney General by any law relating to the commitment, control, or treatment of persons (including insane prisoners and juvenile delinquents) charged with or convicted of offenses against the United States

Id.

⁸⁶ 18 U.S.C. § 3621(b) (2006) (emphasis added).

Place of imprisonment. The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering –

- (1) the resources of the facility contemplated;
- (2) the nature and circumstances of the offense;

institutions. According to 18 U.S.C. § 3585, the Attorney General, through the BOP, may choose to give a defendant credit for prior custody.⁸⁷ It is the Executive, through the Attorney General and the BOP, who has the ability to make crediting decisions, not the judiciary through the district courts.⁸⁸ Through the intersection of sec-

-
- (3) the history and characteristics of the prisoner;
 - (4) any statement by the court that imposed the sentence—
 - (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
 - (B) recommending a type of penal or correctional facility as appropriate; and
 - (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse. Any order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person.

Id.

⁸⁷ *Id.* § 3585.

Calculation of a term of imprisonment

(a) Commencement of sentence. A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) Credit for prior custody. A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

- (1) as a result of the offense for which the sentence was imposed; or
- (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

Id.

⁸⁸ *United States v. Wilson*, 503 U.S. 329, 333–35 (1992).

We do not accept Wilson's argument that § 3585(b) authorizes a district court to award credit at sentencing. Section 3585(b) indicates that a defendant may receive credit against a sentence that "*was imposed*." It also specifies that the amount of the credit depends on the time that the defendant "*has spent*" in official detention "prior to the date the sentence commences." Congress' use of a verb tense is significant in construing statutes. By using these verbs in the past and present perfect tenses, Congress has indicated that computation of the

tion 3621(b) and section 3585, the federal executive branch may effectuate consecutive sentences even when a state judge who sentences second orders concurrent sentences.⁸⁹

The BOP is under no obligation to consider the state judge's order as to consecutive or concurrent sentences.⁹⁰ Even when a state court with primary jurisdiction⁹¹ sentences second and orders a concurrent sentence, the BOP can allow the defendant to remain in state custody for the duration of his state sentence.⁹² The BOP can lodge a detainer with state officials requesting that the defendant's custody be transferred to federal authorities after he has fulfilled his state obligations.⁹³ Once the defendant is in federal custody, the defendant can make a *nunc pro tunc*⁹⁴ request to receive credit on the federal sentence for the time served in the state institution so that the sen-

credit must occur after the defendant begins his sentence. A district court, therefore, cannot apply § 3585(b) at sentencing.

....

After a district court sentences a federal offender, the Attorney General, through the BOP, has the responsibility of administering the sentence. To fulfill this duty, BOP must know how much of the sentence the offender has left to serve. Because the offender has a right to certain jail-time credit under § 3585(b), and because the district court cannot determine the amount of crediting at sentencing, the Attorney General has no choice but to make the determination as an administrative matter when imprisoning the defendant.

Id. (internal citations omitted); *see also* Dictionary Act, 1 U.S.C. § 1 (2006) (regarding the statutory construction of verb tenses discussed by the Supreme Court in *Wilson*).

In determining the meaning of any Act of Congress, unless the context indicates otherwise— words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular; words importing the masculine gender include the feminine as well; words used in the present tense include the future as well as the present

Id.

⁸⁹ *See Romandine v. United States*, 206 F.3d 731, 738 (7th Cir. 2000) (discussing how the Executive, through authority granted under section 3621(b), can override the section 3584(a) presumption of consecutive sentences for sentences imposed at different times and make them concurrent in practical effect and stating that “the effective decision then is made by the Attorney General . . . rather than the federal judge”).

⁹⁰ *See, e.g.*, 18 U.S.C. §§ 3585, 3621(b) (2006); *Barden v. Keohane*, 921 F.2d 476, 483–84 (3d Cir. 1991).

⁹¹ The defendant will serve the state sentence first regardless of the order of the imposition of sentences because the state court has primary jurisdiction. *See infra* Part II.C.

⁹² *See, e.g.*, §§ 3585, 3621(b); *Barden*, 921 F.2d at 483–84.

⁹³ *See Barden*, 921 F.2d at 478.

⁹⁴ *Black's Law Dictionary* defines *nunc pro tunc* as “[h]aving retroactive legal effect through a court's inherent power.” BLACK'S LAW DICTIONARY 1100 (8th ed. 2004).

tences would be concurrent.⁹⁵ The BOP has broad discretion⁹⁶ under section 3621(b)⁹⁷ and may deny this request, thereby ignoring the state sentence altogether even though the state judge sentenced last.⁹⁸ This may be especially important when a defendant has entered a guilty plea with that state pursuant to a plea agreement that provides for a state sentence to run concurrently with the federal sentence imposed first.⁹⁹ Despite this plea agreement and despite the fact that the state may have sentenced second, the defendant would still have to serve consecutive sentences because the BOP refused to give the defendant credit for his state service.¹⁰⁰ The broad discretion given to the federal Executive in section 3621(b) enables the BOP to effectuate consecutive sentences when the federal government has secondary jurisdiction regardless of what the state judge mandates and regardless of the sentencing order.¹⁰¹

C. *State and Federal Exercise of Concurrent Jurisdiction*

Primary jurisdiction, the Interstate Agreement on Detainers, and writs of habeas corpus *ad prosequendum* enable a defendant to serve a state sentence, although imposed second, before a federal sentence. When an individual is first arrested, the sovereign that arrested him has what is known as “primary jurisdiction” over the defendant.¹⁰² If another sovereign also intends to charge the defendant,

⁹⁵ See *Barden*, 921 F.2d at 478; *McCarthy v. Doe*, 146 F.3d 118, 119–20 (2d Cir. 1998).

⁹⁶ *McCarthy*, 146 F.3d at 123; see also *Barden*, 921 F.2d at 483–84.

⁹⁷ Section 3621(b), which applies to commitments after November 1, 1987, replaced 18 U.S.C.A. § 4802(b) (West 1985), *repealed by* Comprehensive Crime Control Act of 1984, ch. 58, § 218(a), 98 Stat. 2027, which applied to commitments prior to November 1, 1987 and gave wide discretion to the Attorney General in determining the place of a prisoner’s confinement. See *Barden*, 921 F.2d at 481–82 (explaining similarities between the two statutes, although section 4082(b) was the statute at issue for *Barden*).

⁹⁸ See 18 U.S.C. § 3621(b) (2006); *Barden*, 921 F.2d at 483.

⁹⁹ See *infra* Part III.B.2.

¹⁰⁰ See *Romandine v. United States*, 206 F.3d 731, 738 (7th Cir. 2000) (“By refusing to make this designation [the state institution as the place of federal confinement], and by instead lodging a detainer with state officials, the Attorney General can ensure consecutive service . . .”).

¹⁰¹ See, e.g., *Del Guzzi v. United States*, 980 F.2d 1269, 1272–73 (9th Cir. 1992) (Norris, J., concurring) (“[C]oncurrent sentences imposed by state judges are nothing more than recommendations to federal officials [because federal] officials remain free to turn those concurrent sentences into consecutive sentences by refusing to accept the state prisoner until the completion of the state sentence and refusing to credit the time the prisoner spent in state custody.”).

¹⁰² HENRY J. SADOWSKI, FED. BUREAU OF PRISONS, INTERACTION OF FEDERAL AND STATE SENTENCES WHEN DEFENDANT IS UNDER STATE PRIMARY JURISDICTION (2006), *available at*

that sovereign is able to do so even while the defendant is in the custody of the first sovereign.¹⁰³ For purposes of trial, sentencing, and incarceration, the sovereign with primary jurisdiction has “priority of custody” over the second sovereign.¹⁰⁴ The second sovereign does not lack jurisdiction over the defendant but merely lacks priority of custody over the defendant.¹⁰⁵

Primary jurisdiction also refers to the sequence in which the defendant serves his sentences.¹⁰⁶ The rule for sequencing mandates that the sentence imposed by the primary-jurisdiction sovereign be served first.¹⁰⁷ Either the primary-jurisdiction sovereign or the secondary-jurisdiction sovereign may sentence the defendant first without affecting primary jurisdiction.¹⁰⁸ A sovereign relinquishes primary jurisdiction to the other sovereign by dismissing the charges, releasing the defendant on bail or parole, or upon the expiration of that sovereign’s sentence.¹⁰⁹ A less common mechanism for releasing primary jurisdiction used in some federal jurisdictions is the executive waiver.¹¹⁰ The executive waiver is a discretionary function of the executive branch by which the Executive may relinquish priority of jurisdiction to the secondary jurisdiction even though the sovereign who grants the waiver arrested the defendant first.¹¹¹ Although executive waivers have not been considered in all jurisdictions, they

www.bop.gov/news/ifss.pdf; *see also* United States v. Cole, 416 F.3d 894, 897 (8th Cir. 2005) (“As between the state and federal sovereigns, primary jurisdiction over a person is generally determined by which one first obtains custody of, or arrests, the person.”); United States v. Vann, 207 F. Supp. 108, 111 (E.D.N.Y. 1962) (“The controlling factor in determining the power to proceed as between two contesting sovereigns is the actual, physical custody of the accused.”). The origin of the current usage of the term of art “primary jurisdiction” is unclear.

¹⁰³ *See* Taylor v. Reno, 164 F.3d 440, 444 n.1 (9th Cir. 1998).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; *see also* Roche v. Sizer, 675 F.2d 507, 510 (2d Cir. 1982); United States v. Warren, 610 F.2d 680, 684–85 (9th Cir. 1980); United States v. Smith, 812 F. Supp. 368, 371 n.2 (E.D.N.Y. 1993).

¹⁰⁶ SADOWSKI, *supra* note 102.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *Id.*; *see also* United States v. Cole, 416 F.3d 894, 897 (8th Cir. 2005) (“Primary jurisdiction continues until the first sovereign relinquishes its priority in some way. Generally, a sovereign can only relinquish primary jurisdiction in one of four ways: 1) release on bail, 2) dismissal of charges, 3) parole, or 4) expiration of sentence.”); Roche, 675 F.2d at 510 (holding that the federal court relinquished primary jurisdiction by releasing the prisoner on bail).

¹¹⁰ *See* Savvas Diacosavvas, Note, *Penal Law: Vertical Conflicts in Sentencing Practices: Custody, Credit, and Concurrency*, 57 N.Y.U. ANN. SURV. AM. L. 207, 218 (2000).

¹¹¹ United States v. Warren, 610 F.2d 680, 684–85 (9th Cir. 1980).

have been upheld by the Ninth Circuit and some federal district courts in New York.¹¹²

The sovereign with primary jurisdiction can loan the defendant to the sovereign with secondary jurisdiction so that the defendant can face charges without the sovereign sacrificing primary jurisdiction.¹¹³ A defendant can be borrowed by lodging a detainer pursuant to the Interstate Agreement on Detainers of 1970 or by filing a writ of habeas corpus *ad prosequendum*.¹¹⁴ The Interstate Agreement on Detainers and writs of habeas corpus *ad prosequendum* provide procedures through which a sovereign with secondary jurisdiction can borrow a defendant to charge him and settle other matters.¹¹⁵

The Interstate Agreement is a compact entered into by “States,” which includes both an individual state of the United States and the United States of America collectively.¹¹⁶ The Interstate Agreement specifies a procedure for the sovereign with primary jurisdiction to loan a prisoner to another member State that does not have primary jurisdiction prior to the completion of the prisoner’s obligations to the primary jurisdiction.¹¹⁷ The sovereign with secondary jurisdiction has to lodge a detainer with the primary-jurisdiction sovereign informing the primary-jurisdiction sovereign that the defendant is wanted by another sovereign.¹¹⁸ This lending procedure does not af-

¹¹² See *id.*; see also United States v. Gonzalez, No. S-1 94 Cr. 313, 1998 U.S. Dist. LEXIS 15300, at *8 (S.D.N.Y. Sept. 30, 1998); Shumate v. United States, 893 F. Supp. 137, 141–42 (N.D.N.Y. 1995) (citing *Warren*, 610 F.2d at 684) (upholding the executive waiver against a challenge by the BOP).

¹¹³ *Cole*, 416 F.3d at 897.

If, while under the primary jurisdiction of one sovereign, a defendant is transferred to the other jurisdiction to face a charge, primary jurisdiction is not lost but rather the defendant is considered to be “on loan” to the other sovereign. This comports with the principles that ordinarily apply when two separate sovereigns exercise jurisdiction over the same person during the same time period.

Id. (citations omitted).

¹¹⁴ See 28 U.S.C. § 2241(c)(5) (2006); 18 U.S.C. app. § 2 (2006).

¹¹⁵ 28 U.S.C. § 2241(c)(5); 18 U.S.C. app. § 2; see also United States v. Mauro, 436 U.S. 340, 358, 361 (1978); *Jake v. Herschberger*, 173 F.3d 1059, 1061–62 (7th Cir. 1999); United States v. Smith, 812 F. Supp. 368, 371 (E.D.N.Y. 1993); SADOWSKI, *supra* note 102.

¹¹⁶ 18 U.S.C. app. § 2, art. II (a).

¹¹⁷ § 2, art. IV, V.

¹¹⁸ *Id.*; see also United States v. Mauro, 436 U.S. 340, 343–44 (1978).

In 1970 Congress enacted the Interstate Agreement on Detainers Act, 18 U. S. C. App., pp. 1395–1398 (1976 ed.), joining the United States and the District of Columbia as parties to the Interstate Agreement on Detainers (Agreement). The Agreement, which has also been enacted by 46 States, is designed “to encourage the expeditious and orderly

fect the primary jurisdiction of the lending sovereign.¹¹⁹ Additionally, the lodging of the detainer does not transfer custody¹²⁰ or begin the sentence imposed by the sovereign with secondary jurisdiction.¹²¹

Writs of habeas corpus *ad prosequendum* are similarly used by federal authorities with secondary jurisdiction to obtain a defendant before the defendant has fulfilled his obligations to the state sovereign with primary jurisdiction.¹²² The sentence of the secondary-

disposition of . . . charges [outstanding against a prisoner] and determination of the proper status of any and all detainees based on untried indictments, informations, or complaints.” Art. I. It prescribes procedures by which a member State may obtain for trial a prisoner incarcerated in another member jurisdiction and by which the prisoner may demand the speedy disposition of certain charges pending against him in another jurisdiction. In either case, however, the provisions of the Agreement are triggered only when a “detainer” is filed with the custodial (sending) State by another State (receiving) having untried charges pending against the prisoner; to obtain temporary custody, the receiving State must also file an appropriate “request” with the sending State.

Mauro, 436 U.S. at 343–44.

¹¹⁹ § 2, Art. V(g) (“For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State . . .”).

¹²⁰ § 2, Art. V; *Thomas v. Whalen*, 962 F.2d 358, 360 (4th Cir. 1992) (“A detainer neither effects a transfer of a prisoner from state to federal custody nor transforms state custody into federal custody by operation of law.”); *see also Mauro*, 436 U.S. at 358–59.

¹²¹ § 2, Art. V; *Thomas*, 62 F.2d at 363 (stating that a prisoner’s federal sentence does not begin until after he has completed his state sentence and is transferred to the federal authorities for service of the federal sentence); *Larios v. Madigan*, 299 F.2d 98, 99–100 (9th Cir. 1962).

¹²² The power to grant a writ of habeas corpus was recognized by Congress in section 14 the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 81–82 (1789).

That all the before mentioned courts of the United States shall have the power to issue writs of . . . *habeas corpus*, and all other writs, not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. . . . *Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Id. The All Writs Act, which is the modern version of section 14 of the Judiciary Act of 1789, states, “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” All Writs Act, 28 U.S.C. § 1651 (2006). The use of the writ of habeas corpus *ad prosequendum* was officially codified in 1948. *See* 28 U.S.C. § 2241(c)(5) (2006); *see also United States v. Ratcliff*, No. CR. A. 98-300, 2001 WL 910402, at *1 (E.D. La. Aug. 2, 2001) (discussing a situation in which a defendant in state custody appeared before the federal court for sentencing on a writ of habeas corpus *ad prosequendum*); BLACK’S LAW DICTIONARY 715 (7th ed.

jurisdiction sovereign, the federal government, does not begin to run when the defendant is produced pursuant to the writ;¹²³ primary jurisdiction is retained by the primary sovereign, the state, when the defendant is borrowed by the federal government.¹²⁴ Through the writ, in some cases, the federal sovereign with secondary jurisdiction is able to sentence the defendant before the state sovereign with primary jurisdiction has done so.¹²⁵ For example, a state may arrest and charge a defendant, and the defendant may plead guilty to those charges. The federal government may also bring charges against the defendant while the defendant is in a state facility. The federal government can file a writ of habeas corpus *ad prosequendum* to bring the defendant before a federal court for hearings, trial, sentencing, etc. The defendant would serve his state sentence first, but the federal government, through the writ, may be able to sentence the defendant before the state.

The main difference between the writ and the Interstate Agreement is that the detainer, pursuant to the Interstate Agreement, is a notification to the sovereign with primary jurisdiction that the prisoner is wanted by another sovereign and that the prisoner should be transferred when the prisoner's obligations to the primary-jurisdiction sovereign are fulfilled,¹²⁶ while the writ compels temporary custody at a specified time.¹²⁷ Additionally, while the federal government may utilize both mechanisms, a state may only request the presence of a defendant who is in federal custody at the time through the detainer.¹²⁸

1999) (“[A writ of habeas corpus *ad prosequendum* is]used in criminal cases to bring before a court a prisoner to be tried on charges other than those for which the prisoner is currently being confined.”); SADOWSKI, *supra* note 102.

¹²³ *Del Guzzi v. United States*, 980 F.2d 1269, 1270 (9th Cir. 1992) (explaining that an inmate's federal sentence does not begin to run until he is returned to federal prison to serve the balance of his federal sentence).

¹²⁴ *Jake v. Herschberger*, 173 F.3d 1059, 1062 n.1 (7th Cir. 1999) (describing the process of “borrowing” a defendant under the writ); SADOWSKI, *supra* note 102.

¹²⁵ SADOWSKI, *supra* note 102.

¹²⁶ *Diacosavvas*, *supra* note 110, at 216; *see also* *United States v. Mauro*, 436 U.S. 340, 358 (1978).

¹²⁷ *Diacosavvas*, *supra* note 110, at 216; *see also* *Mauro*, 436 U.S. at 358.

¹²⁸ *See* 28 U.S.C. § 2241(c)(5) (2006); 18 U.S.C. app. § 2 (2006). The power of the writ is found in a federal statute governing federal courts and does not give states the authority to use the writ. In fact, the Supreme Court in *Tarble's Case* specifically held that states lack the authority to use writs of habeas corpus for prisoners held by another sovereign, including the United States. 80 U.S. 397, 405 (1872) (“[N]o State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government.”). The power of the detainer is found in a compact between the states and the federal gov-

Essentially, primary jurisdiction, the writ, and the Interstate Agreement mean that the defendant would first serve the sentence of the sovereign who arrested him first, but that the sovereign with secondary jurisdiction may or may not sentence him first. Therefore, the defendant could potentially serve the sentence he was given last prior to serving the sentence he was given first.

D. The Current System Enables the Federal Government, with Secondary Jurisdiction, to Effect Consecutive Sentences over the State's Objection when the State Sentences Last

The interaction of primary jurisdiction, judicial authority to impose consecutive or concurrent sentences, and BOP designation and credit authority makes it possible for a defendant to serve consecutive sentences even when a state judge sentencing second orders concurrent sentences. The defendant would serve the primary-jurisdiction sovereign's sentence first.¹²⁹ Under section 3584(a), a federal judge can order a consecutive or concurrent sentence to an existing state sentence (or yet-to-be-imposed state sentence, depending on the circuit).¹³⁰ The following hypothetical¹³¹ illustrates that the interaction of primary jurisdiction, judicial authority to impose consecutive or concurrent sentences, and the BOP's designation and credit authority in some cases¹³² enables the federal government to effectuate consecutive sentences for a defendant over the objection of the state court, which sentenced last. In this hypothetical, the federal judge sentences first, has secondary jurisdiction, and orders consecutive sentences.¹³³ The state judge who sentences second can order consecutive or concurrent sentences to an existing federal sentence.¹³⁴ Thus, the state judge sentences second, has primary jurisdiction, and orders concurrent sentences. After the defendant serves the state sentence, the federal BOP decides whether or not to

ernment, and therefore, both the state and the federal government may use a detainer.

¹²⁹ See *supra* notes 102–09 and accompanying text.

¹³⁰ See *supra* Part II.A.1.

¹³¹ The facts of this hypothetical are consistent with the factual posture of the cases giving rise to the circuit split. See *supra* notes 28–31 and accompanying text.

¹³² The scenario discussed in this Comment is not what always happens when the federal and state governments contemporaneously exercise jurisdiction over the same defendant. Often times, the issues discussed in this Comment do not arise. This Comment focuses on the situation when the federal government, with secondary jurisdiction, sentences first and imposes consecutive sentences over the objection of the state government, which has primary jurisdiction and sentences second.

¹³³ See 18 U.S.C. § 3584(a) (2006); *supra* Part II.A.

¹³⁴ See *supra* Part II.A.2.

credit the defendant with the time served in state custody.¹³⁵ The BOP may decide not to credit the defendant with the time served in state custody.¹³⁶ Under this scenario, the BOP can effectuate consecutive sentences despite the fact that the state judge sentencing last ordered concurrent sentences and despite the fact that the defendant may have entered into a plea agreement with the state, under which concurrent sentences were part of the arrangement.¹³⁷

1. The Current Regime Creates a System of Manipulation

The current criminal justice regime with authority fragmented between the state and federal governments leads to a system of gaming among sovereigns, whereby the state sovereign would try to lose primary jurisdiction to effectuate the sentence that the state sovereign deems appropriate. State and federal judges can relinquish primary jurisdiction by releasing the defendant on bail.¹³⁸ This could potentially lead to a “game of chicken”¹³⁹ between the federal and

¹³⁵ See *supra* notes 85–101 and accompanying text.

¹³⁶ See *supra* notes 89–101 and accompanying text.

¹³⁷ See, e.g., *Barden v. Keohane*, 921 F.2d 476, 477–78 (3d Cir. 1990) (noting that a state court with primary jurisdiction intended concurrent sentences, but that the BOP had discretion to determine that the defendant’s federal sentence did not begin until the defendant arrived in the federal facility for service of the federal sentence).

¹³⁸ See *supra* notes 106–09 and accompanying text.

¹³⁹ For a discussion on the theory of the “game of chicken,” see David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331, 368–73 (2001).

In the game called “Chicken,” two cars race toward each other. The first driver to turn is a chicken. If neither has a sufficient instinct for self-preservation, the cars collide head-on, killing both. . . . [T]he worst possible outcome is for neither player to be chicken, so that the result is a head-on collision, killing both. . . . Thus, it has been observed that cantankerousness, anger, and recklessness can be successful strategies in negotiation. So can a “lock-in” or commitment strategy, by which a player ostentatiously binds himself or herself to a potentially self-destructive course of action, which encourages the other player to give in to avoid the same disastrous result for both. It follows that the mere appearance of cantankerousness, anger, or irrationality, or the credible communication of a “lock-in” or commitment strategy, can be effective. Soviet leader Nikita Khrushchev visited the United Nations during the heyday of the Cold War, where in addition to his belligerent rhetoric, he interrupted a delegate’s speech by taking off his shoe and banging it on the table. The Soviet Union was a nuclear power, but Khrushchev’s action implied that it was headed by a maniac who did not care about consequences. This strategy works quite well in the game of Chicken, provided only that the exploiter is skillful at communicating it convincingly to another player who is rational.

Id. at 368–70.

state authorities—where either sovereign may release an extremely dangerous defendant on bail on the assumption that the other sovereign will collect him. State authorities with primary jurisdiction may also transfer a defendant to the federal authorities to effectuate concurrent sentences even though the defendant may not have yet completed the state sentence.¹⁴⁰ If the state, which has primary jurisdiction, were to make a transfer to the federal authorities, who have secondary jurisdiction, to effectuate concurrent sentences, then the state may be able to lodge a detainer to bring the defendant back in state custody to serve any remaining time on the state sentence after the completion of the federal sentence.¹⁴¹ In response to this, the federal sovereign may be able to refuse to take custody of the defendant until the defendant is eligible for parole on the state sentence.¹⁴² Rather than forcing the state to use complex manipulation tactics to effectuate a concurrent sentence when the state court with primary jurisdiction has sentenced last, the system should be improved to promote uniformity, predictability, and justice.

¹⁴⁰ *Clark v. State*, 468 S.E.2d 653, 655 (S.C. 1996).

The determination by federal authorities that a defendant's federal sentence runs consecutive to his or her state sentence is a federal matter which cannot be overridden by a state court provision for concurrent sentencing on a subsequently obtained state court conviction. Although a state trial judge may properly order the sentences which he or she imposes to run concurrently, or consecutively, to each other, a state court is without authority to modify or place conditions on a sentence from a foreign jurisdiction. Accordingly, it appears the only way to effectuate a state trial court's order that a state sentence run concurrently with a prior federal sentence is to have the defendant returned to federal custody to serve his federal sentence.

Id. (citations omitted); *see also In re Stoliker*, 315 P.2d 12, 14 (Cal. 1957) (holding that the petitioner was entitled to have his custody transferred when continued imprisonment in state prison would compel consecutive service of sentences); *In re Altstadt*, 38 Cal. Rptr. 616, 617 (Cal. Ct. App. 1964).

¹⁴¹ *E.g., Clark*, 468 S.E.2d at 655 n.3.

Contrary to the Department of Correction's contention, a transfer of Clark in this matter will not deprive the State of its ability to obtain custody of Clark after service of his federal sentence. The State may place a detainer on Clark in order that he be returned to state prison after completion of his federal sentence to complete any remaining time on his state sentence.

Id. This may not be an option in every state jurisdiction as the ability to do this depends on the scope and type of the authority of the state's department of corrections.

¹⁴² *E.g., Bloomgren v. Belaski*, 948 F.2d 688, 690–91 (10th Cir. 1991) (noting that federal authorities refused to take custody of Bloomgren until he was eligible for parole on his state sentence because the federal court ordered consecutive sentences and the state court ordered concurrent sentences). Again, this may not be an option in every state jurisdiction.

2. Lack of Congressional Consideration of the Fragmentation of Authority to Impose Concurrent and Consecutive Sentences Between the Federal and State Governments

Why is it that the federal government with secondary jurisdiction is able to ignore the state's order of concurrent sentences when the state sentences second? The answer is probably that both the state and federal legislatures did not consider the interaction of primary jurisdiction, judicial discretion in imposing consecutive and concurrent sentences, and the authority of the BOP to credit the defendant for time served. The fragmentation of authority between the state and federal governments, as well as between the executive and judicial branches, is the cause of the problem. The result of this convoluted interaction is that when the federal government has secondary jurisdiction, the BOP can effectuate consecutive sentences despite the fact that the state judge sentenced last and ordered concurrent sentences. This result is arbitrary and violates the notions of dual sovereignty, comity, and separation of powers.¹⁴³

Congress enacted the Comprehensive Crime Control Act of 1984 (the "Act") to reduce the disparity in sentencing practices regarding what considerations federal judges were taking into account when imposing sentences.¹⁴⁴ Sections 3553 and 3584 are portions of this Act, yet § 3584(a)'s ambiguity is a large part of the problem.¹⁴⁵ The disparity in sentencing practices was certainly not resolved with the Act. In fact, these revisions have helped develop a system under which the federal government with secondary jurisdiction may im-

¹⁴³ Under the current regime, primary jurisdiction is the arbitrary determinant of who makes the concurrency decision. Primary jurisdiction is not based on a concept of higher morality, but is analogous to the "rules of the road;" it makes the process easier and more predictable when different sovereigns have concurrent jurisdiction over a defendant. Also, the current regime essentially allows the BOP to ignore the sentencing authority of the state judge.

¹⁴⁴ S. REP. NO. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182.

The Comprehensive Crime Control Act of 1983 as reported by the Committee is the product of a decade long bipartisan effort of the Senate Committee of the Judiciary, with the cooperation and support of successive administrations, to make major comprehensive improvements to the federal criminal laws. Significant parts of the measure, such as sentencing reform, bail reform, insanity defense amendments, drug penalty amendments, criminal forfeiture improvements, and numerous relatively minor amendments, have evolved over the almost two-decade consideration of proposals to enact a modern Federal Criminal Code.

Id.

¹⁴⁵ *See supra* Part II.A.1.

pose consecutive sentences on a defendant despite the fact that a state judge who sentences second may order or intend to order concurrent sentences. The reason for this scenario is that there is nothing in the federal sentencing scheme that requires the judiciary or the BOP to consider the authority of state courts to make the concurrency determination. Although this may seem to be a narrow circumstance, the case law produced by the circuit split suggests that this is a possible scenario.¹⁴⁶ To resolve the problem, the system needs new sentencing practices that conform with the goals of uniformity and fairness.¹⁴⁷

3. Why a New Rule for the Concurrency Determination Between the States and Federal Governments is Necessary

The temporal difference between a concurrent and a consecutive sentence is substantial in many cases. Consider the Introduction's hypothetical: the young woman who is having a bad day shoplifts at fifteen different stores in Mississippi.¹⁴⁸ She has two prior convictions for shoplifting. She is prosecuted for fifteen counts of shoplifting. The punishment for one count of felony shoplifting is five years in prison.¹⁴⁹ If she serves the sentences for all fifteen counts concurrently, she will serve five years in prison. If she serves the sentences consecutively, she will serve seventy-five years in prison. The difference between consecutive and concurrent sentences for this woman is seventy years. For defendants, it is very important whether sentences are served consecutively or concurrently. Justice Scalia emphasized this point in his dissent in *Oregon v. Ice*¹⁵⁰ stating,

¹⁴⁶ See *supra* Part II.A.1.

¹⁴⁷ See Janet Alberghini, *Structuring Determinate Sentencing Guidelines: Difficult Choices for the New Federal Sentencing Commission*, 35 CATH. U. L. REV. 181, 206–07 (1985) (“The development and implementation of a new federal sentencing policy that is intended to provide greater uniformity, fairness and certainty in federal sentencing practices will be a formidable undertaking.”).

¹⁴⁸ In Mississippi, shoplifting is a felony for a third or subsequent conviction of shoplifting, and carries with it a maximum of five years in prison. MISS. CODE ANN. § 97-23-93(6) (LEXIS, through 2010 Reg. Sess.). Shoplifting is also a felony when \$500 or more worth of merchandise is stolen, and such conduct is punished in accordance with the crime of grand larceny. § 97-23-93(7).

¹⁴⁹ § 97-23-93(6).

¹⁵⁰ 555 U.S. 106, 174 (2009) (Scalia, J., dissenting) (internal citation omitted). *Oregon v. Ice* reexamined the rule from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakeby v. Washington*, 542 U.S. 296 (2004), that the Sixth Amendment's jury-trial guarantee requires that a jury determine any fact that increases the punishment for a particular offense. See 555 U.S. at 163. The Court considered an Oregon statute, OR. REV. STAT. § 137.123 (LEXIS, through 2009 Legis. Sess.), which provided that sen-

There is no doubt that consecutive sentences are a “greater punishment” than concurrent sentences. We have hitherto taken note of the reality that “a concurrent sentence is traditionally imposed as a less severe sanction than a consecutive sentence.” The decision to impose consecutive sentences alters the single consequence most important to convicted noncapital defendants: their date of release from prison. For many defendants, the difference between consecutive and concurrent sentences is more important than a jury verdict of innocence on any single count: Two consecutive 10-year sentences are in most circumstances a more severe punishment than any number of concurrent 10-year sentences.¹⁵¹

The defendant in *Oregon v. Ice* was required to serve 340 months (twenty-eight years and four months) in prison because the sentences were consecutive, but would have served only ninety months (seven and a half years) if the sentences were concurrent.¹⁵² Because of the great difference in duration between consecutive and concurrent sentences, the determination of whether sentences are served consecutively or concurrently should be based on the purposes of punishment.

Currently, the system for determining consecutive or concurrent sentences between the state and federal governments is driven by primary jurisdiction. When the state has primary jurisdiction, the federal government has the ability to override a state’s order of concurrent sentences. Primary jurisdiction is essentially an arbitrary rule used to promote efficiency when various courts have concurrent jurisdiction over a defendant. Primary jurisdiction is analogous to the “rules of the road”—for example that a red light indicates that cars should “stop” and a green light indicates that cars may proceed—in that it makes the operation of courts and prison systems more predictable and efficient, yet it is not based on some sense of a higher moral good. For this reason, a concept like primary jurisdiction should not have a dispositive role in determining whether sentences are consecutive or concurrent and thus whether they are longer or shorter. A rule that is more consistent with the purposes of punish-

tences run concurrently unless the judge found statutorily enumerated facts. 555 U.S. at 165. The statute allowed a judge to order consecutive sentences “[i]f a defendant [was] simultaneously sentenced for criminal offenses that d[id] not arise from the same continuous and uninterrupted course of conduct.” § 137.123(2). The Court determined that whether the criminal offenses arose from the same continuous course of conduct was a fact that *did not* have to be submitted to a jury pursuant to the Sixth Amendment and *Apprendi/Blakely*. *Ice*, 555 U.S. at 170.

¹⁵¹ *Ice*, 555 U.S. at 174 (Scalia, J., dissenting) (internal citations omitted); *see also* *Ralston v. Robinson*, 454 U.S. 201, 216 n.9 (1981).

¹⁵² 555 U.S. at 166 & n.5.

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ment needs to be implemented with regard to the concurrency determination.

III. THE PROPER SOLUTION IS THAT IF EITHER SOVEREIGN ORDERS CONCURRENT SENTENCES, SENTENCES MUST BE SERVED CONCURRENTLY

The problem of the federal government's ability to impose consecutive sentences when it has secondary jurisdiction and sentences first despite the concurrency order from a state judge has been considered in the past. Previous solutions suggested by scholars are inadequate because they solve the problem only superficially and do not require federal recognition of state sentencing authority.¹⁵³ These solutions also assume that the policies underlying concurrent and consecutive sentences are of equal importance. Because effectuating consecutive sentences despite a sovereign's decision that a defendant should serve only a set term of years and nothing more violates the notion that a defendant should not receive a greater punishment than necessary, the system should have a preference for concurrent sentences. A new rule—that if either sovereign orders concurrent sentences, the sentences must be served concurrently regardless of sentencing order—would promote the goals of uniformity, fairness, and predictability in the criminal justice system and would simultaneously uphold each sovereign's sentencing authority.

A. *Arguments in Support of the View that the Judge who Sentences Second Should Make the Effective Concurrency Determination Are Flawed*

Several authorities suggest or support the view that the criminal justice sentencing system should place the authority to impose consecutive or concurrent sentences in the hands of the judge who sentences second. Courts at all levels in both the federal and state systems have discussed the reasonableness of this principle.¹⁵⁴ Many

¹⁵³ See *infra* Part III.A.

¹⁵⁴ E.g., *United States v. Neely*, 38 F.3d 458, 460–61 (9th Cir. 1994) (holding that a federal court is powerless to impose a concurrent sentence until the defendant has been sentenced by another court); *Cozine v. Crabtree*, 15 F. Supp. 2d 997, 1012 (D. Or. 1998); *Clark v. State*, 468 S.E. 2d 653, 655 (S.C. 1996); *People v. Chaklader*, 29 Cal. Rptr. 2d 344, 346–47 (Cal. Ct. App. 1994) (citing § 669 of the California Penal Code and reasoning that “[e]ven under California law, the choice between concurrent and consecutive sentences lies in the court which pronounces judgment second”); *Thompson v. State*, 565 S.W.2d 889, 890 (Tenn. Crim. App. 1977) (holding that a consecutive sentence may only be imposed in relation to an already imposed sentence).

of these courts explain that allowing otherwise would permit the court that sentences first to preempt the second court's sentencing discretion.¹⁵⁵ Other courts explain that the judge who sentences first cannot be sure of the length of future sentences when the length of sentences is relevant to the decision to impose concurrent or consecutive sentences.¹⁵⁶ Lastly, some courts additionally assert that the principles of dual sovereignty¹⁵⁷ and comity¹⁵⁸ require this result.

¹⁵⁵ *E.g.*, *United States v. Eastman*, 758 F.2d 1315, 1318 (9th Cir. 1984); *State v. Arnold*, 824 S.W.2d 176, 178 (Tenn. Crim. App. 1991) ("Otherwise, the first sentencing court's action would be preemptive of the last court's function and power to impose a sentence which is based upon all that has gone before.").

Allowing the second sentencing court to determine whether a sentence is to run concurrently with, or consecutively to, the prior sentence(s), is consistent with this goal of avoiding conflicts between coordinate courts and sovereigns. This rule permits courts, corrections officials, and defendants to easily compute the sentences owed by defendants and the effect of any new sentence that may be imposed. The alternative would allow one sovereign to interfere with the rights of other sovereigns by prospectively running a sentence consecutive to—or concurrent with—sentences that might someday be imposed by another sovereign, without even knowing the circumstances of those future sentences. The other sovereigns, in turn, might follow their own laws and order that their sentences run concurrently with, or consecutively to, any pre-existing sentences. The two sentences would then be in conflict, which creates uncertainty and ambiguity and may result in problems in calculation of service of the sentence.

Cozine, 15 F. Supp. 2d at 1012 (internal quotations and citations omitted).

¹⁵⁶ *E.g.*, *Salley v. United States*, 786 F.2d 546, 548 (2d Cir. 1986) (Newman, J., concurring) (explaining that the first judge relinquishes sentencing authority to the second judge who effectively extends the expiration date of the first judge's sentence and that the length of a consecutive sentence is not well reasoned when the court does not know how long the other sentence will be) ("The length of the primary sentence is always relevant to a reasoned decision concerning both the length of a consecutive sentence and the choice of imposing it consecutively."); *Luther v. Vanyur*, 14 F. Supp. 2d 773, 776 (E.D.N.C. 1997) ("[W]hether two sentences imposed at different times by different judges should run consecutively or concurrently must necessarily be decided by the second sentencing judge because at the first sentencing the issue doesn't arise.").

¹⁵⁷ *E.g.*, *Hawley v. United States*, 898 F.2d 1513, 1514 (11th Cir. 1990) ("Because of the division of powers between the federal government and the states under the dual sovereignty principle of our form of government, a defendant may not, by agreement with state authorities, compel the federal government to impose a sentence that is concurrent with an existing state sentence."); *Pinaud v. James*, 851 F.2d 27, 30 (2d Cir. 1988) ("[E]ven if the state sentence has been imposed with the expectation that it will be served concurrently with a yet-to-be imposed federal sentence, the federal court need not make its sentence concurrent with the state sentence but remains free to make the federal sentence consecutive."); *United States v. Sackinger*, 704 F.2d 29, 32 (2d Cir. 1983) (holding that, under dual sovereignty, a state cannot bind a federal court that sentences second to concurrent sentences through a plea agreement with the defendant); *Meagher v. Dugger*, 737 F. Supp. 641, 646 (S.D. Fla. 1990); *Chaklader*, 29 Cal. Rptr. 2d at 347 (holding that under dual sovereignty, the

Another argument in favor of the view that the judge who sentences second alone should have the concurrency determination is that this is the best way to fulfill the requirements of various sentencing statutes. For example, 18 U.S.C. § 3553(a) lists several factors that federal courts should consider when imposing a sentence: the need “to reflect the seriousness of the offense,” the need to deter future criminal conduct, and the need to protect the public from the defendant.¹⁵⁹ The court that sentences second can take these factors into consideration, in light of the other sovereign’s sentence for the defendant, to properly impose a consecutive or concurrent sentence.¹⁶⁰ Consecutive and concurrent sentences by their very nature affect the length of time the defendant is incarcerated. Therefore, the argument is that the court that sentences second is able to consider the need for deterrence, the history of the defendant, and the need to protect the public by making the defendant’s sentence longer or shorter through a consecutive or concurrent sentence.

The Sentencing Guidelines explain that the goal of federal courts ordering consecutive or concurrent sentences is to “achiev[e] a reasonable punishment for the instant offense.”¹⁶¹ The Commentary further explains that a federal court should consider the length and type of an undischarged sentence, among other factors.¹⁶² This

state court could not bind the federal court’s ability to impose a concurrent or consecutive sentence with the existing state sentence).

¹⁵⁸ *E.g.*, *United States v. Smith*, 972 F.2d 243, 244 (8th Cir. 1992) (“[W]hen federal and state sentences conflict, the district court’s sentence does not have to give way to the earlier state court sentence.”); *Cozine*, 15 F. Supp. 2d at 1012 (“It would be extraordinarily provincial for the United States to assert that federal courts may impose sentences that run concurrently with preexisting state sentences but not the other way around.”).

¹⁵⁹ See 18 U.S.C. § 3553(a) (2006). For the text of § 3553(a), see *supra* note 74.

¹⁶⁰ See U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(c) cmt. background (2008).

Background: In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a). Exercise of that authority, however, is predicated on the court’s consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

Id.

¹⁶¹ *Id.* § 5G1.3(c) (“(Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.”).

¹⁶² *Id.* § 5G1.3 cmt. n.3.

authority lends further support to the notion that the second judge should have the final word about consecutive or concurrent sentences because the second judge is best able to evaluate what is a fair and just sentence in light of the sentence imposed by the first court.

Scholars have likewise concluded that a sovereign that sentences first, regardless of whether it is the state or federal government, should not bind the sovereign who sentences second with respect to concurrent or consecutive sentences.¹⁶³ These scholars argue that the second judge should be able to order a sentence to be served concurrently or consecutively with an undischarged sentence, and that the first judge should not make this determination prospectively.¹⁶⁴

Despite the considerations behind the view that the second sentencing judge should always have the concurrency determination, this result is neither efficient nor effective enough to truly resolve the problem. First, the system is too fragmented to enforce the rule that the judge who sentences second would always have the concurrency determination. This is evidenced by some flawed suggestions by scholars.¹⁶⁵ Savvas Diacosavvas recommends reworking Federal Rule of Criminal Procedure 35(a)¹⁶⁶ to provide a more reasonable window for amending sentences, thus allowing a federal court to revise its sen-

Application of Subsection (c). (A) In General. Under subsection (c), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following: (i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a)); (ii) the type (*e.g.*, determinate, indeterminate/parolable) and length of the prior undischarged sentence; (iii) the time served on the undischarged sentence and the time likely to be served before release; (iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and (v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

Id.

¹⁶³ See generally Erin E. Goffette, *Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 VAL. U. L. REV. 1035 (2003).

¹⁶⁴ See *id.*

¹⁶⁵ See, *e.g.*, *id.*; James J. Sample, *The Sentences That Bind (The States)*, 103 COLUM. L. REV. 969 (2003).

¹⁶⁶ FED. R. CRIM. P. 35(a). This section currently reads, "Correcting Clear Error. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." *Id.* Diacosavvas actually states that FED. R. CRIM. P. 35(c) should be amended, but then cites the language of FED. R. CRIM. P. 35(a) in note 94. See Diacosavvas, *supra* note 110, at 227, 245 n.94. Presumably the intention was to amend FED. R. CRIM. P. 35(a).

tence after a state court, initially sentencing second, imposed a consecutive or concurrent sentence.¹⁶⁷ Diacosavvas's solution may practically solve the problem, but only in the sense that it allows the federal judge to always give the second sentence. There is no compelling federal interest to support the position that the federal government should always have the final decision with respect to consecutive or concurrent sentences.

Some federal courts have complained that if a federal court could not compel the state to give consecutive sentences, the federal sentence would be subsumed by the state sentence and thereby negated.¹⁶⁸ The states could have these same concerns. The state sentence subsuming the federal sentence is not a valid concern. Why does the federal government have any interest in the state sentence of a defendant? If the defendant serves the prescribed amount of time for the federal crime, the concern of the federal government should end there.¹⁶⁹ The imposition of a concurrent sentence by a state court in no way reduces the federal sentence.¹⁷⁰ Additionally, the federal government cannot force states to impose sentences on criminals for state crimes.¹⁷¹ Nor can the federal government even

¹⁶⁷ Diacosavvas, *supra* note 110, at 227–28. The Second Circuit in *United States v. Donoso*, 521 F.3d 144 (2d Cir. 2008), upheld the federal district court's use of FED. R. CRIM. P. 35(a) to amend its sentence after the state court had sentenced the defendant. *Id.* at 146.

¹⁶⁸ *E.g.*, *United States v. Ballard*, 6 F.3d 1502, 1509 (11th Cir. 1993) (holding that if the twenty-one-month federal sentence was served concurrently with the anticipated ten-year state sentence, the federal sentence would be negated and would preclude Ballard from serving separate time for his federal sentence). It is important to note that in *Ballard*, the defendant wrote a letter, while in state custody, threatening the President's life, which is a federal offense, so that he could be incarcerated in a federal institution. *Id.* at 1503. *Ballard* is arguably a fact-specific case, and the Eleventh Circuit was especially concerned with allowing a defendant to manipulate the criminal justice system by committing a second crime in order to serve his sentence in a preferable institution. *Id.* at 1510.

¹⁶⁹ Goffette, *supra* note 163, at 1084.

Federal courts have expressed the sentiment that the federal sentence "disappears" or is "negated" when a state sentence is served concurrently with the federal sentence. This is a fallacy. A federal court has no authority over a sentence given in a state court nor over the manner in which a state court effectuates state law. At the time a federal court sentences a defendant, it intends for the defendant to serve a specified number of months in prison. A concurrent state sentence in no way reduces the length of the original sentence imposed by the federal court.

Id.

¹⁷⁰ *Id.*

¹⁷¹ See Sample, *supra* note 165, at 990 ("Consider that the federal government may not prevent states from sentencing state criminals to terms of no imprisonment what-

require the state government to criminalize certain behavior.¹⁷² For example, medical marijuana is legal in California¹⁷³ despite the fact that the federal government declares the use of medical marijuana illegal.¹⁷⁴ If states are allowed to legalize (for state-law purposes) conduct that is illegal under federal law, the federal government certainly does not have an interest in usurping a more insignificant aspect of state sovereignty, for example by always making the final decision of whether sentences are concurrent or consecutive. Additionally, if the state chooses not to prosecute a defendant, the federal government cannot compel the state to do so.¹⁷⁵ Therefore, the federal interest in criminal justice ends after the defendant serves the sentence imposed on him by the federal government.

Furthermore, allowing the federal judge to make the final determination would not enhance accountability. Federal judges are appointed for life,¹⁷⁶ whereas many state judges are elected.¹⁷⁷ In fact, allowing a state judge to make the final determination regarding concurrency would enhance accountability because federal judges are not elected, and are therefore not accountable to the people for their decisions.

Another problem with the solution advanced by Diacosavvas is that the states could likewise use their analogous sentence amendment statutes or revise these statutes to give state courts a greater window of time to amend their sentences. This could have the effect of creating a battle between state and federal judges of post hoc sentencing revisions as each court tries to impose its sentence last. Ex-

soever. Where then is the justification for preventing states from crediting convicts for time served while they are confined in non-state facilities?”).

¹⁷² See *New York v. United States*, 505 U.S. 144, 149 (1992) (holding that Congress can encourage but not compel state legislatures to enact particular laws).

¹⁷³ Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (Deering, LEXIS through 2011 Extraordinary Sess.).

¹⁷⁴ Controlled Substances Act, 21 U.S.C. §§ 801 et seq. (2006); §§ 841(a)(1), 844(a); see also *Gonzales v. Raich*, 545 U.S. 1, 28–29 (2005) (holding that Congress has the power under the Commerce Clause to prohibit the use of medical marijuana even though California’s Code expressly allows the use of medical marijuana).

¹⁷⁵ Cf. *Printz v. United States*, 521 U.S. 898, 905, 933, 935 (1997) (holding that Congress cannot compel state officers to enforce federal law).

¹⁷⁶ U.S. CONST. art. III, § 1.

¹⁷⁷ Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at A1. Approximately 87% of state judges face some kind of election, and thirty-nine states elect some of their judges. *Id.*; see also G. Alan Tarr, *Selection of State Appellate Judges: Reform Proposals: Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1449 (2003) (explaining that scholars categorize states by the states’ systems of judicial selection, including partisan election, nonpartisan election, legislative election, gubernatorial appointment, or merit selection).

tending the Federal Rules of Criminal Procedure's timeframe for sentence amendments is an arbitrary solution and does not lead to a legally sound resolution of the federal government's failure to recognize the sentencing authority of the states.

Another scholar, Erin G. Goffette, proposes a model state statute which would apply when a state court has primary jurisdiction and sentences second.¹⁷⁸ If the court decides to impose a concurrent sentence but knows that it will be unable to effectuate that sentence—because the defendant would serve the federal sentence second and the BOP would most likely refuse to credit the defendant with time served in the state institution—the model statute would allow the court to ignore state statutory minimums and give credit to the defendant based on the length of the federal sentence.¹⁷⁹ In effect, the

¹⁷⁸ See Goffette, *supra* note 163, at 1097–99.

¹⁷⁹ *Id.* Goffette's suggested model statute reads:

Concurrent sentences; crediting a term of imprisonment to account for an undischarged federal sentence

(a) *Eligible Defendants.* This section is applicable to defendants who are in the primary custody of the state and are subject to an undischarged federal term of imprisonment, and for whom the court wishes to impose a sentence to run concurrently with the undischarged term of imprisonment.

(b) *Statement of Purpose.* The purpose of this section is to authorize the court to effectuate a concurrent sentence in those instances in which the court has discretion under [insert state statute(s)] to impose a sentence to be served concurrently with an undischarged federal term of imprisonment. In order to ensure that the court's sentence will be served concurrently with the existing federal sentence, the court may achieve the equivalent of concurrent sentences by crediting the state sentence by the number of months intended to run concurrently with the federal sentence.

(c) *Realization of Concurrent Sentences.* When sentencing an eligible defendant, the court, in order to effectuate concurrent sentences, shall establish the term of imprisonment for the instant offense, including any credit as calculated under state statute, shall identify the proceedings in which the federal sentence was imposed, and

(1) if the term of imprisonment for the instant offense is longer than the undischarged federal term of imprisonment, shall credit the term of imprisonment for the instant offense by the minimum number of months of the undischarged federal term of imprisonment that remain at the time of sentencing for the instant offense; or

(2) if the term of imprisonment for the instant offense is shorter than the minimum number of months of the undischarged federal term of imprisonment that remain at the time of sentencing for the instant offense, shall designate the defendant's sentence as satisfied by the federal sentence and shall order the defendant released to federal custody.

(d) *Substitution of Credited Sentence for Mandatory Minimum.* If the sentence for the instant offense mandates a minimum term of imprisonment, the court may substitute a credited sentence for the statutory minimum according to provisions (c)(1) and (c)(2) of this section.

Id.

state would give a shorter sentence than it normally would because after the defendant serves this shorter sentence, he will serve time in a federal institution. Thus, the defendant would serve the amount of time deemed necessary by the state even though the state has primary jurisdiction.

There are several problems with Goffette's model statute. One problem is that the proposal is merely a *model* state statute, which means that the statute would resolve the fragmentation of authority in sentencing practices only in the particular states that choose to enact this statute. It is difficult to imagine that every single state would enact the model statute.¹⁸⁰ Even if all but one state adopt the model statute, one hold-out would prevent reaching the goal of a completely uniform system. Furthermore, if the federal sentence is reversed on appeal, then the state may have imposed a much shorter sentence than the state deemed appropriate in accordance with the model statute in order to compensate for the initial imposition of a consecutive sentence by the federal government. Another problem with Goffette's approach is that, although the statute solves the fragmentation dilemma in practice,¹⁸¹ it does not resolve the failure of either sovereign to recognize the sentence of the other. The principles of dual sovereignty and comity are not served when the state and federal governments can use a statutory loophole to circumvent recognition of the other sovereign's authority.¹⁸² For these reasons, Goffette's model statute is not a sufficient solution to the fragmentation of authority in the sentencing practices.

Another problem with allowing the second judge to always make the final sentencing determination is that it presumes concurrent and consecutive sentences should be given the same priority and

¹⁸⁰ For example, Congress enacted the Interstate Agreement on Detainers Act in 1970, which had been enacted by only forty-six states by 1978. *United States v. Mauro*, 436 U.S. 340, 343 (1978). Although this is a vast majority of the states, any hold-outs prevent uniformity of application of an agreement and may lead to some uncertainty.

¹⁸¹ It is important to note that Goffette also eliminates the ability of the BOP to ignore the sentence of the judge who sentences second when making credit determinations, and therefore the separation of power problem is not part of the critique of her proposed model statute. Goffette, *supra* note 163, at 1094–96. However, Goffette does not propose a solution that would prevent state correctional departments from ignoring the sentence of the judge who sentences second.

¹⁸² Goffette recognizes the importance of the principles as well. *Id.* at 1100 (“Equitably, the doctrines of comity and dual sovereignty mandate that a second sentencing court be as free in its authority to sentence under the laws of the jurisdiction as a first sentencing court.”). Therefore, her solution needs to go further to ensure that these principles are actually satisfied and not simply assume that they appear to be satisfied in practice.

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therefore that the order of sentencing should be determinative. The next section will discuss the policy reasons for giving priority to concurrent sentences and why concurrent sentences should be given preference over consecutive sentences in determining the totality of the defendant's sentences.

B. The General Rule Should Be that if Either Sovereign Orders Concurrent Sentences, Sentences Must Be Served Concurrently Regardless of Sentencing Order

The solution to the problems discussed in the previous section is the enactment of a general rule that mandates that sentences run concurrently if either the state or the federal government so orders. This would promote efficiency, uniformity, predictability, and fairness in the criminal justice system.

Several reasons exist for imposing consecutive rather than concurrent sentences or vice versa. Congress has promulgated a variety of factors that federal judges should consider when fashioning an appropriate sentence for an offender under 18 U.S.C. § 3553(a).¹⁸³ All of these factors must be viewed in light of the limiting principle at the beginning of the statute, which states that the sentence imposed should be sufficient but “not greater than necessary. . . .”¹⁸⁴ Among these factors are the nature of the offense, the history of the defendant, the need to promote compliance with the law, the need to “reflect the seriousness of the offense,” the need to provide just punishment, the need to promote deterrence, and the need to protect the public.¹⁸⁵ Consecutive sentences are used to lengthen the term of imprisonment, and are recommended by the Sentencing Commission for revocation of probation or violation of supervised release.¹⁸⁶ Factors that may weigh in favor of consecutive sentences may be the number of the defendant's previous offenses, “the nature of the crimes involved,” or the great danger that the defendant may pose to society.¹⁸⁷ Concurrent sentences may be appropriate where the defendant faces multiple charges for the same activity.¹⁸⁸ Concurrent

¹⁸³ 18 U.S.C. § 3553(a) (2006); *see supra* note 74.

¹⁸⁴ *Id.* § 3553(a).

¹⁸⁵ *Id.*

¹⁸⁶ U.S. SENTENCING GUIDELINES MANUAL § 7B1.3(f) (2008).

¹⁸⁷ Steve Thompson, *Concurrent Vs. Consecutive Sentences in Criminal Law*, ASSOCIATED CONTENT (Oct. 19, 2006), http://www.associatedcontent.com/article/71874/concurrent_vs_consecutive_sentences.html?cat=17.

¹⁸⁸ Mike Jacobs, Comment to *Concurrent Sentencing*, MISC.LEGAL.MODERATED, GOOGLE GROUPS (Nov. 29, 2008, 7:08 PM),

sentences may also be appropriate where the same act violates more than one criminal statute.¹⁸⁹ Other mitigating factors, such as the defendant's possible loss of familial support, his job, or future respect, may favor concurrent sentences.¹⁹⁰ Concurrent sentences are also used when there are multiple charges against the defendant and the judge is concerned that one or more of the sentences could be overturned on appeal.¹⁹¹ In this situation, the judge may determine that justice is fulfilled by the defendant's service of a sentence for any one of the offenses.¹⁹²

In any given circumstance, the judge weighs these various factors and determines whether to impose a concurrent or consecutive sentence in light of any other charges the defendant faces or any other offenses for which the defendant has been convicted. It is in the judge's discretion to choose consecutive or concurrent sentences.¹⁹³ When multiple judges considering the same information decide differently on the concurrency issue, which sentence should prevail? To answer this question, one must realize that concurrent and consecutive sentences should not be given equal priority.¹⁹⁴ Because consecutive sentences by their nature are longer, are a greater punishment, and are a greater restriction on freedom,¹⁹⁵ concurrent sentences should be given preference in order to promote justice and fairness in the criminal justice system.

Additionally, when one sovereign determines, considering all pending charges and offenses, that a concurrent sentence is appropriate for those charges and offenses, the system should not provide that sovereign a greater punishment than the sovereign ordered. Forcing a greater sentence upon the sovereign violates the sentenc-

http://groups.google.com/group/misc.legal.moderated/browse_thread/thread/41bd1be20e770ab7.

¹⁸⁹ CHRISTOPHER HARDING & RICHARD W. IRELAND, PUNISHMENT: RHETORIC, RULE, AND PRACTICE 29 (1989).

¹⁹⁰ *See id.* at 46.

¹⁹¹ Jacobs, *supra* note 188.

¹⁹² *Id.*

¹⁹³ *See supra* Part II.A.

¹⁹⁴ *See* John F. Carr, Comment to *Concurrent Sentencing*, MISC.LEGAL.MODERATED, GOOGLE GROUPS (Nov. 29, 2008, 6:06 PM) http://groups.google.com/group/misc.legal.moderated/browse_thread/thread/41bd1be20e770ab7.

¹⁹⁵ *Oregon v. Ice*, 555 U.S. 160, 174 (2009) (Scalia, J., dissenting) ("There is no doubt that consecutive sentences are a 'greater punishment' than concurrent sentences. We have hitherto taken note of the reality that 'a concurrent sentence is traditionally imposed as a less severe sanction than a consecutive sentence.'" (internal citations omitted)); *see also* *Ralston v. Robinson*, 454 U.S. 201, 216 n.9 (1981).

ing autonomy of the sovereign. Therefore, the general rule should be that if either judge, state or federal, orders concurrent sentences, the sentences should be served concurrently regardless of the sentencing order. This rule would eliminate the determinative nature of primary jurisdiction on the actual length of imprisonment of the defendant who is subject to the concurrent jurisdiction of the federal and state governments. Under the current scheme, when the state government has primary jurisdiction, the federal government can effectuate consecutive sentences even though the state has ordered concurrent sentences. Primary jurisdiction is an arbitrary concept which promotes efficiency and predictability when marshals and prison officials transfer a defendant between jurisdictions. It is similar to the “rules of the road”—for example, that vehicles drive on the right side of the road—which are based on uniformity and not on notions of morality and justice. Imposing a rule that sentences must be served concurrently if either sovereign orders concurrent sentences would reduce the arbitrary effects of the fragmentation of sentencing authority between the state and federal governments and additionally would promote the fundamental principles that underlie the criminal justice system.

Further, several authorities suggest that a sentence should not impose any greater punishment than necessary and perhaps even that concurrent sentences are preferable. For example, 18 U.S.C. § 3553(a) lists factors that judges must consider when imposing sentences but qualifies these factors by requiring that a sentence be sufficient “but not greater than necessary”¹⁹⁶ With this language in mind, if Sovereign A orders five years for the defendant under the assumption that “five years are enough” and Sovereign B is satisfied by a two-year concurrent sentence for the crime the defendant committed under Sovereign B’s laws, causing the defendant to serve seven years through consecutive sentences exceeds the needs of either sovereign and is “greater than necessary” under section 3553(a). Additionally, the Supreme Court has held that the Eighth Amendment’s prohibition on cruel and unusual punishment prohibits not only barbaric modes of punishment but also sentences that are disproportionate to the nature of the crime committed.¹⁹⁷ Thus, if one sove-

¹⁹⁶ 18 U.S.C. § 3553(a) (2006). For the text of the statute, see *supra* note 74.

¹⁹⁷ *Solem v. Helm*, 463 U.S. 277, 284–89 (1983).

Although the Framers may have intended the *Eighth Amendment* to go beyond the scope of its English counterpart, their use of the language of the English *Bill of Rights* is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.

reign ordered concurrent sentences but the sentences are served consecutively, the sentences served by the prisoner may arguably be disproportionate to the crime committed under the laws of the sovereign that ordered concurrent sentences. Therefore, if one sovereign orders concurrent sentences, the sentences should be served concurrently. In fact, some states have presumptions in favor of concurrent sentences and may interpret ambiguous sentences to be concurrent.¹⁹⁸ These authorities lend support to the notion that concurrent and consecutive sentences are not of equal priority and perhaps that concurrent sentences should be favored in the criminal justice system.

Another rationale behind this theory is that it is illogical to force a sovereign to have a defendant serve a greater sentence than that sovereign intended or required. Concurrent sentences do not indicate that one sovereign does not receive a sentence served by the defendant for a crime in violation of that sovereign's laws. Rather, each sovereign has an interest in causing a defendant to serve only a sentence for the crime that the defendant committed in violation of the sovereign's own laws. Neither sovereign has any interest in the sentence served by the defendant for the other sovereign. This is not

Id. at 286 (emphasis added). It is important to note that Justice Scalia, in his concurring opinion in *Harmelin v. Michigan*, challenged the Court's holding in *Solem*, and argued that the Eighth Amendment prohibits cruel and unusual punishment to the extent of forbidding barbaric modes of punishment but does not forbid disproportionate punishments. 501 U.S. 957, 974–79 (1991) (Scalia, J., concurring).

In sum, we think it most unlikely that the English Cruell and Unusuall Punishments Clause was meant to forbid "disproportionate" punishments. There is even less likelihood that proportionality of punishment was one of the traditional "rights and privileges of Englishmen" apart from the Declaration of Rights, which happened to be included in the *Eighth Amendment*.

Id. at 974 (emphasis added). Justice Scalia wrote the lead opinion, but the portion of the opinion that challenges *Solem* was joined only by Chief Justice Rehnquist. Despite Justice Scalia's challenge, *Solem* arguably stands for the principle that the Eighth Amendment's prohibition on cruel and unusual punishment encompasses a ban on punishments that are disproportionate to the crime committed. In a concurring opinion written by Justice Kennedy and joined by Justices O'Connor and Souter, Justice Kennedy stated, "Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle." *Id.* at 997 (Kennedy, J., concurring).

¹⁹⁸ CAL. PENAL CODE § 669 (Deering, LEXIS through 2011 Extraordinary Sess.) ("Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."); OR. REV. STAT. § 137.123 (LEXIS through 2009 Leg. Sess.); see also *In re Altstadt*, 38 Cal. Rptr. 616, 617 (Cal. Ct. App. 1964) (In reference to section 669, the court stated that "[i]n statutory construction, the interpretation resulting in concurrent sentences is favored.").

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to say that a multiple offender should not receive a higher penalty than a single offender simply because his multiple offenses are in violation of the laws of different sovereigns. What this means is that each sovereign, at the time of sentencing, can take into account the various sentences that the defendant has served in the past and the offenses that the defendant has committed prior to the sentencing. If after taking this into account the sovereign determines that the defendant should serve only one particular block of time for his crime under the sovereign's laws, then the sovereign should not be forced to have the defendant serve a longer period for the same offense. A judge may determine that, in light of all the factors related to the crimes of the defendant, a two-year sentence is sufficient. By imposing a concurrent sentence, the judge is essentially declaring that the court does not deem any additional years necessary if the other sovereign concludes that more than two years are appropriate. Each sovereign has an interest only in a defendant serving the prescribed sentence for the offense under the laws of that sovereign. If Sovereign A orders consecutive sentences at the protest of Sovereign B, Sovereign A should not be able to force Sovereign B to have the defendant serve more time than Sovereign B deems appropriate. Sovereign A has the option of making its sentence longer, up to the limitations of statutory maximums, but Sovereign A's recourse should not be imposing a consecutive sentence over the objection of Sovereign B.

During the nation's founding and the drafting of the Constitution, the people delegated some state power to the federal government, but the states retained all power not given to the federal government.¹⁹⁹ A major area of law governed by the states is criminal law.²⁰⁰ In addition, there are many criminal acts that offend both state and federal law, such as drug possession. Because of federalism—the division of powers between the state and federal governments—neither the federal nor the state government has any interest in the sentence imposed on the defendant by the other sovereign.²⁰¹ Therefore, if either sovereign orders that the defendant serve the sentence concurrently with any other sentences the defendant is serv-

¹⁹⁹ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

²⁰⁰ See *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (discussing residual state sovereignty).

²⁰¹ Consider the fact that California has decriminalized medical marijuana while the federal government continues to criminalize this offense. See *supra* notes 173–74 and accompanying text.

ing or will serve,²⁰² then the sovereign should get no more than ordered, and the defendant should serve his sentence for that sovereign concurrently regardless of the sentencing order of the sovereigns.²⁰³

Another reason for implementing the proposed general rule—that the defendant must serve concurrent sentences if either sovereign orders a concurrent sentence regardless of the order of sentencing and order of service—is that this will provide a more predictable and fair system which allows sovereigns and defendants to enter into plea agreements and to have greater confidence in their efficacy. The current system allows a federal judge who sentences first but who has secondary jurisdiction to order a sentence to be served consecutively with a pending but yet-to-be imposed state sentence that will be served first.²⁰⁴ Under this regime, a plea agreement with the state for concurrent sentences may be rendered ineffective because, since the federal sentence is served second, the defendant may actually be required to serve consecutive sentences if the BOP refuses to give credit for time served in a state correctional facility.²⁰⁵ This is problematic because plea agreements are valued in the criminal justice system as a

²⁰² This limitation is important. The rule proposed by this Comment does not suggest that all crimes committed by the defendant after sentencing or during the service of his sentence should also be served concurrently. This is illogical and would violate principles of retribution and just punishment. Only the offenses by the defendant that are known to the sovereign or sentences that the defendant is currently serving should run concurrently with a concurrent sentence imposed by the sovereign.

²⁰³ This rule applies to concurrent jurisdiction between more than one state or concurrent jurisdiction between the state and the federal governments. This Comment focuses on the concurrent jurisdiction between the state and federal governments, but the policy concerns underlying the rule endorsed by this Comment—that if either sovereign orders concurrent sentences, the sentences must be served concurrently—are promoted when this rule is applied to conflicts between states.

²⁰⁴ This, of course, depends upon the outcome of the circuit split in the circuit where the case is pending. *See supra* Part II.A.2. As discussed above, even when the federal judge is silent because the circuit has determined that the federal judge may not declare sentences to be served concurrently or consecutively where the federal judge sentences before the state, the BOP still has the power to cause the sentences to be served consecutively. *See supra* Part II.B.

²⁰⁵ *See, e.g.,* *Hawley v. United States*, 898 F.2d 1513, 1514 (11th Cir. 1990); *Pinaud v. James*, 851 F.2d 27, 30 (2d Cir. 1988); *United States v. Sackinger*, 704 F.2d 29, 32 (2d Cir. 1983) (holding that under dual sovereignty, a state cannot bind a federal court sentencing second to concurrent sentences through a plea agreement with the defendant); *Meagher v. Dugger*, 737 F. Supp. 641, 646 (S.D. Fla. 1990) (“[A] defendant may not, by agreement with state authorities, compel the federal government to impose a sentence that is concurrent” (quoting *Hawley v. United States*, 898 F.2d 1513, 1514 (11th Cir. 1990))); *People v. Chaklader*, 29 Cal. Rptr. 2d 344, 347 (Cal. Ct. App. 1994) (holding that under dual sovereignty, the state court could not bind the federal court’s ability to impose a concurrent or consecutive sentence with the existing state sentence).

means of efficient and speedy resolution of criminal matters and as a way to quickly relieve dockets.²⁰⁶ Even if the state could vacate its prior plea agreement based on the federal government's imposition of consecutive sentences and potentially give the defendant no sentence or a sentence of time served, it is impractical to compel the state to take this step, especially considering the efficiency goals of plea agreements. Additionally, under the current system, if a federal judge sentences last, a prior plea agreement with the state authorities for concurrent service could become ineffective because a state court cannot prospectively bind a federal court to concurrent sentences.²⁰⁷ These results are arbitrary and violate not only the rights of the defendant but also the rights of the state sovereign that entered into the plea agreement with the defendant.²⁰⁸ If the rule is that sentences

²⁰⁶ Plea agreements reduce transaction costs in the courts of both the federal and state governments, and clear up dockets. In many circumstances, plea agreements are a preferable way to come to a resolution in criminal matters. *E.g.*, *Santobello v. New York*, 404 U.S. 257, 260–61 (1971); *Brady v. United States*, 397 U.S. 742, 752 (1970); *United States v. Papaleo*, 853 F.2d 16, 18 (1st Cir. 1988).

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called “plea bargaining,” is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello, 404 U.S. at 260–61.

For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Brady, 397 U.S. at 752.

²⁰⁷ See *supra* note 205.

²⁰⁸ See *Goffette*, *supra* note 163, at 1088.

must be served concurrently if either sovereign orders concurrent sentences regardless of sentencing order, prosecutors and defendants could more confidently enter into plea agreements and know that the plea agreements would be enforceable with regard to consecutive or concurrent sentences. Both the sovereign and the defendant would be assured that the concurrency determination in the plea agreement will in fact be the type of sentence served by the defendant. Both would know that primary jurisdiction and the arbitrary order of sentencing would not alter the effectiveness of the plea agreement.

In addition to these considerations, some of the most fundamental principles of the American criminal justice system are that (1) people are innocent until proven guilty²⁰⁹ and that (2) it is better to have a guilty man go free than to incarcerate an innocent man.²¹⁰ These often-referenced fundamentals suggest a policy of erring on the side of caution in the American legal system, which means that the system favors lesser restrictions on freedom when mistakes are possible. When sovereigns disagree as to whether sentences should be concurrent or consecutive, the system should continue to err on the side of caution and impose concurrent sentences to avoid imposing sentences that are a greater-than-necessary punishment.

Further, the art of sentencing cannot truly be objectified. Although the Federal Sentencing Guidelines, federal statutory maximums and minimums, and similar state statutory devices provide a great deal of guidance to judges, it can rarely if ever be said that the defendant got precisely the sentence that he deserved. The Federal Sentencing Guidelines are discretionary, not mandatory,²¹¹ and judges have leeway in departing from statutory minimums imposed

²⁰⁹ *E.g.*, *Coffin v. United States*, 156 U.S. 432, 452–54 (1895) (holding that a defendant has a right to have the court instruct the jury on the presumption of innocence and tracing the presumption of innocence past England, past ancient Greece and Rome, at least to Deuteronomy); Jeffrey Reiman & Ernest van den Haag, *On the Common Saying that It Is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con*, in *CRIME, CULPABILITY, AND REMEDY* 226, 226 (Ellen Frankel Paul et al. eds., 1990); Jean Francois Marie Arouet de Voltaire, *Zadig, or Destiny*, in *CANDIDE AND OTHER STORIES* 131 (Roger Pearson, trans., Alfred A. Knopf 1992).

²¹⁰ *See, e.g.*, William J. Brennan Jr., *The Contemporary Constitution*, *KETTERING REVIEW*, Fall 1987, at 10; Reiman & van den Haag, *supra* note 209; Voltaire, *supra* note 209. Scholars differ on exactly how many guilty men should go free under this saying. For a discussion on the various number proposed by different scholars, see Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174–77 (1997). *See, e.g.*, Reiman & van den Haag, *supra* (ten guilty men).

²¹¹ *United States v. Booker*, 543 U.S. 220, 245 (2005) (holding that making the Sentencing Guidelines mandatory is inconsistent with the Sixth Amendment).

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by Congress.²¹² With this lack of objective criteria upon which to determine a sentence, let alone whether the sentence should be concurrent or consecutive, the criminal justice system should err on the side of caution and follow the determination of the judge that will restrict the defendant's freedom for a lesser period of time. Requiring that the defendant serve concurrent sentences regardless of the order of sentencing if either a federal or a state judge orders concurrent sentences would align the sentencing practices between the state and federal government with the fundamental principles that underlie the American criminal justice system. Because the "right" sentence that the defendant should serve cannot be objectively determined, the system should give the defendant a concurrent sentence if either sovereign so orders. This would avoid punishing the defendant with a greater sentence than is necessary.

For these reasons, the interaction between the state and federal criminal justice systems should in law and in fact require that if either judge orders the sentences to be served concurrently, the sentences must be served concurrently. The issue then would be how to achieve this result.

IV. CREATION AND ENFORCEMENT OF THE RULE THAT IF EITHER SOVEREIGN ORDERS CONCURRENT SENTENCES, THE DEFENDANT MUST SERVE THE SENTENCES CONCURRENTLY

The fragmentation of sentencing authority between the federal and state governments with regard to concurrency results in the federal government, when it exercises secondary jurisdiction, being able to effectuate consecutive sentences even if the state orders concurrent sentences.²¹³ The proper solution to this problem would be to demand that the sentences run concurrently if either sovereign imposes concurrent sentences. This requires the revision of two federal statutes and the use of two federal statutes that are currently in place. This problem affects not only the states but also the federal government, and therefore, the solution needs to be effective for all sovereigns.

²¹² See generally U.S. SENTENCING GUIDELINES MANUAL (2008); see also *United States v. Lowe*, 136 F.3d 1231, 1233 (9th Cir. 1998).

²¹³ See *supra* Part II.D.2.

A. *Creation of the Rule that if Either Sovereign Orders Concurrent Sentences, the Sentences Must Be Served Concurrently*

First, the law must resolve the problem of the federal government's ability, in some circuits, to impose consecutive sentences on the defendant when it has secondary jurisdiction but sentences first. Congress should revise § 3584(a)²¹⁴ to clarify any disagreement between the circuits as to whether the statute's language, "Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently,"²¹⁵ refers to circumstances when the federal judge sentences first.²¹⁶ The revised statute should add a line to the end of § 3584(a) that states, "Neither a federal nor a state court may order terms to run consecutively to anticipated but yet-to-be-imposed sentences by other federal or state courts." This additional language would clarify that a judge cannot order a sentence to run consecutively to anticipated sentences but rather only to sentences that have already been imposed or that the defendant is serving at that time. Following this amendment, a provision should be added that states,

*A court may order terms to run concurrently to anticipated but yet-to-be-imposed sentences by other federal courts or state courts so long as the defendant is already charged with the offenses for which the sentence will run concurrently, or these offenses were committed prior to sentencing and are known to the court at the time of sentencing. When a federal or state court judge orders its sentence to be served concurrently, the sentence will run concurrently with any undischarged sentence, pending sentence, or sentence for an offense committed by the defendant and known to the court at the time of sentencing for which the defendant has not yet been sentenced.*²¹⁷

²¹⁴ 18 U.S.C. § 3584(a) (2006). Goffette similarly suggests a revision to this statute to clarify ambiguity and provide that a federal court may not prospectively bind a future sentencing court. Goffette, *supra* note 163, at 1092. The proposed revisions to the statute in this Comment would have the same effect when the federal judge sentencing first tries to order consecutive sentences, but would expressly allow a federal court sentencing first to order concurrent sentences.

²¹⁵ § 3584(a).

²¹⁶ See *supra* Part II.A.

²¹⁷ Section 3584(a) would therefore read,

Imposition of concurrent or consecutive terms. If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates

This additional language would clarify that a federal judge does have both the power and the authority to prospectively order concurrent sentences but only as to those offenses against any sovereign that are known to the federal judge at the time of sentencing.

The next step would be to revise §§ 3621(a)²¹⁸ and 3585.²¹⁹ These revisions would require the BOP to follow the concurrency determination of either the state or the federal government regardless of the order of sentencing.²²⁰ If the state has primary jurisdiction and orders a concurrent sentence, regardless of the sentencing order, the BOP, upon receiving the defendant for service of the federal sentence after service of the state sentence, would either credit the defendant with the appropriate time served in state custody toward the federal sentence or would release the defendant if the defendant has satisfied the length of his concurrent federal sentence. If the state has secondary jurisdiction, the BOP would turn the defendant over to the state department of corrections after the defendant has served the length of the federal sentence to effectuate the concurrent sentence

that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently. *Neither a federal nor a state court may order terms to run consecutively to anticipated but yet-to-be-imposed sentences by other federal or state courts. A court may order terms to run concurrently to anticipated but yet-to-be-imposed sentences by other federal courts or state courts so long as the defendant is already charged with the offenses for which the sentence will run concurrently, or these offenses were committed prior to sentencing and are known to the court at the time of sentencing. When a federal or state court judge orders its sentence to be served concurrently, the sentence will run concurrently with any undischarged sentence, pending sentence, or sentence for an offense committed by the defendant and known to the court at the time of sentencing for which the defendant has not yet been sentenced.*

²¹⁸ § 3621(a). The section currently reads,

Commitment to custody of Bureau of Prisons. A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 [18 U.S.C. §§ 3581 et seq.] shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624 [18 U.S.C. § 3624].

Id. Goffette likewise recommends revising the Bureau of Prisons' designation and credit authority; however, her revision is to a program statement rather than the statutes. Goffette, *supra* note 163, at 1094–96. She states, “BOP Program Statement 5160.04(9)(e) should be amended to eliminate discretion and to require that the state sentence be honored.” *Id.* at 1094.

²¹⁹ § 3585.

²²⁰ This may require procedures for the BOP to access to the order of the state judge in a timely manner. This Comment does not attempt to lay out these procedures.

of the state judge. The state would ensure this result by appropriately crediting the defendant with the time served in federal custody.²²¹

Under the revised sentencing scheme, if a federal or state judge orders concurrent sentences and the defendant serves the federal sentence second, the BOP would be required to credit the defendant with the time served in the state institution.²²² In addition, if neither judge orders concurrent sentences and the court that sentences second, state or federal, orders consecutive sentences, the BOP should take the defendant into custody for the full length of the federal sentence. If neither court orders concurrent sentences and the court that sentences second, either state or federal, is silent on whether the sentences should be served concurrently or consecutively, the BOP should follow the presumptions of § 3584(a).²²³

In order to effectuate this, a subsection (c) should be added to 18 U.S.C. § 3585 that states:

*(c) Concurrency determination of State and Federal Sentences. If either a federal or state court sentences the defendant to concurrent sentences, the Bureau of Prisons will credit the defendant appropriately for time served for another sovereign when taking the defendant into custody. If neither a state nor a federal court ordered concurrent sentences, the Bureau of Prisons will follow the sentencing determination of the second sentencing court if it ordered consecutive sentences. If neither a state nor federal court ordered concurrent sentences and the second sentencing court was silent on whether the sentences are served concurrently or consecutively, the Bureau of Prisons will follow the presumptions of 18 U.S.C. § 3584(a).*²²⁴

²²¹ Some jurisdictions have sentencing laws that provide procedures for crediting the defendant with service of his state sentence in a federal institution. See, e.g., FLA. STAT. § 921.16(2) (LEXIS through 2011 Act 141); 730 ILL. COMP. STAT. 5/5-8-6 (LEXIS through 2011 Act 97-225).

²²² The BOP cannot ignore the sentence instruction of its own sovereign. Not only will the revision to § 3621(b) help to enforce this, but the federal habeas statute will help to effectuate this. See 28 U.S.C. § 2255(a) (2006).

²²³ Section 3584(a) creates the presumption that “[m]ultiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.” § 3584(a).

²²⁴ Section 3585 will then read:

Calculation of a term of imprisonment

(a) Commencement of sentence. A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

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Additionally, the following should be added to § 3621(a): “*The length of the term of imprisonment will be calculated in accordance with the guidelines in 18 U.S.C. § 3585.*”²²⁵

What these revisions to the federal statutes would do is displace certain notions of primary jurisdiction, which carry too much weight when the defendant is subject to both state and federal sentences. Notions of primary jurisdiction would remain intact in that they would govern what they are designed to govern: the exercise of each sovereign’s jurisdiction over a defendant;²²⁶ these notions, however, will no longer govern the effectuation of consecutive or concurrent sentences between the state and federal governments. Rather, the defendant would always serve a concurrent sentence if either judge orders it regardless of the order of service or the order of sentencing. In this way, the federal government would no longer be able to force a defendant to serve consecutive sentences when a state judge has ordered concurrent sentences.²²⁷ This would promote the effectiveness of plea agreements, which are important for enhancing efficiency

(b) Credit for prior custody. A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

- (1) as a result of the offense for which the sentence was imposed;
- or
- (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

(c) *Concurrency determination of State and Federal Sentences.* If either a federal or state court sentences the defendant to concurrent sentences, the Bureau of Prisons will credit the defendant appropriately for time served for another sovereign when taking the defendant into custody. If neither a state nor a federal court ordered concurrent sentences, the Bureau of Prisons will follow the sentencing determination of the second sentencing court if it ordered consecutive sentences. If neither a state nor federal court ordered concurrent sentences and the second sentencing court was silent on whether the sentences are served concurrently or consecutively, the Bureau of Prisons will follow the presumptions of 18 U.S.C. § 3584(a).

²²⁵ Section 3621(a) will then read:

Commitment to custody of Bureau of Prisons. A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 [18 U.S.C. §§ 3581 et seq.] shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624 [18 U.S.C. § 3624]. *The length of the term of imprisonment will be calculated in accordance with the guidelines in 18 U.S.C. § 3585.*

²²⁶ See *supra* Part II.C.

²²⁷ See *supra* Part II.

and quick dispute resolution in the criminal justice system.²²⁸ And perhaps most importantly, these revisions would force both sovereigns to recognize each other's sentencing authority.

B. Constitutional Authority for the Creation of the Rule that Sentences Must be Served Concurrently if Either Sovereign Orders Concurrent Sentences

The federal criminal justice system is required to follow the laws of the federal government, and therefore federal authorities would have to abide by the revisions to §§ 3621(a), 3584(a), and 3585. Some consideration must be given to how the federal government can constitutionally require state governments to follow these same revisions. Congress cannot commandeer state legislatures and require them to incorporate the new rule in their laws,²²⁹ but states cannot violate valid federal laws.²³⁰ It would be inefficient and extremely difficult to get all states to agree to the new rule.²³¹ This fact stems from the nature of dual sovereignty. The federal government has the power to require states to follow the revisions to § 3584(a) because the Necessary and Proper Clause of the Constitution allows Congress to create laws that are necessary and proper to the carrying out the constitutionally enumerated powers of the United States government.²³² The proposed amendment to § 3584(a)—that the sentences must be served concurrently if either judge orders concurrent sentences—would be useless if the federal government did not have the power to exact state compliance. The Supreme Court has stated that Congress does not exceed its power under the Necessary and Proper Clause when it enacts laws that are “conducive to the due administration of justice” and are based on Congress’s constitutionally granted powers.²³³ The Necessary and Proper Clause is therefore tied to the legitimacy of federal jurisdiction, and laws enacted pursuant to

²²⁸ See *supra* Part III.B.

²²⁹ See *supra* notes 172 and 175 and accompanying text.

²³⁰ Cf. *Printz v. United States*, 521 U.S. 898, 913, 928–29 (1997) (stating that state officials cannot obstruct operation of federal law and state courts cannot refuse to apply federal law).

²³¹ See *supra* note 180 and accompanying text.

²³² See U.S. CONST. art. 1, § 8, cl. 18 (“[Congress has the power t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”). Federal habeas power stems from this clause, and federal courts can use the habeas power to enforce the rule that if either sovereign wishes its sentences to be served concurrently, the sentences will be served concurrently regardless of the sentencing order. See *infra* Part IV.C.

²³³ *McCulloch v. Maryland*, 17 U.S. 316, 417 (1819).

the clause must aid the administration of justice and relate to a federally granted power. The powers granted to Congress under the Constitution include, *inter alia*, the commerce power,²³⁴ the postal power,²³⁵ and the power to create courts below the Supreme Court.²³⁶ These powers allow Congress to create certain federal criminal statutes and allow Congress to give federal courts the power to hear such claims, through federal question jurisdiction²³⁷ or jurisdiction over claims when the United States is a party.²³⁸ When Congress enacts a law that is necessary and proper to the carrying into execution one of these constitutionally enumerated powers, states are required to abide by the valid federal law.²³⁹

For example, the Supreme Court in *Jinks v. Richland County* upheld the constitutionality of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d).²⁴⁰ Section 1367(d) tolls the limitations period in state courts for state law claims over which a federal court exercises supplemental jurisdiction so that if the federal court declines to exercise jurisdiction over the state law claim, the claim would not be time-barred in state court.²⁴¹ The Court explained that the statute was appropriate under the Necessary and Proper Clause because it “promote[d] fair and efficient operation of the federal courts” by allowing a federal court to decide whether to exercise supplemental jurisdiction without a concern for the repercussions that the plaintiff would face if the federal court dismissed the state law claim.²⁴² Congress has the constitutional power to create lower federal courts under Article I, § 8, clause 9 and thus has the power under Article I, § 8, clause 18 to create laws that are necessary and proper

²³⁴ U.S. CONST. Art. I, § 8, cl. 3.

²³⁵ U.S. CONST. Art. I, § 8, cl. 7.

²³⁶ U.S. CONST. Art. I, § 8, cl. 9.

²³⁷ 28 U.S.C. § 1331 (2006).

²³⁸ §§ 1345–1346.

²³⁹ *Cf. Printz v. United States*, 521 U.S. 898, 913, 928–29 (1997) (stating that state officials cannot obstruct operation of federal law and state courts cannot refuse to apply federal law).

²⁴⁰ 538 U.S. 456 (2003). 28 U.S.C. § 1367(d) (2006) provides:

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

§ 1367(d).

²⁴¹ *Jinks*, 538 U.S. at 459.

²⁴² *Id.* at 463.

for the fair and efficient administration of these courts. The constitutionality of the supplemental jurisdiction statute in *Jinks* was linked to the legitimacy of federal jurisdiction pursuant to the Necessary and Proper Clause and congressional power to create lower federal courts in the first place.²⁴³ By analogy to *Jinks*, it is necessary and proper for states to abide by the rule that sentences will be served concurrently if any sovereign orders concurrent sentences in order to promote the fair and efficient administration of the federal courts—courts which were created pursuant to Congress’s constitutionally granted authority under Article I, § 8, clause 9. For these reasons, Congress has the constitutional authority to make the proposed revisions to §§ 3621(a), 3584(a), and 3585, and states would be required to follow these valid federal laws.

C. Use of Federal Habeas Statutes for Enforcement

A further check on the ability of the federal government to ignore a state’s concurrency order could be the federal habeas statute, 28 U.S.C. § 2255.²⁴⁴ This statute permits a prisoner who claims some defect in his federal incarceration to file a habeas petition in federal court.²⁴⁵ Under the revisions of §§ 3584(a), 3585, and 3621(a), the failure of the BOP to credit a prisoner for the time served in state custody²⁴⁶ would be a violation of federal law; therefore, a prisoner

²⁴³ *Id.* at 462–63.

²⁴⁴ 28 U.S.C. § 2255 (2006).

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

§ 2255(a).

²⁴⁵ *Id.*

²⁴⁶ The Bureau can designate the state institution as the place of the service of the federal sentence. 18 U.S.C. § 3621(b) (2006).

Place of imprisonment. The Bureau of Prisons shall designate the place of the prisoner’s imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable

Id. Designating the state institution as the place of federal incarceration is one step in crediting the defendant for his time served in accordance with the concurrent sentencing order.

could file a federal habeas petition asking the court to order the BOP to credit the prisoner for the time served.²⁴⁷ This statute would apply regardless of whether the state or the federal government, sentencing first or second, ordered the concurrent sentence.

Additionally, under 28 U.S.C. § 2254, if either the state or the federal government orders concurrent sentences, the defendant is in state custody, and the state refuses to credit the defendant with the time served in the custody of another jurisdiction, the defendant may file a habeas petition.²⁴⁸ Under this statute, a defendant can challenge his incarceration in a state facility as a violation of the United States Constitution or federal law. Before a defendant can take advantage of § 2254, the statute requires either that the defendant exhaust all of the remedies available at the state level or show that no such remedies exist.²⁴⁹ Refusal by the state authorities to credit the defendant with the time served in federal detention when a court has imposed a concurrent sentence upon the defendant would violate § 3584(a) because, under the proposed changes, if any judge orders a concurrent sentence with any undischarged or pending sentences, under federal law, the sentences must be served concurrently.²⁵⁰ The habeas statutes, §§ 2254 and 2255, can therefore be used to enforce the new rule of requiring sentences to be served concurrently if a judge orders them to be concurrent.²⁵¹

²⁴⁷ § 3621(b); *see also supra* Part IV.A, B.

²⁴⁸ 28 U.S.C. § 2254 (2006). Section 2254(a) reads,

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Id.

²⁴⁹ § 2254(b).

²⁵⁰ *See supra* Part IV.A.

²⁵¹ Section 2254(d)(1) states,

An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States

Id. This may require the Supreme Court to recognize the rule advocated by this Comment and advanced by § 3584(a)—that if either sovereign orders concurrent sentences the sentences are served concurrently—before a prisoner in state custody is able to enforce this rule through the state habeas statute, § 2254.

*D. The Combination of Revisions and Use of Habeas Statutes
Effectuates Concurrent Sentences If Either Sovereign Orders
Concurrent Sentences*

The proposed revisions of §§ 3584(a), 3621(a), and 3585 would result in a criminal justice system that prevents a federal judge from ordering that the federal sentence be served consecutively to anticipated future sentences. The BOP would always take into consideration the sentences imposed by the various courts, state and federal, when making credit determinations to ascertain if multiple sentences were ordered to be served concurrently. Secondary jurisdiction would no longer allow the federal government to force consecutive sentences when the state judge who sentences second has ordered concurrent sentences.

These revisions would promote the recognition of state authority in federal courts. Dual sovereignty and comity would be protected because the BOP would recognize the sentence of the state court. Additionally, this new rule reduces the fragmentation of authority between the state and federal governments in the criminal justice system. The use of the federal habeas statutes to enforce the new rule would eliminate the difficulties associated with getting all states to agree to the same procedures. Instead, the rule would be a federal rule—a rule that is consistent with the basic principles underlying the criminal justice system and constitutional rights²⁵²—binding upon the states. The interests of both sovereigns²⁵³ would be promoted because each sovereign would receive the sentence the sovereign ordered and because neither has an interest in the sentence of another sovereign. Under such a criminal justice system, when a sovereign orders a concurrent sentence, the sovereign would be given only what the sovereign deems necessary, and therefore, if either sovereign orders concurrent sentences, the sentences would be served concurrently.²⁵⁴

V. CONCLUSION

Under the current sentencing scheme, when the federal government has secondary jurisdiction but sentences first, the federal

²⁵² See *supra* notes 209–10 and accompanying text.

²⁵³ This rule applies to concurrent jurisdiction between states or concurrent jurisdiction between the state and the federal governments. This Comment focuses on the concurrent jurisdiction between the state and federal governments, but the policy concerns underlying the rule endorsed by this Comment—that if either sovereign orders concurrent sentences, the sentences will be served concurrently—are promoted when this rule is applied to conflicts between states.

²⁵⁴ See *supra* Part III.B.

court can effectively ignore a state court's determination that the federal and the state sentences should be served concurrently and can force the defendant to serve consecutive sentences instead.²⁵⁵ Because the sentence of the sovereign with secondary jurisdiction is served second and because the BOP has credit and designation authority, the BOP may ignore the determination of state judges with regard to concurrent sentences, as demonstrated by the earlier discussion of the circuit split.²⁵⁶ This result poses serious problems to the principles of dual sovereignty and comity. Additionally, allowing the federal government to ignore the state's post-federal-sentence concurrency determination limits the effectiveness of plea bargains in reducing the workload of the courts and promoting efficiency in the criminal justice system.²⁵⁷

The proper result should be that if either sovereign, state or federal, wishes to impose concurrent sentences, while sentencing first or second, the sentences must be served concurrently both in law and in practice. This would produce uniformity, predictability, and fairness in the criminal justice system.²⁵⁸ The principles that underlie the criminal justice system favor concurrent sentences because the goal of sentencing is to provide punishment that is no greater than necessary. When a sovereign is forced to accept a greater sentence than the sovereign ordered—through the service of consecutive rather than concurrent sentences—the defendant's sentence becomes greater than necessary for that sovereign. When a judge orders a concurrent sentence after considering the totality of the defendant's offenses, the judge implicitly states that the service of just one sentence satisfies the defendant's obligations to that sovereign. Thus, a judge should not be compelled to accept a greater sentence than the judge ordered.

In order to implement the rule proposed in this Comment, Congress should amend §§ 3584(a), 3621(a), and 3585. These amendments would resolve the circuit disagreement about the federal judiciary's authority to order a consecutive sentence to an anticipated but yet-to-be-imposed state sentence because the amendments would explicitly disallow this practice.²⁵⁹ Federal judges would, however, retain the authority to order concurrent sentences whether sentencing first or second. Further, these amendments would also re-

²⁵⁵ See *supra* Part II.D.2.

²⁵⁶ See *supra* Part II.A.1.

²⁵⁷ See *supra* Part III.B.

²⁵⁸ *Id.*

²⁵⁹ See *supra* notes 217–25 and accompanying text.

quire the BOP to take into consideration the state judge's order with regard to concurrency. If the state judge ordered concurrent sentences, regardless of the sentencing order and regardless of whether the federal judge ordered consecutive sentences, the BOP would be required to credit the defendant with his time served in state custody. Inmates could use two federal habeas statutes, §§ 2254 and 2255, to petition the federal court if the inmates are effectively serving consecutive sentences even though a judge ordered concurrent sentences.²⁶⁰ These amendments and the new rule that an order of concurrent sentences always prevails would reduce the importance of primary jurisdiction in the imposition of consecutive or concurrent sentences, would eliminate the ability of the federal government to ignore the sentencing authority of the states, and would transform the criminal justice system into a more coherent and less fragmented system of justice, fairness, and predictability.

²⁶⁰ See *supra* Part IV.C.